Legal obstacles to prosecution of breaches of humanitarian law *

by Jacques Verhaegen

It is common knowledge that by signing and ratifying the Geneva Conventions of 12 August 1949 the High Contracting Parties have undertaken to seek out and prosecute all persons, *whatever their nationality,* committing or ordering to be committed any of the grave breaches defined in the said Conventions. As I have stated elsewhere,[1] this express undertaking is so far removed from present custom, and from the traditional immunities enjoyed by nationals in this respect, as to justify asking how States intend to put it into effect and make its implications thoroughly understood and accepted by their politicians, armed forces and *legal authorities.*

As regards the Belgian State, I asked "whether, any more than any other country, it was willing to impose (and had accustomed public opinion to the idea of imposing) the sanctions set out in its penal law on any Belgian, of whatever rank or function, who defied a prohibition of humanitarian law, not from personal interest or sadism, but in the name and on behalf of the State and in connection with the State's measures for national defence".

* This article is taken from the Belgian national report to be presented to the XIVth International Congress of Penal Law (Vienna, 1989), and is dedicated to the memory of my brother Yves, a war volunteer.

[1] Verhaegen, J., "La répression des crimes de guerre en droit pénal belge", in *Mélanges Hans-H. Jescheck*, Berlin, Duncker und Humblot, 1985, p. 1441.

The current unwillingness to prosecute and pass judgement on offences of this kind has already been examined by several authors.[2] One is tempted to agree with André Malraux's dictum in *"l'Espoir"* that "men find it hard to believe that their fellow fighting men may be contemptible", or with the remark by an expert in administrative law, on the subject of abuse of authority in French national law, that "it may go against the grain to sentence a policeman who has used force without malicious intent and in the belief that he was acting in the general interest—it seems unfair".[3]

This unwillingness was mentioned in the seminar on *"New horizons in international penal law of armed conflicts"*, held by the International Institute of Higher Studies in Criminal Sciences (Noto, May 1984). The summary record states that, probably for political and psychological rather than legal reasons, the difficulty of establishing a system of humanitarian law involving *penal* sanctions appears to be linked mainly with the still widespread ignorance of the role of humanitarian law in protecting the *minimum standard of treatment due to human beings* in the worst circumstances; that is, the minimum degree of humanity, to be perpetually protected against the attacks made on it for "reasons of State" and military necessity.

From the various phases of the Shimoda affair and the My Lai trial to the difficulties encountered in setting up the Kahane Commission after the Sabra and Shatila incidents, there are numerous examples of these reluctant and obstructive attitudes to the implementation of *legally protected* humanitarian law.[4]

The reluctance, whether of political or psychological origin, would not have been able to overcome the legal obligation to "seek out and prosecute" without the support derived from some legal texts, at least with regard to *legal* aspects. The Noto report, mentioned above, praises the Seminar for calling upon judicial bodies to consider and researchers to examine the bottlenecks, hypothetical loopholes or procedural obstacles most generally used to raise a

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[2] Verhaegen, J., *La protection pénale contre les excès de pouvoir et la résistance légitime à l'autorité*, Brussels, Ets. Emile Bruylant, 1969, pp. 117 ff. and references quoted.

[3] See Debary, *L'inexistence des actes administratifs*, Paris, Pichon-Durand, 1960, p. 32.

[4] Verhaegen, J., "Les nouveaux horizons du droit international pénal des conflits armés", in *Revue de droit pénal et criminel*, (*Rev. Dr. Pén. Crim.*), Jan. 1985, p. 34 and "New horizons in international criminal law", in *Nouv. Et. Pénales*, 1985, pp. 45-58.

"legal" barrier to the prosecution and punishment of even flagrant and pernicious violations of humanitarian law.

This article proposes to consider the principal pretexts of this kind.

1. Repudiation of the competence of the legal authorities (declinature)

The time-honoured claim by the executive power to remove from the control of the legal authorities decisions in the "preserves" of foreign policy, State security and national defence is known in some countries as the "theory of the act of government" or *"judicial restraint"*. When not based purely and simply (and one is tempted to add, unashamedly) on "reasons of State" devoid of all legal or moral considerations, it will at least attempt to claim legitimacy on the (untrue) grounds that it is impossible to investigate the legality of government action without dangerously encroaching on the government's discretionary powers.[5]

Admittedly, now that the majority of States have signed international agreements [6] recognizing the principle of penal responsibility for acts of war and that of individual appeal against violation of *jus in bello*, it is not easy to maintain that acts relating to national defence are immune from penal prosecution. Nevertheless, this old theory still regularly crops up to a significant extent in statements by political and military leaders and even in the reasoning of judges.

"We invoke declinature ... Where defence is concerned, decisions are above the law and the question of their legality does not arise".[7]

These were the terms in which a Belgian law officer replied in 1986 to a petition for the reversal of a government decision relating to armaments. The plea of declinature, entered in the very year in

[5] Typical of this opinion is the statement made on the Belgian radio by General V. Walters after his country had been condemned by the International Court of Justice (27 June 1986). "My Governement", he said, "will not allow its foreign policy to be dictated to it by a college of foreign judges".

[6] Geneva Conventions of 12 August 1949: First Convention, Art. 49/ Second Convention, Art. 50/ Third Convention, Art. 129/ Fourth Convention, Art. 146/; Additional Protocol I, Geneva 1977, Art. 85; and the European Convention on Human Rights, Art. 15, § 2, referring to "lawful" acts of war.

[7] Reply by the Chief Commissioner ("premier auditeur") of the Council of State in the case of *Pax Christi and jointly interested parties*, 1986.

which Belgium ratified a Protocol that makes it obligatory to *bring before the country's courts* anyone giving orders to attack the civilian population or non-defended localities, that prohibits the use of indiscriminate violence and that imposes the duty to ensure that new weapons are compatible with the rules of international law, clearly illustrates the difficulty in assimilating penal international law on armed conflicts which is experienced by the very persons responsible for applying its precepts.

This claim of immunity from prosecution is not by any means the only way of preventing violations of humanitarian law from coming to the knowledge of the courts.

2. Cases in which no action is taken or which are simply dealt with under the disciplinary corps of the armed forces

The right assigned to certain judicial authorities, particularly prosecuting bodies, to assess the validity of the charges brought, and even the advisability of prosecution, has probably done much to keep out of the courts most of the "service-related" crimes and offences (of whatever gravity) committed in the name and on behalf of the State.[8]

Some authors have drawn the pessimistic conclusion that, in certain privileged cases, only a campaign by the mass media could ensure that such matters were referred to the courts by which they should properly be tried.[9]

In the "Greenpeace Affair", the French Prime Minister declared on 27 August 1985 that, "if it appeared that criminal acts had been committed by French citizens, legal proceedings would be taken immediately", yet on 28 November 1985, although—or perhaps because—several of the political and military figures responsible for the operation had been identified, the Minister of Defence stated that penal prosecution had unfortunately become impossible (sic)

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[8] Verhaegen, J., "L'excès de pouvoir, la légalité de crise et le droit de Nuremberg", in *La protection pénale contre les excès de pouvoir*, op. cit., pp. 359 ff. On the *favor potestatis* see especially pp. 420 ff. On certain prosecutions actually made, see Verhaegen, J., "La culpabilité des exécutants d'ordres illégaux", in *Rev. Jurid. du Congo* 1970/3, pp. 231 ff., especially Note 2.

[9] See, for example, McCarthy, M., *Rapport sur le procès du capitaine Medina*, (report on the trial of Captain Medina), Paris, Laffont, 1973 and summary by Verhaegen, J., in *Rev. Dr. Pén. crim.*, 1973-74, p. 615.

because Parliament had refused to set up a parliamentary commission of inquiry!

In Belgium, just as in France, the unjustified inertia of prosecuting bodies could theoretically be overcome by the acknowledged right of the injured party to initiate public prosecution; but Belgian jurisprudence has not recognized this right as applying to courts martial, which in Belgium are the bodies normally competent to deal with war crimes and, more commonly, with breaches of the law by military personnel.

Moreover, by virtue of a Belgian law of 1975, military tribunals to whom the competent authorities have applied in due form may still decide to take no action themselves[10] on the matter referred to them, but to refer it for disciplinary action to the accused person's superior officers "because the offences are not serious". Obviously, apart from the fact that the penalties which the disciplinary authorities are entitled to inflict may not always be appropriate to the true gravity of the breaches, there is the risk that the authorities' view of the accusations will be greatly influenced by considerations irrelevant to law, such as the disinterested motives of the accused loyalty to the service or the "honour of the flag".[11]

To prevent as far as possible such cases from being improperly hushed up, or "understandingly" referred back for disciplinary action by the armed forces, it has been proposed, as part of the reform of military penal procedure, that tribunals should be required to state officially the action taken on each complaint, giving explicit *reasons* for any decision to dismiss the charge. This is surely an extremely important innovation.

3. Exclusion of State secrets

The recognition by the judicial authority of its legal competence to deal with the case, and admission that it is presumed sufficiently serious to rule out its referral to the armed forces for disciplinary action, still does not guarantee, of course, that adequate legal proof of the breach can be produced to the judges.

There is a very real risk in this kind of prosecution that revelation of the truth will be prevented by the accused and those

[10] Verhaegen, J., "De la connaissance des infractions commises par les militaires", in *Journal Trib.*, Brussels, 1973, pp. 721 ff.

[11] Ibid., p. 722, Col. 2, and Verhaegen. J., *La protection pénale contre les excès de pouvoir*, *op. cit.*, pp. 73 ff. and 432 ff.

summoned as witnesses refusing to give evidence, if they decide to plead that any of the circumstances comprising the breach, or any evidence of it, is officially secret.

Needless to say, the mere allegation of official secrecy by the administration itself does not mean that this must be accepted by a judicial authority investigating a violation of international law. Thus, at the trial in 1972 of some Belgian soldiers accused of third-degree interrogation of prisoners during manœuvres, the Liège Court Martial rejected an application for the proceedings to be held *in camera* made by a senior officer who was required by the court to describe some extremely questionable training given to an army unit.[12]

There can be no further doubt that to accept that a particular point in the investigation is covered by official secrecy in no way relieves the authorities of the obligation to provide the information necessary to establish the truth in a case being tried, when so required by the judge. "The withdrawal of certain documents that it would be very dangerous to communicate must be reconciled with the production of other documents from which the legality or otherwise of the action taken may be determined".[13]

The prohibition in Belgian penal law to communicate "information whose secrecy is important to national defence or the external security of the State" might be invoked by persons interrogated; but Article 119 of the Penal Code containing this prohibition, and Article 13 of the Act of 14 January 1985 containing regulations for discipline in the armed forces, punish only the communication of information to persons not entitled to receive it; such persons could not possibly include judicial authorities required to seek out and investigate violations of international penal law, whether or not perpetrated under the cloak of official secrecy.[14]

The Geneva Conventions make it compulsory to report breaches of these Conventions (see Article 87 of Additional Protocol I), and the Belgian Bill No. 577 punishes the failure to take action by persons having knowledge of orders given in violation of

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[12] Verhaegen, J., "La tentation de la torture", *Journal trib.*, 1975, pp. 473 ff., and more specially "Savoir où porter le fer — A propos de la condamnation de six para-commandos", in *Journal Trib.*, 1973, p. 140, Col. 2.

[13] Cambier, Cyr. *La censure de l'excès de pouvoir par le Conseil d'Etat*, Brussels, 1956, No. 223.

[14] The Belgian Penal Code punishes divulgation of an employer's secrets "except in cases where the custodians of the secret matters are called as witnesses in the courts and in cases where the law obliges them to reveal these secrets".

the Conventions. It would therefore be completely illogical to put any obstacle in the way of their being divulged to a judicial authority responsible precisely for seeking out and repressing such violations.

In his report to Louvain University in 1980 on this very question, Professor H. H. Jescheck answered it with extreme clarity. He said "We have, in effect, to choose between two opposing values: the concern of the State to keep certain matters secret so as to safeguard its external security, national defence system and foreign policy; and the concern to safeguard the general legal system challenged by the matters in question. We cannot simply subject the legal system—particularly the higher standards of international public order—to the political interests of a State... The revelation of secret preparations leading to the violation of international humanitarian obligations, such as the threat to the legal principles protected in time of armed conflict by the Geneva Conventions and their Additional Protocols, should be justifiable according to the principles and in the very conditions of the state of necessity leading to the justification".[15]

4. Refusal to class acts as legal or illegal

Like any penal law, the rules of penal international law must be strictly interpreted. They apply to all cases that come within their terms, and to those cases only. Their strict interpretation does not of course exclude either the *logical* applications that draw all necessary implications from the rule, or the *evolutive* applications which cover, in particular, the *modus operandi* (which is difficult or impossible for the legislator to foresee because of the advanced techniques characteristic of it), provided this *modus* comes with certainty within the terms of the definition.

Whereas the sentences passed upon war criminals after the Second World War too often disclosed the temptation to interpret penal laws *extensively*, partly because of faulty appreciation of the exonerating causes legally invoked [16] it is the tendency towards

[15] Jescheck, H.-H., "La protection des secrets d'Etat illégaux en République fédérale d'Allemagne", in *Licéité en droit positif et références légales aux valeurs*, Brussels, 1982, p. 376.

[16] "Une justice avec des dents" (Justice with teeth), a term used by a French Governement Commissioner, quoted by Maunoir, J.-P., *La répression des crimes de guerre devant les tribunaux français et alliés*, Geneva, 1956, p. 52.

restrictive interpretation that characterizes the legal classification of (or refusal to classify) offences committed for reasons of state by national agents in the exercise of their duties.[17]

A number of aberrations of this kind, deliberate or otherwise, but undoubtedly leading to restriction in the scope of penal law, can already be seen in the conduct of those who interpret penal international law.

a. The general principles of penal international law (beginning with the first principle, namely the ultimate supremacy of the *laws of humanity* as expressed in Martens' clause, with its direct corollaries: the principle of immunity of non-combatants, and the fundamental prohibition of the use of weapons having excessively injurious or indiscriminate effects) are to be refused recognition as imperative juridical rules.[18]
b. Rules made in general terms or not clearly defined [19] are, because they lack precision, to be declared inadequate grounds on which to declare a given fact punishable under penal law. *Lex infinita, transgression permissa!*
c. Where rules are specific and sufficiently precise, the necessary logical conclusions are not to be drawn from them [20] and their *evolutive* interpretation is to be rejected.[21]

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[17] *La protection pénale contre les excès... op. cit.*, p. 427 and references quoted.

[18] "The (Martens) clause is not binding on our country": statement by the Belgian Minister of Foreign Affairs on 9 November 1983 in the Lower House of Parliament (C.R.A., p. 130). On the mandatory nature of the Martens clause, see the reply by Ambassador R. Bindschedler, Head of the Swiss Delegation to the Diplomatic Conference, in *Licéité en droit positif, op. cit.*, p. 632, Note 23.

[19] International conventions contain all too many vague formulas of this kind. See Verhaegen, J., "Les impasses du droit international pénal", in *Rev. Dr. Pén. Crim.*, 1957-1958, pp. 1-61, especially pp. 18-20. Similarly, "It may be asked whether the jurists (composing the United Nations Commission on international law for the formulation of the Nuremberg principles) were sufficiently expert to discuss questions of penal law. The legal training of an internationalist is not that of an expert in penal law... President Scelle himself found cause to say as much" (*Rev. Dr. Pén. Crim.*, 1950-1951, p. 819).

[20] Verhaegen, J., "L'activité militaire en période de crise (conditions et limites de sa justification en droit pénal belge)", in *Rev. Belge Dr. Intern.*, 1984-1985/I, p. 331.

[21] "Controversy has arisen as to whether the Hague Regulations apply to nuclear weapons" (statement by Mr. Tindemans, Belgian Minister of Foreign Affairs, to the Lower House of Parliament on 9 Nov. 1983). Cf. the Council of State's opinion of 8 Oct. 1984 on the Bill "for approval of the Geneva Additional Protocols"; that opinion reiterates that international instruments such as the Hague Conventions of 1899 and 1907 and the humanitarian Geneva Conventions of 1949 are applicable to nuclear weapons.

d. The person committing the violation is to be given the benefit of attenuating circumstances such as "service reasons", even though the law does not recognize these as having any power to exonerate from penal responsibility.[22] Some authors even go so far as to regard obedience to criminal orders from a superior as objective justification.
e. Indictments under national law, such as for homicide or bodily injury caused by carelessness,[23] and in particular "preventive" indictments under national penal law (namely those that, whilst not directed against the crime itself, punish acts that lead to or prepare for crime) will never be entertained, although neither personal competence nor the territorial competence of jurisdictions would be a legal bar to them. Thus, giving orders to prepare a crime (whether or not they are obeyed) would be so excluded. So would participation in a concerted plan to commit or help to commit crime or to refrain from any action to prevent it from being carried out.[24]
f. By contrast, any interpretation and legal classification of an act, however inaccurate, emanating from the executive power will be received docilely and without question, despite their incompatibility with a precisely worded law and however clear the facts of the matter.[25]

Such practices are reminiscent of the refusal in the 1914-1918 war to regard the use of *poison gas* as a clear violation of the general and express prohibition of the use of *poison* (Article 23a of the Hague Regulations), the refusal to regard *air bombardment* of

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[22] A typical example is reported in *La protection pénale contre les excès de pouvoir*, *op. cit.*, p. 435.

[23] On the simultaneous presence of the factors constituting manslaughter through carelessness, see the report of the Kahane Commission on responsibility for the Sabra and Shatila events, Stock, 1983, p. 109. See also Verhaegen, J., "Le délit d'imprudence et la guerre", in *Rev. Dr. Pén. Crim.*, 1959-1960, pp. 419-491, and "L'ordre illégal et son exécutant devant les juridictions pénales", in *Journ. Trib.*, Sept. 1986, pp. 449-454, especially p. 452.

[24] Verhaegen, J., *L'activité militaire en période de crise*, op. cit., pp. 336-339.

[25] Verhaegen, J., "Une interprétation inacceptable du principe de proportionnalité", in *Revue de droit pénal militaire et de droit de la guerre*, 1982, pp. 333 ff. The opinion of M.-F. Furet in her preface to the proceedings of the Montpellier Symposium (XVI[e] Colloque de la Société Française de Droit International, Montpellier, 3-5 June 1982) on international law and weapons, that "general ideas (such as 'striking without discrimination' or producing 'excessively injurious effects') can be interpreted onla by agreement between States which decide what weapons are to be prohibited in the light of these general principles" is a typical example of the law being submitted to classification by national executives.

undefended towns as a clear violation of the general and express prohibition to *bombard* them (Article 25 of the Hague Regulations),[26] and the refusal before August 1949 to regard the taking of *hostages* as a clear violation of the general and express prohibition of *general penalties* or violence to the lives of persons in occupied territories (Articles 46 and 50 of the Hague Regulations).

The Belgian Court of Cassation, giving judgement on 4 July 1949 in the Muller case, which has become the *leading case* on the repression of war crimes in Belgian law, nevertheless reiterated the mandatory character.

1. of all the necessary implications of the express provisions of humanitarian law;[27]
2. of the supplementary principle of *humanity* referred to by the Martens clause, although this final supplementary rule to all crisis law is so imprecise that it must give the judge greater latitude in accepting grounds for a plea that an official who is a victim of his error in fact or in law is not personally responsible.[28]

5. The need to safeguard vital national interests

When a Belgian law officer quotes the rule *salus rei publicae suprema lex esto* in answer to a petition for the reversal of a government decision on the subject of armaments;[29] when a French judge rejects a defence based on the international obligations of France, arguing against them "the natural, imprescriptible and inalienable right of every nation to defend itself against ag-

[26] The words "by whatever means" were added to Art. 25 of the Hague Regulations at the request of General Amourel to safeguard the logical and evolutive interpretation of that Article.

[27] "Whereas the appeal maintains with good reason that although the Hague Convention of October 18, 1907 and the Regulations annexed thereto... do not contain any explicit provision relating to hostages, the execution of hostages is nevertheless implicity considered as a violation of the laws and customs of war by Articles 46 and 50 of the aforesaid Regulations" (Pasicrisie, 1949, I, 515).

[28] Although prior to August 1949 reprisals against the civilian population were not *explicitly* prohibited, there are orders to which "disobedience is due because they manifestly violate an overriding principle of humanity" (Belgian Court of Cassation, 4 July 1949, *Pas.* 1949, p. 516).

[29] Quoted in the case of *Pax Christi and jointly interested parties* (1986).

gression"; [30] and when the French government delegate to the Diplomatic Conference of 1974-1977 justifies his rejection of the provisions relating to indiscriminate attacks on the grounds that these provisions would be likely to compromise the right of legitimate defence recognized by Article 51 of the Charter of the United Nations,[31] they forget, voluntarily or otherwise, that the imperative requirements of international law were framed after prior compromise and minutely adjusted to strike a balance between the requirements of humanity and those of political and military necessity, and therefore have an *unconditional* nature that no public necessity can further reduce.

These rules are, very exactly, "rigid and the fruit of compromise", and represent the absolute minimum due to the human person in the worst possible circumstances.

That these rules suffer absolutely no derogation is recalled in Article 4 of the International Covenant on Civil and Political Rights, Article 15 (2) of the European Convention on Human Rights, and Article 60 (5) of the Vienna Convention on the Law of Treaties, and was given particular prominence by the judgement, delivered on 18 January 1978 by the European Court of Human Rights in the case of *Ireland against the United Kingdom* (§163), recalling the fourfold character of the interdicts set out in Article 15, paragraph 2 of the European Convention on Human Rights, as follows:

— they suffer no restriction
— they suffer no derogation
— they are not subject to the condition of reciprocity, that is, to the condition that they be respected by the other party
— they may be validly quoted even in opposition to vital national interests.

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[30] "Whereas, even if international treaties are recognized to prevail over each country's national law, there is a rule that takes precedence of international treaties and is binding on all; and whereas that rule derives from the natural right of any nation to defend itself against all forms of aggression or oppression; and whereas that right is imprescriptible and inalienable, being one of the means of protecting personal freedom" (Judgement rendered by the Tribunal de Grande Instance (county court), Nîmes, 17 June 1985, in the case of M. P. vs. L.-L. Cahu. Similarly, "When other nations threaten us with chemical weapons we cannot confine ourselves to manufacturing gas masks. France is lagging behind, and *must not be bound by any restriction.*" F. Mitterrand, "Le Monde", 11 Feb. 1986.

[31] See the reply in the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC, 1987, pp. 615-617, Nos. 1923-1934.

In Belgium, a certain Instruction A.2 circulated in 1975 by the General Staff appeared to be unaware that no derogation from these rules was permissible; the instruction led to objections from law faculties and other quarters, resulting in protracted negotiations leading several years later to the withdrawal of the disputed text. It was only in March 1983 that the Minister of National Defence recognized that certain fundamental values had indeed to prevail even over vital national interests, and that he decided to redraft Instruction A.2 to make it "more in harmony with the principles of humanitarian law".[32]

It is interesting to note that the *Seminar on military penal law and the law of war* (Brussels, 1980-1981) invoked the all too frequent disregard of this principle by the competent authorities as a reason to propose the **explicit** addition, to Bill No. 577 dealing with the repression of grave breaches of the Geneva Conventions, of a provision reading: "No political, military or national advantage or necessity shall be held to justify, even as reprisals, the breaches mentioned in Articles 1, 3 and 4, without prejudice to the exceptions stated in paragraphs 9, 12 and 13 of Article 1".[33]

With the same end in view, in 1986 the *Government Commission on the revision of the penal code* recommended that a similar text be added to the future Belgian Penal Code.

6. The trial as catharsis

Where existing impediments and procedural obstacles appear unable to avert legal action, and public opinion, alerted by reports of excesses appearing in the mass media, clamours for "punishment

[32] See Andries, A., "Note sur l'illégalité de l'article 20, b du règlement de discipline militaire A.2", in *Licéité en droit positif et références légales aux valeurs*, op. cit., pp. 599-604; and Verhaegen, J., "L'illégalité manifeste et l'exception de la nation en péril", in *Journ. Trib.*, 1973, pp. 629-634, and "La répression des crimes de guerre en droit pénal belge", *op. cit.*, p. 1449.

[33] On Bill No. 577, see Verhaegen, J., "Le vote du projet de loi belge No. 577: un enjeu international", in *Journ. Trib.*, centenary issue, 1982, pp. 227 ff. This text, adapted to Additional Protocol I and approved by the Belgian Red Cross, was used as a recommendation by the Law Faculties of all the Belgian Universities (A. Andries, "Chronique de droit pénal militaire", in *Rev. Dr. Pén. Crim.*, Nov. 1983, pp. 906-907). Its importance was reiterated at the Brussels Symposium on humanitarian law, Nov. 1986.

of the guilty", the penal proceedings, though unavoidable, may still provide a number of loopholes.[34]

If the temptation prevails not to seek the origin of a war crime at too high a level, not to apply the cautery where it would be more pertinent, doubtless some justice will be done; but probably it will punish only one offender in a hundred, more often than not held solely responsible for appalling situations he would not have wished for—situations in which, as Bernanos says, "he probably did no more than adjust his nature".

A number of observers have protested that the punishment meted out to these scapegoats was at once inadequate, misleading and ridiculous. The present author has dealt with this question elsewhere.[35]

If in an attempt to restore equity the judge, making ample allowances for the crucial circumstances in which subordinate offenders were placed, refuses to make scapegoats of them and decides that the proceedings shall be quietly dropped, this will indeed seem nearer to justice, but will still leave grave doubts unanswered. Such action, which would play down the criminal and unjustifiable nature of the deed, and pass over in silence the guilt of those not directly involved in the crime but more truly culpable, could hardly be described as "likely to have any preventive effect on the genesis of war crimes".[36]

Conclusions

The obstacles still impeding or preventing action by our national courts in the preserves of national defence and foreign policy are due partly to shortcomings in our laws of procedure (for example as regards the judge's *saisine* (right to deal with the case).

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[34] See "Les impasses du droit international pénal" in *Rev. Dr. Pén. Crim.*, 1957, pp. 57 ff.; "Savoir où porter le fer — A propos de la condamnation de six para-commandos" in *Journ. Trib.*, 1973, pp. 137-141, and "L'ordre illégal et son exécutant devant les juridictions pénales", quoted in *Journ. Trib.*, 1986, p. 454.

[35] See, inter alia, the interesting analysis by J.-J. Servan-Schreiber quoted in "Le délit d'impudence et la guerre", in *Rev. Dr. Pén. Crim.*, Feb. 1960, p. 431. The term "trial as catharsis" is borrowed from P. Videl-Naquet, *La torture dans la République*, Paris, 1972.

[36] See *Les impasses du droit international pénal*, op. cit., p. 36; *La protection pénale contre les excès de pouvoir*, op. cit., Foreword, p. 7 and Conclusions, p. 458; and *L'ordre illégal et son exécutant*, op. cit., p. 453.

The principal shortcoming does not perhaps lie there. As Professor Stanislas Nahlik writes, "It is no longer the rules that are lacking, but the willingness to observe them".[37]

Objectivity compels the conclusion that the obstacles just described are, more than anything else, the product of a state of mind, a *mentality* as yet unaccustomed and unwilling to recognize the primacy of law in politics, and in any event ill-prepared to apply penal law to State affairs.

That was, however, the lesson that privileged observers such as Karl Jaspers or Pierre-Henri Teitgen believed mankind could have learned from the Nuremberg trials. There the choice was made "between the two major principles... that of the law at the mercy of States and that of the law above States... (the latter) a fundamental principle whose contribution to the development, progress and consolidation of international law is such as to justify the statement that this judgement will undoubtedly be a landmark in history".[38]

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[37] Nahlik, Stanilas, *International Review of the Red Cross*, Geneva, July/Aug. 1984, No. 241, p. 225.

[38] *Rev. dr. intern. sc. dipl. et pol.*, Oct. 1946, pp. 165 ff.