

PIOTR LUBIŃSKI

WAR CRIMES: CONCEPTS OF CRIME AND PUNISHMENT

War crimes committed while a conflict is in progress are often regarded as being subject to the Roman principle *silent leges inter arma* (the law is silent in wartime). Today, we use several definitions to describe the deeds of persons who commit the gravest acts of cruelty on a mass scale. These concepts include genocide, crimes against humanity, and crimes against peace. However, it is with war crimes that the world most frequently comes into contact, since war, or more broadly armed conflict, has been a more or less legal means since the dawn of history for settling various kinds of disputes between states. And it is war that generates the greatest number of the crimes mentioned above. In order fully to understand this concept, it is necessary to refer not only to humanitarian law, but also to the law regulating the conduct of armed conflict, while bearing in mind that, despite their disparate origins, both of these branches of law are today complementary, forming a common system of the international humanitarian law of armed conflict. Furthermore, it is also necessary to examine the international tribunals that serve to punish these crimes and the statutes that have led to the definition of the deeds that are known today as war crimes.

*

In the past, it was difficult to find an acceptable definition of the deeds that we call war crimes today. However, the beginnings of the legal regulation of the ways of conducting wars were already present in the earliest times. As early as 2000 B.C.E., for example, at the time of the Egyptian-Sumerian wars, a range of agreements were arrived at which obligated the warring parties to differentiate civilians from combatants. Others governed the procedures for declaring war. The Code of Hammurabi, who lived from 1728 to 1686 B.C.E., contained provisions for the protection of the weak from the acts of the strong, and for the freeing of hostages. Similarly, the principles of respect for human life and human dignity were regarded as obligatory.

The need to regulate the actions of combatants was thus recognized in antiquity. There are a number of reasons for this. One was the neces-

sity of maintaining discipline among the troops. Rape, murder, and looting frequently led to a relaxation of standards in the army, while also fostering hatred on the part of the enemy. One of the greatest theoreticians of war, Sun Pi, who was born in China in 380 B.C.E., banned unnecessary cruelty on the grounds that it would have a negative impact on the strength of a wise commander's army. The medieval period produced the code of chivalry, which ordained that an opponent bested in a fair fight should be treated with respect. However, these regulations were confined largely to the nobility, the knightly caste. The important thing, however, is that an effort was often made to avoid the excessive destruction of the rural population, in other words the civilians who constituted the economic basis for maintaining the knights. One example of the reaction of medieval rulers to impermissible means of waging war is the sentencing to death without trial in 1305 of Sir William Wallace for killing people without regard to sex, age, or clergy status. Another such example is the Ordinance of Charles VII of Orleans in 1439, which threatened harsh penalties against all who committed crimes, abuses, or lawless acts. In cases where the perpetrator managed to evade being brought to account, his commander was held responsible for his misdeeds.

Another example of the existence of a certain system of norms, and of punishment for violations, was the trial of one Peter von Hagenbach, who was accused in 1474 of transgressions against the laws and customs of war. Named commandant of the German city of Breisch by Charles of Bald, the Duke of Burgundy, von Hagenbach permitted rape, the murder of civilians, the confiscation of property, and the imposition of illicit taxes.

Later centuries concentrated more on regulating the right to embark upon war than on the conduct of war. However, these principles existed in the form of custom. So things remained until 1863. That year saw the publication, for the first time, of a collection of principles defining the way in which war should be waged. This was the so-called Lieber Code, the *Instructions for the Government of Armies of the United States in the Field*, issued as General Order no. 100 of the Union Armies during

the American Civil War. It was intended to prevent excessive cruelty during a war which was in fact a fratricidal conflict, both figuratively and literally—one of Francis Lieber's sons fought and died in the Confederate armies, while the other two served with the Union. The Lieber Code was undoubtedly a compilation in written form of existing customs for the conduct of war. Nevertheless, it is significant due to the fact that it introduces penal sanctions for the failure to observe these norms. This in turn led to the first cases of the punishment of war criminals in court, by standards that would not sound out of place today, for deeds committed in the course of the conflict. It would therefore seem that this is the date from which we are justified in using the concept of war crimes, as well as the term "war criminal."

The main goal of contemporary humanitarian law has not been regulating the conduct of conflict, but rather the protection of all those who, for whatever reason, have become *hors de combat* (incapable of fighting), and also of the civilian population. The most important violations of this law, which is known as the Geneva law, constitute to a large degree what we refer to at present as war crimes. The history of humanitarian law began in 1859 on the fields of Solferino, where the Swiss industrialist Henri Dunant witnessed the battle and the unimaginable suffering of the wounded and dying Italian, French, and Austrian soldiers who became casualties. Dunant founded the movement that, to this day, brings aid to the wounded and others in need under the flag of the Red Cross and the Red Crescent. 1864 saw the signing of the first convention on improving the fate of those wounded in armed conflict. The next step on the road to the regulation of the behavior of combatants was the signing in 1868, at the initiative of Tsar Alexander II, of the Saint Petersburg Declaration on explosive small-arms shells. A few years later, in 1874, the Brussels Conference was convened. Its purpose was to draft a declaration on the laws and customs of war. Although the Declaration itself, modeled on the Lieber Code, was not ratified, it formed the basis of the Hague Conventions of 1899 and 1907, which are regarded as milestones in the development of the law of armed conflict.

The Second Hague Convention of 1899 contained the so-called Martens Clause, which stated that "populations and belligerents remain under the protection and authority of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." This clause also appears in the Fourth Hague Convention of 1907, the Geneva Convention of 1949, and the additional protocols to these conventions. It remains one of the fundamental concepts in humanitarian law. The Hague Convention of 1899 was supplemented by conference papers that led to the ratification of further conventions in 1907, which turned into a relatively exhaustive legal system for regulating the conduct of war. Furnished with these legal instruments, nevertheless, the international community found itself facing a war that changed the view of the world at the time and brought these lofty principles into confrontation with reality.

*

The First World War brought not only death and destruction, but also attempts at bringing to responsibility those who violated the laws and customs of war. The scale of the conflict and the barbarities committed in its course came as a shock to the international community. There were demands for the punishment of those responsible for the crimes, all the way from Kaiser Wilhelm down to common soldiers who had mistreated prisoners of war. The preliminary peace conference, gathered in Paris on January 15, 1919, established a Committee of Fifteen (also known as the "Committee for Responsibility"), which recommended the convening of a "High Tribunal" to hold trials on the crimes committed during the war. The decision as to who should be indicted was to be left to a Prosecution Commission. The later efforts of this Committee to bring charges against Kaiser Wilhelm may indeed have come to nothing when the former ruler fled to the Netherlands (where, despite outside pressure, he received asylum), but it was nevertheless fruitful due to the important concepts that it formulated. One of these concepts was that the imperial immunity is domestic rather than in-

ternational in nature, and that therefore the Kaiser could be charged and tried in an international forum. As a result, the Versailles Treaty, signed on June 28 1919, included provisions about the culpability of the ex-Kaiser and other German war criminals. After the Treaty came into effect, however, it turned out to be impossible to bring German war criminals before an international tribunal. The victorious powers agreed in the final analysis that these persons should be tried within the territory of the Weimar Republic, and the very idea of trying the most culpable war criminals degenerated into confusion. The commission charged by the Reichstag with investigating war crimes concentrated, in fact, on producing arguments in justification of German actions. Held in accordance with international agreements before the Supreme Court in Leipzig, the trials turned into a parody of the idea of punishing war criminals. One example of this is the verdict of this court in the cases of generals Hans von Schack and Benno Krusek, who had been in charge of a camp, located in a swamp, where three thousand prisoners of war perished. These generals decided to bring several thousand Russians to the camp despite the fact that they were suffering from typhus; the corpses of those who died were laid out on the same tables where bread was later served. The court acquitted both generals and termed General Krusek "a good father to the prisoners."

The sentences passed in the Leipzig trials were lenient, not exceeding several years' imprisonment. Furthermore, those convicted did not usually serve even these light sentences, since they either escaped from prison or were granted temporary release. In a speech to the House of Lords on October 7, 1921, Lord Maghan summed up the matter by observing that the attempt at judging Germans by other Germans inside Germany, under German law, had been a failure.

*

The experience of the First World War led to the ratification of the Convention on improving the fate of the sick and wounded in the belligerent armies and the Convention on prisoners of war. These conventions broadened and superseded the provi-

sions of the Hague Convention. Unfortunately, the resulting legal system was soon to be brought into confrontation once again with the reality of the Second World War. The scale of the barbarities committed then surpassed the experience of the First World War, especially in regard to the treatment of civilians. At the same time, the experience drawn from the shameful Leipzig Trials became a point of reference for the formulation of the provisions that established the Nuremberg and Tokyo Tribunals. They also became a significant factor in the discourse on the culpability of individuals for crimes committed in the course of armed conflicts and the exclusion of war from among the means for resolving disputes between nations. The Nuremberg Tribunal, or more properly the International Military Tribunal in Nuremberg, was ultimately established in 1945 by a decision of the four victorious powers (the United Kingdom, France, the United States, and the Soviet Union) in the name of all nations. Its founding was by no means something that could be taken for granted, since, as late as the Yalta Conference, Stalin's proposal that some 50 thousand German Nazis should be killed instead of being tried was treated completely seriously, all the more so as the British side was inclined to favor such a proposal.

Twenty-two defendants took their places in the dock during the Nuremberg Trial, which lasted from November 20, 1945 to October 1, 1946. Cases against lower-ranking defendants were heard in the courts of the countries where the crimes were committed. One Nuremberg defendant committed suicide, and another was ruled unfit to stand trial. Three of them were acquitted, twelve sentenced to death, three to life in prison, and four to shorter terms of imprisonment. Martin Bormann was sentenced to death in absentia. Article 6 of the Nuremberg Tribunal Charter provided for individual responsibility for crimes against peace, violations of the laws and customs of war, and crimes against humanity. Article 6b, in turn, defined war crimes as "violations of the laws or customs of war," and went on to state that "[s]uch violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of the civilian population of or in occupied

territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages" and a range of other offenses. Both the Hague convention of 1907 and the Geneva Convention of 1929 covered these crimes and acts. A range of crimes was categorized as war crimes *sensu stricto*—that is, as violating the laws and customs of war (abuse of the white flag, or the refusal to extend pardon). The other crimes may be treated at the same time as crimes against humanity. The differentiating factor between these two types of crimes is their relation to the civilian population. While war crimes covered acts against the civilian population of occupied territory, crimes against humanity covered actions against the civilian population within their own country, as well as acts committed not only in the course of the war, but also before the start of war. In the case of crimes against humanity, there is no requirement for an armed conflict to exist, as in the case of war crimes.

From the point of view of Poland, those parts of the sentences that applied to war crimes committed within Polish territory were important. Basically, the majority of the charges contained references to these crimes. It is worth looking at the sentence passed against Hans Frank, the General Governor in occupied Poland. Among other things, he set up a system of concentration camps and a system for the extermination of the Jewish population. According to estimates, between 2.5 and 3.5 million people of Jewish origins resided in the General Government. According to Frank's own rough calculations, not more than 100 thousand Jews remained alive there on January 25, 1944. Frank was culpable of the deportation of nearly a million Poles for slave labor, and for economic exploitation that led to the death by starvation of large numbers of people. His attitude towards exercising governance is best summed up in the comment he made after reading a newspaper story about posters carrying information on the execution of Czech students: "If I were to order that posters be hung up whenever seven Poles were shot, all the forests in Poland couldn't supply the paper for those posters."

A tribunal similar to the one in Nuremberg was established to try the crimes committed during the

war against the Japanese Empire. A Sub-Commission for Far Eastern Affairs carried out preliminary work in Chongqing. In an analogy to the case of the Nuremberg tribunal, the bases for the operation of this Tribunal were the Hague Convention on the laws and customs of war and the Geneva Convention of 1929. The Tribunal was established under an order of January 19, 1946 issued by General Douglas MacArthur, supreme commander of the US Armed Forces in Japan and the Far East. MacArthur also nominated eleven judges, including candidates proposed by the other countries that were signatories to the Act of Capitulation (Australia, Canada, New Zealand, and the USSR). The charter of the Tribunal was modeled after the Charter of the Nuremberg Tribunal. The first verdict was handed down in 1948. From the very beginning, the "Tokyo tribunal," as it was known, faced criticism centering mostly on the assertion that it represented victors' justice and would not take into account the acts and crimes committed by US forces. The main accusations in this regard were the firebombing of Tokyo and the dropping of the atomic bombs on Hiroshima and Nagasaki. Furthermore, the court refused to admit charges against the USSR for violating the March 13, 1941 treaty of neutrality.

Both Tribunals had to deal with the fundamental question of who should be regarded as a war criminal. Usually, the answer is thought to apply to military personnel. However, this is not a hard and fast rule. It was decided that any person can be regarded as a war criminal as long as they are found to have some connection with the armed forces. Therefore, civilians may be responsible for crimes, as in the case of the Japanese foreign minister, Hirota, who was found responsible for the crimes committed in Nanking during the Second World War [actually, in 1937-1938 – transl.].

Military tribunals have played an important role in defining the responsibility for war crimes. They have also played an influential role in demarcating the scope of the concept. It has turned out, however, that the greatest progress in the field of defining crimes, including war crimes, takes place after the most brutal and dramatic conflicts, in instances that come as a shock to public opinion. So it was

after the Second World War, and so it was as well after the events in the former Yugoslavia and in Rwanda.

*

On August 12, 1949, the representatives of 12 countries unanimously approved a convention on the protection of the victims of war. Its form and contents are undoubtedly the result of the experiences of the Second World War. Particularly noteworthy is the Fourth Convention, devoted to the protection of civilians, and especially the part devoted to the protection of the civilian inhabitants of occupied territory. After all, the greatest crimes during the Second World War were committed against the civilian populations of occupied territory. The newly adopted convention refers not only to armed conflict of an international nature, the events that we are almost always prepared to refer to as "war." The provisions of the Geneva Convention of 1949 also include the joint article 3, referred to as "the convention in miniature." It contains a certain minimal standard of protection for the participants in non-international conflicts. Its importance lies in the fact that earlier humanitarian law and the law of armed conflict applied only to conflicts between states. The introduction of this article also made non-international conflicts a subject of the interest and protection afforded by humanitarian law. Violations of joint article 3 could therefore be war crimes.

However, the period following the ratification of the Geneva Convention did not bring peace. Nor did it prevent resort to the use of arms in solving disputes between states. Wars of national liberation, conflicts resulting from the cold war, and other armed conflicts made the international community aware of the necessity for further regulation in the field of humanitarian law. A diplomatic conference operated in Geneva from 1974 to 1977, as a result of which two Additional Protocols to the 1949 Geneva Convention were ratified. The first protocol widened protections in cases of international conflicts, while the second represented a broadening of Article 3 in relation to internal conflicts. The importance of the Additional Protocols should never be underestimated. They strengthen the protection

of persons exposed to the negative results of war and, just as importantly, Protocol I combines the Geneva law and the Hague law. The contents of this Protocol, which come from Geneva law, imply limitations on the conduct of military operations, which previously fell under Hague law.

The shaping of a universal concept of international humanitarian law (that is, law that encompasses both Geneva law and Hague law) has not always gone hand in hand with its observance. The 1990s saw two events that, without the slightest risk of exaggeration, can be called catastrophes in both humanitarian and human terms. The war in the former Yugoslavia brought death and destruction to thousands of people and exile to millions of others. It took place on the doorstep of contemporary Europe, which did not take a sufficiently active stance at a time when it could have stopped the violence. Something similar happened in Rwanda, where a tragic massacre of the Tutsi and moderate Hutu people broke out in April 1994 and went on for a hundred days. Approximately 800,000 people died at this time, and nearly 500,000 women were raped. If few people were interested in the war in the former Yugoslavia, hardly anyone was interested in the events in Rwanda. However, these events led to the calling of two international tribunals, *ad hoc* in nature, as well as the development of international criminal law, the creation of a charter for the International Criminal Court, and the establishment of that tribunal. They also contributed to the establishment of an alternative method for the prosecution and punishment of the most serious violations of international humanitarian law, including war crimes.

When speaking about Yugoslavia, we accept the view that the first fighting broke out in 1991, and the Tribunal for judging the crimes committed there was established two years later, when the fighting was still going on. The UN Security Council classified the increasing violation of international humanitarian law (IHL) in the former Yugoslavia, including ethnic cleansing, as a threat to international peace and security. In connection with this, the Council decided to make use of its prerogatives resulting from chapter VII of the United Nations Charter. The Criminal Tribunal for the Former

Yugoslavia was established through two resolutions, nos. 808 and 827. The first of them was passed in February and the second in May 1993. The Hague was the seat of the Tribunal. Aside from the Tribunal, the UN also established a Prosecutor's Bureau, a unit dealing with witnesses and the accused, and a so-called "Registry," or a broadly conceived Secretariat. The operation of the Tribunal is based on the Statute and on the Procedural and Evidentiary Principles approved by the International Criminal Tribunal for the Former Yugoslavia (ICTY). The Tribunal is not governed by national law, but has jurisdiction, and in fact precedence, in the trying of the most serious crimes committed in Yugoslavian territory.

A year after the establishment of the Tribunal for the Former Yugoslavia, Security Council Resolution 955 of November 1994 created a Tribunal for crimes committed in Rwanda, with headquarters in Arusha, Tanzania.

The activities of both Tribunals are exceptionally important from the point of view of punishing international war crimes. However, there are certain differences between them, as the Hague Tribunal concentrates on violations of the Geneva Convention, while the statute of the Arusha Tribunal contains reference to Article 3 and Additional Protocol II. From the very beginning, therefore, the Rwanda Tribunal has focused on the prosecution of individuals guilty of war crimes committed in an armed non-international conflict. This is significant to the degree that the problem of war crimes was originally limited exclusively to international conflicts.

The statutes of both Tribunals are the bases for their legislative activity. At the very beginning of its operation, the Hague tribunal had to answer the question of what defines an armed conflict. This is a fundamental question, since the application of the Geneva Convention, or at least the common Article 3, comes into force only when an armed conflict exists. Only from that moment on is it possible to speak about the commission of war crimes. The Tribunal referred to this issue in the so-called Tadic case. It found that "an armed conflict exists when there exists resort to armed force between states, or prolonged armed violence between authorities

and organized armed groups, or between such groups inside a state. International humanitarian law applies from the beginning of such an armed conflict, and applies even after the cessation of armed combat, until the moment when a peace agreement is reached or, in the case of internal conflicts, a peaceable understanding between the sides. Until such time, international humanitarian law applies throughout the territory of the belligerent states, or, in the case of internal conflict, in the entire territory that finds itself under the control of the sides, whether or not combat is taking place there." Of course, not every internal conflict crosses the threshold of armed internal conflict. Riots, disorders, short-lived insurrections, or the actions of bandit groups are not of this nature, and international humanitarian law does not apply to them. Similarly, the culpability for acts committed during such incidents may not be based on the culpability for war crimes.

The so-called Tadic principle, based on the foregoing finding, was used to formulate the provisions of the statute of the International Criminal Court (ICC). The statute itself is therefore important to the degree that it provides the most current definition of the most important violations of international law, including war crimes. A preparatory committee for the founding of the ICC prepared the text of the statute itself. From 1996 to 1998, there were six meetings to work on the text of the statute. The fruit of these meetings was the subject of a conference in Rome from June 15 to July 17, 1998, which resulted in the promulgation of the statute of the ICC. A treaty resulting from the sessions came into force on July 1, 2002, 60 days after the submission of the 60th ratification document, and this date is accepted as the date of the founding of the International Criminal Court. The task of the court is to apprehend and try individuals suspected of war crimes, crimes against humanity, and genocide. The court is permanent and not subject to any statute of limitations. Its only restriction is the fact that its jurisdiction extends only to crimes committed since the Rome Treaty came into effect. Therefore, the ICC cannot try, for example, persons suspected of carrying out the Srebrenica massacre.

Quoting the contents of Article 8 in their entirety would be supererogatory, since it consists of two densely printed pages of text and is easily available on the Internet, for instance in the legal database of the Polish parliament website. Only for the sake of example, we might cite several of its provisions on the commission of war crimes. Article 8 (2) (a) (i) covers intentional killing. These are all forms of the deprivation of life, either through commission or omission. Such killing could, for instance take the shape of imprisonment in such conditions that hunger and mistreatment could cause the death of those imprisoned. The prosecution must prove either an intent to kill, or an intent to cause serious injury connected with a contemptuous attitude towards human life. Under Article 8 (2) (a) (ii), another war crime is torture or inhuman treatment. Here, again, on the precedent of the findings of the Tribunals for the Former Yugoslavia and Rwanda, we can state that torture can be a part of a crime against humanity, the crime of genocide, and also a war crime. The definition of torture is in effect fixed, but the distinguishing factor here is its connection with armed conflict. The important thing is the strengthening of culpability for the commission of torture. It is accepted without doubt that culpability for the crime is shared by persons holding official positions who failed to prevent torture, as well as by rank-and-file perpetrators. Significantly, all forms of rape are included under torture. Torture must be a public act, not resulting from personal motive, since crimes of that nature are covered by domestic legislation. On the other hand, it is difficult to imagine that torture committed during an armed conflict could result only from private motives, not connected with the ongoing conflict. Another form of war crime, in the light of Article 8 (2) (a) (viii), is the taking of hostages. Hostages are persons not engaged in conflict who are illegally deprived of freedom, frequently in an arbitrary manner and under threat of death. This crime includes the taking as hostages of civilian persons or those who have lost the status of combatants. When it comes to the use of hostages as human shields, we are dealing with one of the forms of humiliating inhuman treatment defined in Article 8 (2) (a) (xxiii) of the Rome Treaty.

*

It might seem that a complete system for the punishment of war crimes has been created. After all, we have the law, the tribunal, and the appropriate procedure. It turns out, however, that this is not enough. The International Criminal Court is not able, nor is it intended to be able, to punish all of those guilty of war crimes. At the most, it is the highest-ranking people involved in a given conflict who can be tried before and punished by this Court. There may be ten such persons, or fifty, but the Court is never going to try all the participants in a conflict. For the others, there remain the courts in the country where the conflict took place. The experience of the Leipzig trials after the First World War shows that this is no easy task. Furthermore, the majority of contemporary conflicts are internal. Therefore, it is not only a matter of punishing war criminals, but also of reconciliation, the return of the society to normalcy, and, prosaic as it may sound, training lawyers who will be able to serve their country in the future. War causes not only death and destruction, but also yawning gaps in education. When the fighting goes on for 10 to 12 years, as was the case in Sierra Leone, not only is there a shortage of well-educated lawyers, but the whole country becomes almost illiterate.

All of this means that so-called "mixed" or "hybrid" courts are increasingly popular. These have also been called third-generation courts (the Nuremberg and Tokyo Tribunals were the first generation, and the *ad hoc* courts in Yugoslavia and Rwanda the second generation). At present, this type of solution exists in Sierra Leone, Sarajevo, Kosovo, and Cambodia, while the court in East Timor has concluded its work. The functioning of these courts depends on the coexistence of an international element and a domestic element. This coexistence can be seen, for instance, in the mixed makeup in the courtrooms—in Sierra Leone, three judges sit on the panel, of whom two are nominated by the UN Secretary General and the third by the government of Sierra Leone. This coexistence also extends to the legal system, since both domestic and international law are applied. The *lingua franca* of these courts is English, which facilitates the work of the international judges and prosecutors.

Such tribunals are exceptionally effective instruments for combating war crimes. Above all, their physical presence in the place where the crime was committed gives them a significant advantage over courts operating far away. Secondly, the effect on the country in question is enormously effective. For example, the court in Sarajevo will only be international for five years, after which local prosecutors and judges will take over its entire operation. This represents a chance for reconciliation in the postwar period. Equally important, if not the most important of all in today's world, is the fact that such courts are far less expensive than UN ones.

Each court, of course, is different. The one in Sierra Leone is almost completely separate from the country's existing legal system. The Sarajevo court, on the other hand, is part of the domestic legal system. This results from the necessity of adapting these courts to the internal system in a given country. In Sierra Leone, in effect, there was no existing legal system upon which the operation of such a court could be based. In Bosnia, on the other hand, such a system survived, which meant that the court could be woven into it. This shows another strong point of the third-generation courts—their elasticity and adaptability to specific conditions.

*

At present, however, it is not only international courts that offer a chance to punish war criminals. A legal principle known as universal repression or universal jurisdiction has crystallized, which makes it possible to indict and try certain persons on the basis of the conviction that they have committed acts that violate the most important universal human values. Therefore, regardless of the origins of the perpetrator or the place where the crime was committed, every country has the right to try and punish such persons. This is the case with the perpetrators of such acts as war crimes, genocide, or crimes against humanity.

One of the first countries to pass legislation making possible the application of the principle of universal justice was Belgium, which passed a law on July 16, 1993 making possible the punishment

of war criminals on the basis of universal jurisdiction. As a result of amendments to this law in 1999, the law was broadened to cover the prevention of the most important violations of humanitarian law, and to cover the crime of genocide. This law made possible the famous trial of the Butare Four, Rwandans suspected of crimes committed during the massacre of the Tutsi in that country. Vincent Ntezimana, Alphonse Higaniro, and the nuns Gertruda Mukangango and Julienne Kizito were in the dock. The nuns became notorious as accessories to the burning of Tutsi refugees who sheltered in churches in their parishes (the nuns brought gasoline and showed where the Tutsi were hiding). Higaniro was accused of supporting extremist death squads and of inciting the killing of several families who lived in houses blocking his view of a lake. Ntezimana was accused and convicted of drawing up lists of his university colleagues, who were murdered later. To a certain extent, the principle of universal jurisdiction has also been applied in France, Germany, and Spain, where a sentence was passed in March 2005 against Adolfo Sicilingo, an officer involved in murder and torture during the reign of the military junta in Argentina.


*

War crimes have been and continue to be committed. It is difficult to count on even the most perfect legal system and instruments preventing them in the future. Yet an analogous situation exists in domestic law. The law forbids a wide range of acts and procedures, yet crimes nevertheless continue to be committed. No one regards this as a reason to abandon the prosecution of common criminals. We should treat war crimes in the same way. While aware that we will not always be able to stop them being committed, we should be ready to try and punish them harshly. In view of their scale, these crimes represent an offense to the morality of all human beings, be they Christians, Muslims, or Jews. I am deeply convinced that creating a climate that does not tolerate such acts will lead in the future to the effective prevention of the violation of basic human rights.

At the same time, it cannot be forgotten that perhaps the greatest challenge of our times is the

changing nature of armed conflict. In the 20th century, conflict stopped being symmetrical—that is, combat between two more or less equal partners, each of which deployed trained troops. At present, we most often have to deal with asymmetrical conflicts—that is, fighting between regular armed forces and partisans, terrorists, or bandits. These groups fight under completely different conditions. The lack of institutionalized armed forces paid out of the state budget leads to the need constantly to seek financial means to cover the costs of these groups. This leads to the formation of a particular kind of belligerent mini-economy, in which such natural resources as gold and diamonds, or the plunder and persecution of the civilian population, become ends in themselves, as the simplest method of acquiring space for one's own clan, tribe, or

group. All of this leads to situations where armed groups become a part of the global criminal world, as happened with the narco-partisans in Colombia or the mujahedeen in Afghanistan. Armed conflicts frequently evolve into bandit fighting, where the lack of any military discipline among the belligerents has an exceptionally negative impact on the observance of the norms of humanitarian law. All of this makes it necessary not only to revise the manner of combating such phenomena, but also to find effective ways of inculcating and observing the norms of humanitarian law in surroundings where the only norm is often the right of might.



Piotr Łubiński—a graduate of the Faculty of Law and Administration at the Jagiellonian University and a doctoral candidate in the Chair of International Public Law. He is a member of the Polish Red Cross Executive Board's Commission for the Dissemination of International Humanitarian Law.

PRO

MEMORIAL

26

Genocide - the deliberate destruction of a given population group because of its ethnic, cultural, or religious distinctness - has a long history. In Nazi Germany, however, the old practices of persecution, condemnation, and exclusion became the policy of the state.

For this issue, we have chosen articles that attempt to define war crimes and the crime of genocide by discussing the Nazi crime of genocide against the Jewish and Roma peoples. Other articles analyze the sources of terrorist financing and ways of combating terrorism.

Our next issue, in June 2007, portrays the Auschwitz-Birkenau Museum on the sixtieth anniversary of its founding.

INFORMATION BULLETIN

THE AUSCHWITZ-BIRKENAU STATE MUSEUM AND
THE AUSCHWITZ-BIRKENAU DEATH CAMP
VICTIMS MEMORIAL FOUNDATION

ISSN 1233-7870

PRO

MEMORIA

The faith in the myth of the indivisible nation, the *Volksgemeinschaft*, intended to protect Nazi German society from internal conflicts, was connected with the elimination of those groups that did not fit into the unitary model. The Nazis appealed to the fears of the public, which were transferred from the international situation of the time to allegedly "alien" minority groups, the "internal enemy." The legal differentiation of the minorities, and ultimately the denial to them of the status of human beings, prepared Nazi German society to take part in, consent to, or remain indifferent to the crime of genocide. Continuing old world practices, the Nazi German state separated the groups of "aliens" whose cultural distinctness was gradually to be obliterated from those marked for physical obliteration—the Jews and the Roma.

The concept of "genocide" does not appear in the verdict pronounced by the International Military Tribunal in Nuremberg. Aside from "crimes against peace" and "war crimes," the Nazis were accused of "crimes against humanity." It was pointed out during the trial that "the most numerous and most inhuman crimes were committed against the Jews." However, despite popular misconceptions, none of the Nazi leaders was convicted of the genocide of the Jews. The recognition of the separate status of the crime of genocide occurred during the session of the United Nations General Assembly in December 1946. Over time, it became clear that crimes against humanity were those committed against the civilian population in general, while genocide was committed against a strictly defined group.

Continuing our reflections on the problem of terrorism—presenting the origins of the phenomenon, the sources of its financing, and the means of combating it—we wish to draw attention to the fact that, 60 years after the end of the Second World War, the world has not become a better place, and will not do so until there is a universal comprehension of the need for active participation in improving it.

The Editors

In this issue:

| | |
|---|----|
| Bernard Bruneteau—The Century of Genocide | 3 |
| Raphael Lemkin—Genocide..... | 13 |
| Franciszek Piper—Genocide: Theory and Practice..... | 17 |
| Marek Isztok—The Genocide of the Roma in Germany and Occupied Europe..... | 25 |
| Piotr Łubiński—War Crimes: Concepts of Crime and Punishment..... | 31 |
| Marcin Marcinko—Nuclear Terrorism | 41 |
| Eleonora Jedlińska—The Remembered and Imagined Holocaust in Contemporary Art: On the Work of Zbigniew Libera, Piotr Uklański, and Maciej Toporowicz | 53 |
| Piotr Setkiewicz—Mortality among the Prisoners in Auschwitz III-Monowitz | 61 |
| Irena Strzelecka—Mexico (<i>Meksyk</i>): The Transit Camp in Birkenau..... | 67 |
| Henryk Jakubowski—The War Years, 1939–1945 | 73 |
| Maria Ciesielska—The Survivors of Sobibor | 81 |
| Ewa Bazan—The Pacification of Garbatka | 87 |
| Jeff Heinrich—Angela Polgar's Mother..... | 93 |
| Klemens Hołownia—Theater in Auschwitz | 97 |