

CONFLATING CONSCIENCE AND LEGALITY IN INTERNATIONAL LAW: IMPLICATIONS FOR THE FUTURE

‘Law could never accurately embrace what is best and most just for all at the same time, and so prescribe what is best. For the dissimilarities between human beings and their actions, and the fact that practically nothing in human affairs ever remains stable, prevent any sort of expertise whatsoever from making any simple decision in any sphere that covers all cases and will last for all time.’¹

I INTRODUCTION

Informed by Locke and Rawls, Richard Adams has cogently argued in this volume that space should be left in the application of domestic legislation for the exercise of conscience at the highest levels of military leadership.² The idea of conscience in international law is at once more specific in its acknowledgement and less welcome in its application. It is explicit in the Martens clause, and has been sought in international criminal prosecutions both as a potential defence and as a mitigating response. Yet, in practice, international judicial consideration and public discourse of such conscience has drifted distinctly toward positivism. This article seeks to identify that drift and offer reason to be vigilant against it, lest international law comes to be inhospitable to urgently important ideas of right and justice in individual decisions.

This article begins with the classic position of the Martens clause, with its reference to the ‘dictates of public conscience,’ as the first format in which conscience is represented in international law. With it is the shock to the global conscience which defines crimes against humanity as they emerged in the years following the Second World War. Together these form the public or communal conscience in international law. Identifying the content of this shared conscience, however, appears to have been slowly reduced in practice to compliance with law, effectively substituting a positivist approach to law as authority for visible consideration of right. In a circular

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¹ Plato, *Statesman*, tr CJ Rowe (Hackett Publishing, 1997) 249b.

² Richard Adams, ‘Conscience and Coercion: Justice and the Defence Act’ (2019) 40(2) *Adelaide Law Review* 427.

development, this appears now to be reflected in the public discourse originally thought to give rise to Martens' 'public conscience'.

The article then compares the communitarian idea of a collective, shared or public conscience with the treatment of individual conscience in international criminal law. The immanent tension between the individual and the collective moral sense was made obvious in the so-called '*Nazi Judges*'³ and '*High Command*'⁴ cases before the United States Military Tribunal in Nuremberg in 1948.⁵ In these cases, international law (and the judges administering it) wrestled with the culpable collapse of individual conscience and grievous wrong in war. An almost hybrid form of conscience emerged from the analysis, on the basis that special moral and legal duties obtain from professional vocations against which the exercise of individual conscience is to be measured. Even so, the Tribunal ultimately held on the evidence before it that these obligations did not offer a sufficient defence to international crimes of the most repugnant type. The cases contrast with the explicit acceptance of a moral defence in Israel's *Nazi and Nazi Collaborators (Punishment) Law*⁶ and the trial of Jews accused of collaboration in the Nazi genocide — a moral position distinct from the perpetrator who would not have otherwise become a victim of the crime in which they participated.

The difficulty with the reduction of 'public conscience' to a positivist approach to legal compliance, first in law and then in practice — which affects in turn the continuing development of law — is its conceptual incompatibility with the retention of some form of 'individual conscience' in international criminal law. The reduction not only risks the limited defence of conscience at least notionally available to those accused of international crimes, and with it the more often accepted mitigation of punishment, but it also deprives the international community of the legal scope to demand individual consideration of right and justice in the exercise of the lawful power to take lives in armed conflict.

³ *United States v Altstötter et al (Judgement)* (United States Military Tribunal, 3 TWC 1, 4 December 1947) ('*Nazi Judges*').

⁴ *United States v von Leeb et al (Judgement)* (United States Military Tribunal, 12 TWC 1, 27 October 1948) ('*High Command*').

⁵ Constituted under 'Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity' (1948) 3 Official Gazette for the Control Council for Germany 5 ('Control Council Law 10'). The two cases were part of a series of 12 conducted by the US Military Tribunal, addressing thematic groupings of defendants: in the *Nazi Judges* case (Case No. 3), Nazi judges and justice officials, and in the *High Command* case (Case No. 12), senior officers of the German High Command.

⁶ *Nazi and Nazi Collaborators (Punishment) Law 1950* (Israel), Sefer Ha-Chukkim No. 57 of 5710 [tr Ministry of Foreign Affairs, 'Nazi and Nazi Collaborators (Punishment) Law 5710-1950'], *Ministry of Foreign Affairs* (Web Page, 2013) <<https://mfa.gov.il/mfa/mfa-archive/1950-1959/pages/nazis%20and%20nazi%20collaborators%20punishment-%20law-%20571.aspx>>.

II 'PUBLIC CONSCIENCE' AND THE MARTENS CLAUSE

The Martens clause was first suggested by Russian delegate Professor Martens as a compromise measure on a disputed rule regarding civilians taking up arms against an occupant in the 1899 Hague *Convention (II) with Respect to the Laws and Customs of War on Land*.⁷ It was expressed in the preamble as:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire 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.

For the purposes of this article, the key terms are the 'requirements of the public conscience,' although it is also useful to observe as background the moral imperative underpinning the clause evident in the parties' thinking it 'right' to include it.

A similar recitation to Martens' original clause was included in the preamble to the 1907 Hague *Convention (IV) Respecting the Laws and Custom of War on Land*,⁸ adjusted to the now more familiar phrase 'dictates of public conscience.'⁹ It also appeared in the 1949 *Geneva Conventions*¹⁰ and in 1977's *Additional Protocol I*,¹¹ although those drafters relocated references to the principles of humanity and the dictates of public conscience to the denunciation clauses.¹² It has been suggested that the purpose of this change was to ensure that the Martens clause preserved the

⁷ Opened for signature 29 July 1899 (entered into force 4 September 1900) ('1899 Hague Convention (II)').

⁸ Opened for signature 18 October 1907 (entered into force 29 January 1910).

⁹ Ibid Preamble.

¹⁰ *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31 ('Geneva Convention (I)'); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked of Armed Forces at Sea*, 75 UNTS 85 ('Geneva Convention (II)'); *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 75 UNTS 135 ('Geneva Convention (III)'); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 ('Geneva Convention (IV)'), all opened for signature 12 August 1949 (and entered into effect 21 October 1950).

¹¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

¹² *Geneva Convention (I)*, art 63; *Geneva Convention (II)*, art 62; *Geneva Convention (III)*, art 142; *Geneva Convention (IV)*, art 158; *Additional Protocol I*, art 1(2); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) Preamble; *Convention on Prohibitions or Restrictions on the Use of Certain*

application of customary minimum standards to any state withdrawing from the treaties.¹³ Notwithstanding this repetition, the meaning and legal effect of the Martens clause is debated. It has been variously argued to be a ‘reminder’ of the continued application of custom despite the conclusion of the treaties, an assurance that an inhumane act not explicitly prohibited by the treaty is not therefore permitted, and a substantive rule by which conduct in armed conflict is to be measured.¹⁴

The International Court of Justice (‘ICJ’) has considered the clause representative of customary law, without giving a determinative view on the interpretation of ‘public conscience.’ Rather, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ simply observed that the clause as a whole was ‘an effective means of addressing the rapid evolution of military technology.’¹⁵ Its reasoning focussed primarily on the application of the ‘established principles of humanity,’ including that of distinction and the prohibition of unnecessary suffering, rather than the separate content of ‘public conscience.’¹⁶

Among the dissenters, Judges Shahabuddeen and Weeramantry gave greater weight to conscience. Judge Weeramantry considered that the dictates of public conscience were necessarily affected by the ‘universal acceptance’ of human rights.¹⁷ Judge Shahabuddeen considered Martens’ public conscience an independent source of normative value, along with the principles of humanity and customary law.¹⁸ Its content was ‘to be ascertained in light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community.’¹⁹ Nauru had contended in its submissions in the matter that the public conscience in this sense was to be determined by legal communications and ‘[g]eneral principles of law recognised by civilised nations,’ including as evidenced

Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, opened for signature 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983) Preamble.

¹³ Georges Abi-Saab, ‘The Specificities of Humanitarian Law’ in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Springer, 1984) 265, 274.

¹⁴ See Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky’ (2000) 11(1) *European Journal of International Law* 187, 189–92.

¹⁵ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [78], [84] (‘*Nuclear Weapons*’).

¹⁶ See Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94(1) *American Journal of International Law* 78, 87.

¹⁷ *Nuclear Weapons* (n 15) 490.

¹⁸ *Ibid* 405–6.

¹⁹ *Ibid* 406. Australia also advocated for this view in its oral submissions in the matter, arguing that public conscience was not ‘static.’ ‘Oral Statement of the Government of Australia’, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Pleadings 36, 39 [10] (Gareth Evans).

in General Assembly resolutions.²⁰ With this Judge Shahabudeen appeared to agree only to an extent; setting aside the status of such resolutions as law, he thought they should be given ‘weight ... on the point of fact as to the state of “human conscience and reason” ... more particularly in view of the fact that that finding accords with the general tendency’ of the legal evidence in the matter.²¹ Overall, Judge Shahabuddeen considered conscience to favour prohibition.²²

The lack of definition of the ‘public conscience’ by the majority in the *Nuclear Weapons Advisory Opinion* has led to continued judicial debate as to its place in law. Cassese found jurisprudence applying three interpretative approaches to the clause as a whole: first, to confirm interpretation of extant rules of international law, as suggested in parts of the *Nuclear Weapons* opinion; second, to suggest a new interpretation of existing rules with reference to human rights as the measure; and third, in a single Colombian case, to exclude contrary interpretations of extant rules.²³ None of the three clearly incorporates the independent normative value which Judge Shahabuddeen attributed to public conscience, a view specifically rejected by the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) in its *Kupreskic* decision.²⁴ There, the ICTY used the Martens clause to support interpreting ‘as narrowly as possible the discretionary power to attack belligerents and, by the same token, ... to expand the protection accorded to civilians.’²⁵ Both the ‘principles of humanity’ and ‘dictates of public conscience’ were to apply to interpretation ‘any time a rule of international humanitarian law [was] not sufficiently rigorous or precise,’ but the ICTY concluded that they were not ‘independent sources’ of law.²⁶ What the ICTY did allow was a role for ‘public conscience’ in the formation of customary law in this interpretative sense, giving *opinio iuris sive necessitates* as informed by the Martens clause decisive weight in circumstances ‘where State practice is scant or inconsistent.’²⁷ However, this too relies on the ‘public conscience’ reflecting a view as to legality, rather than an independent sense of right or justice. Thus, in applying the Martens clause, there is a distinct positivist tendency across different approaches to relate the purpose of conscience in the Martens clause to the interpretation of legal standards.

There is a second significant difficulty inherent in these varying interpretative approaches. That is, identifying through evidence the *content* of the public conscience. With respect to the similar formulation of ‘elementary considerations

²⁰ ‘Republic of Nauru: Response to Submissions of Other States,’ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Pleadings 1, 13.

²¹ *Nuclear Weapons* (n 15) 410.

²² *Ibid.*

²³ Cassese (n 14) 202.

²⁴ *Prosecutor v Kupreskic (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [525] (‘*Kupreskic*’).

²⁵ *Ibid* [525].

²⁶ *Ibid.* On the role of the public conscience with respect to the formation of customary law, and particularly *opinio iuris*, see also Meron (n 16) 83.

²⁷ *Kupreskic* (n 24) [527].

of humanity' in ICJ jurisprudence, Cassese has asked 'how does one establish their scope and purport or, in other words, by what yardstick can one determine whether or not certain obligations are imposed by them?'²⁸ Given the similarity of terms, comparison should be available with the treatment of the 'collective conscience' of the global community as the measure of gravity of both genocide and crimes against humanity in international criminal law.²⁹ Yet this term too has not been clearly defined except for a general sense of abhorrence of grievous wrong. Other than in an interpretative sense, Cassese concluded that the ambiguity of the Martens clause makes it incapable of legal meaning, other than by reference to extant law, and therefore one of the 'contemporary legal myths of the international community.'³⁰ Greenwood similarly suggested that the concept of the 'public conscience' is simply too vague for use as an independent rule of law.³¹ This may be the practical driver of the reductionist approach in individual cases where the Martens clause has been raised.

Others have taken a more optimistic view. Ticehurst argued that the term 'public conscience' appeals to natural rather than positive law, presuming 'the prevalence of right and justice,' with particular reference to the reasoning employed at Nuremberg.³² He thought that this global 'moral code' allowed states other than major military powers to influence the development of the laws of armed conflict. In essence, the clause is a link between positive and natural law and an 'objective means' of determining the content of the latter — although Ticehurst conceded that the ICJ had not gone so far in its consideration.³³ Meron, also more optimistic than Cassese, saw in the clause a perspective for 'public opinion that shapes the conduct of the parties to a conflict and promotes the development' of law, conceding that 'popular opinion, the *vox populi*, may be different from the opinion of governments,' but may shape the latter in developing customary law through *opinio juris*.³⁴ Meron did question whether the dubious but 'common assumption ... that public opinion is a force for good and that it invariably serves humanitarian causes' meant that public opinion

²⁸ Cassese (n 14) 213. This phrase was first employed by the ICJ to derive legal principles applicable in peacetime: *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22.

²⁹ See, eg, *Prosecutor v Kambanda (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-97-23-S, 4 September 1998) [61-62]; *Prosecutor v Ruggiu (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-97-32-I, 1 June 2000) [48]; *Prosecutor v Ndindabahizi (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-2001-71-I, 15 July 2004) [499].

³⁰ Cassese (n 14) 187.

³¹ Christopher Greenwood, 'Historical Development and Legal Basis' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, 1995) 28.

³² Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 37(317) *International Review of the Red Cross* 125, 132.

³³ *Ibid* 133.

³⁴ Meron (n 16) 83.

and the public conscience were necessarily the same.³⁵ More importantly, while the Martens clause has ‘made itself felt by governments, international conferences and the media,’ he was ‘far less confident’ that it ‘has had any influence on the battlefield, especially in bloody internal conflicts.’³⁶

Meron’s doubt appears to be reflected in Australian governmental discourse on its participation in armed conflict, to the extent that the latter appears to offer no room for Martens-style conscience beyond the framework of existing international law, and certainly not for Ticehurst’s natural law. The discourse is a good example of the positivist conflation of the evidence for law and conscience, which tends to eliminate any room for the formulation of conscience on other terms.

A Appeal to Law Rather than ‘Right’ in Public Operational Narratives

In light of the public quality of conscience required by the Martens clause, it is significant that Australian discourse markedly prefers the language of legality to that of right or conscience. Official commentary on the expansion of Iraq air operations into Syria in 2015 is a case in point. The criticality of Iraqi (legal) consent and the principle of collective self-defence meant expanded air strikes would, according to then-Prime Minister Abbott, target only the Islamic State organisation and ‘not the Assad regime, evil though it is.’³⁷ While Abbott did make associated moral claims about the destruction of the ‘death cult,’ they existed only within the legal framework he had identified.³⁸ The Opposition supported ‘this proportional action within international law.’³⁹ At the tactical level, in acknowledging credible reports of civilian casualties involving Australian aircraft, the Government typically emphasised the Defence Force’s compliance with ‘strict rules of engagement designed to protect our forces, minimise the risk of injury to civilians and strictly comply with Australia’s obligations under domestic and international law’ and asserted that it ‘always complies’ with international law.⁴⁰

³⁵ Ibid 85.

³⁶ Ibid 88.

³⁷ Tony Abbott, ‘The Syrian and Iraqi Humanitarian Crisis; Australia to Extend Air Operations against Daesh into Syria’ (Press Release, 9 September 2015) 2 <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/4064518/upload_binary/4064518.pdf;fileType=application%2Fpdf#search=%22media/pressrel/4064518%22>.

³⁸ David Wroe and Lisa Cox, ‘Tony Abbott Commits Australian Forces to Iraq’, *Sydney Morning Herald* (online, 3 October 2014). See also Air Task Group (ATG), *Department of Defence* (Web Page) <<http://defence.gov.au/Operations/Okra/ATG.asp>>.

³⁹ Anna Henderson and Eliza Borrello, ‘Australia Confirms Air Strikes in Syria, Announces Additional 12,000 Refugee Places’, *ABC News* (online, 9 September 2015) <<http://www.abc.net.au/news/2015-09-09/australia-to-accept-additional-12,000-syrian-refugees/6760386>>.

⁴⁰ Department of Defence, ‘Operation OKRA — Credible Civilian Casualty Report’ (Media Release, 29 March 2018); Department of Defence, ‘Operation OKRA — Credible Civilian Casualty Report’ (Media Release, 30 September 2017).

It may be that this point of view is based on a presumption of the completeness of the body of international law as it applies to targeting. That would be an important step reflecting on the continued relevance of the Martens clause, which was originally proposed as an interim compromise ‘until a more complete code of the laws of war is issued.’⁴¹ Russia took this very position in its submissions in the *Nuclear Weapons* matter.⁴² However, the Australian press description appears founded on a different nuance; it appears to argue that it is a sufficient answer to moral critique if the actions of Australian forces complied with the rules of engagement, which are representative of international law. The press statements do not suggest, for example, that the rules of engagement include moral or conscientious proscriptions which draw on sources other than positivist rules.

The framing of this discourse — which fits the sources Meron would link with Martens’ ‘public conscience’ — suggests clearly that, questions of the evidentiary proof of individual allegations aside, Australian involvement in incidents could not have been wrongful because it complied with law (that is, the argument is based on the reasoning that since what is lawful equals what is legitimate, therefore what is unlawful must equal that which is wrong). The contrasting critique contends that Australian and other countries’ activities could not have been right, because they were unlawful. Both perspectives play to David Kennedy’s criticism of the gap between the content of law and of human conscience, in which ‘the new law of force has captured war in a legal vocabulary.’⁴³ Gerry Simpson too is critical of the subsuming of the originally moral ideas of crimes against humanity, genocide and human rights violations into legal technical terms ‘to be debated and reinvented.’⁴⁴ This may be the case in fact but is it not inevitably so; in comparison, the North Atlantic Treaty Organisation’s (‘NATO’) 1999 air campaign in Kosovo was described as

illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population.⁴⁵

Interestingly, the equation of positivist legality with morality appears not only in government discourse, but in criticism by humanitarian and other organisations, who might be expected to appeal to right, justice or humanity in conjunction with, if not independently of, law. They also show a tendency to frame their critique using the

⁴¹ 1899 Hague *Convention (II)* (n 7) Preamble.

⁴² ‘Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Threat or Use of Nuclear Weapons’, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1995] ICJ Pleadings 1, 13.

⁴³ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004) 262–3.

⁴⁴ Gerry Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (Polity Press, 2007) 84.

⁴⁵ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000) 4.

specific language of humanitarian law.⁴⁶ There is evidence of a similar approach by NATO, and its critics, during its air campaign in Libya in 2011.⁴⁷

These developments would seem to reflect Cassese's conclusion that the significant achievement of the Martens clause was actually to approach the laws of humanity in positivist and not just moral terms by converting it to a treaty clause.⁴⁸ However, in doing so, it has also reduced the independent value of the clause's 'rhetorical and ethical code words,'⁴⁹ and undermined their plain meaning. It is to be compared with the treatment of individual conscience as a defence in international criminal law, which has remained fairly stable in its application since 1945, but is equally problematic in its approaches.

III INDIVIDUAL CONSCIENCE IN INTERNATIONAL CRIMINAL LAW

Given that the essence of the crime against humanity is its shock to the conscience of humankind, the place for individual conscience as a defence is curious. This section canvasses the argument, made before international criminal tribunals, that a moral decision not to resign one's responsible position, or to continue to contribute to an act so as to avoid worse consequences should another be appointed in one's stead, should negate the consciousness of international guilt. The response of the tribunals has been mixed, leaving open the possibility that such a defence exists, but generally evidencing a preference for considering the argument in mitigation following a finding of guilt.

This approach to individual conscience as a negation of guilt is distinct from the treatment of individual conscience, as an expression of remorse or repugnance for acknowledged criminal acts, in mitigation during sentencing. As examples of this

⁴⁶ See, eg, 'Iraq: Civilian Casualties Mount in West Mosul: Coalition, Iraqi Forces Taking Inadequate Precautions', *Human Rights Watch* (Web Page, 6 June 2017) <<https://www.hrw.org/news/2017/06/06/iraq-civilian-casualties-mount-west-mosul>>; 'Australia: Protect Civilians in Iraq and Syria: Government Needs to Improve Transparency of Operations, Investigations', *Human Rights Watch* (Web Page, 22 May 2017) <<https://www.hrw.org/news/2017/05/22/australia-protect-civilians-iraq-and-syria>>; 'Methodology', *Airwars* (Web Page) <<https://airwars.org/methodology/>>; Amnesty International, 'At Any Cost: The Civilian Catastrophe in West Mosul, Iraq' (Report, 2017) <<https://www.amnesty.org/download/Documents/MDE1466102017ENGLISH.PDF>>.

⁴⁷ See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 13 October 2011, vol 533, col 495 (William Hague); 'NATO Urged to Investigate Civilian Deaths During Libya Air Strikes', *Amnesty International* (Web Page, 10 August 2011) <<https://www.amnesty.org/en/latest/news/2011/08/nato-urged-investigate-civilian-deaths-during-libya-air-strikes/>>; 'Libya: NATO Says Sorman Compound Legitimate Target', *BBC News* (News Article, 20 June 2011) <<https://www.bbc.com/news/world-africa-13850856>>.

⁴⁸ Cassese (n 14) 188.

⁴⁹ Meron (n 16) 89.

usage, the ICTY accounted for one defendant's 'remorse,' including his wish to 'testify because of his conscience' at the proceedings,⁵⁰ and another's 'propulsion of his own conscience' towards rehabilitation for his crimes.⁵¹ There is also some indications of 'conscience,' in the sense of character and personal qualities, being used as evidence to assess the credibility of allegations against an individual. Jean Mpambara, for example, was acquitted by the International Criminal Tribunal for Rwanda ('ICTR'), after it received evidence that he 'wanted to flee but his conscience and his sense of responsibility obliged him to hold out ... He felt like fleeing in order not to be involved but, on the other hand, he felt obliged to stay — in order to live up to his responsibilities'.⁵² In other contexts, morally-laden terms are used in non-conscientious contexts; for example, criteria such as 'should have known,' in the context of superior responsibility, are used synonymously with 'had reason to know' from a factual perspective.⁵³

A Individual Conscience as a Perpetrator's Defence

Two key cases in which individual conscience was advanced as a defence were tried by the US Military Tribunal at Nuremberg, which appeared to leave the defence open as a matter of law although not generally persuaded of it on the evidence in individual matters. It did, however, suggest that the measure of individual conscience, or the values to which an individual ought to be held in good conscience, may be qualitatively different depending on the values ascribed to their profession as a judge or a senior military commander.

1 The Nazi Judges Case and Judicial 'Consciousness of Injustice'

The 16 indicted defendants in the *Nazi Judges* case included five judges, four prosecutors and eight officials from the Reich Ministry of Justice, including the erstwhile acting Minister of Justice (one defendant, Karl Engert, was both a judge and a Ministry official). They were charged with war crimes and crimes against humanity during the war in Europe, conspiracy to commit such crimes between 1933 and 1945, and membership of certain organisations declared criminal by the International Military Tribunal, contrary to Control Council Law 10. Although all pleaded not guilty, 10 of the defendants were convicted of one or more charges and sentenced

⁵⁰ *Prosecutor v Erdemovic (Sentencing Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-96-22-T, 29 November 1996) [96].

⁵¹ *Prosecutor v Obrenovic (Sentencing Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No. IT-02/60/2-S, 10 December 2003) [144].

⁵² *Prosecutor v Mpambara (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-01-65-T, 11 September 1996) [161]–[162].

⁵³ See, eg, *Prosecutor v Nindiliyimana (Military II Case) (Judgement and Sentence)* (ICTR, Trial Chamber II, Case No. ICTR-00-56-T, 17 May 2011) [1218]–[1219], with respect to General Bizimungu.

to terms of imprisonment, and four were acquitted.⁵⁴ Charges against two were discontinued — Carl Westphal died before the trial commenced, and Engert's illness meant he attended only two days of hearing.⁵⁵ Other key defendants were missing from the trial, including those with potentially the greatest responsibility: Roland Freisler, the 'hanging judge' of the extraordinary People's Court, was killed in an air raid in 1945; the President of the *Reichsgericht* and both Nazi Ministers of Justice were also dead.⁵⁶

It was a trial less of the defendants individually than one in which 'the judicial system of the Third Reich as a whole' was indicted.⁵⁷ That is, the Tribunal looked to both Nazi legislation and to the 'law in action,' in terms of Hitler's direct influence on the judiciary, including through the distribution of secret 'guidance' to judges by the Ministry of Justice,⁵⁸ as the substance of the international crime:

The charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts.⁵⁹

The key features of the criminal Nazi system were the erosion of predictability through use of a rule of analogy which discounted pre-1935 judicial interpretations, institutionalisation of double jeopardy through the filing of so-called 'nullity pleas,'⁶⁰ receipt of torture-tainted evidence, and abuses of process contrary to international law. These procedural features were in addition to unlawful substantive statutes, which purported to authorise torture, disappearances or discriminatory measures; the establishment of a range of special or extraordinary courts; and judicial oversight of murder, illegal imprisonment, brutalities, atrocities, transportation of civilians, and other inhumane acts.⁶¹

⁵⁴ *Nazi Judges* (n 3) 954–5 (for a summary of the charges and pleas), 1081 (for individual determinations).

⁵⁵ *Ibid* 954.

⁵⁶ See Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, tr Deborah Schneider (Harvard University Press, 1991) 270.

⁵⁷ *Nazi Judges* (n 3) 984; see also Klaus Kastner, "'Der Dolch des Mörders war unter der Robe des Juristen verborgen' – Der Nürnberger Juristen-Prozess des Jahres 1947" (2018) 54(1) *Recht und Politik* 53, 57.

⁵⁸ *Nazi Judges* (n 3) 992, 1009–10, 1017. With respect to the Ministry's guidance documents, the Tribunal considered their secrecy determinative in finding that they were not issued in good faith: *Nazi Judges* (n 3) 1018.

⁵⁹ *Ibid* 985.

⁶⁰ See Matthew Lippman, 'The Prosecution of Josef Altstoetter et al' (1998) 16(2) *Dickinson Journal of International Law* 343, 382.

⁶¹ The unlawful characteristics of the Nazi judicial system are described at length in the judgment: *Nazi Judges* (n 3) 1010–80.

To the extent that matters of conscience were argued before the Tribunal, they were put in two ways. The first involved both legal and values-based arguments, contending that judicial action even in the Nazi system was based on the principle of *Gesetz ist Gesetz* ('law is law') in which the judge had no ethical discretion not to apply the law as written. That is, the decision to administer Nazi law, notwithstanding its content, could be consistent with the proper exercise of judicial values and conscience, particularly in the German civil law tradition. The second drew on the moral relativity of the actions taken by judges, compared to their inaction or the possible abdication of action by resignation, as evidence of their individual 'consciousness' of guilt.

The Tribunal conceded that, as a matter of domestic law, judges were required to comply with the law as written even when it was contrary to international law. However, as both the Tribunal's jurisdiction and the charges themselves drew from international law, it could not be an effective defence.⁶² Similarly, the administration of a domestic legal system could not be effectively placed beyond the reach of individual criminal liability by characterising it as an act of state.⁶³ Thus, for defendant Ernst Lautz, the Tribunal considered his determination that he was obliged to comply with German law and his 'resistance' to Nazi influence except as he believed to be required by that law as matters in mitigation of punishment but not relevant to the question of international guilt.⁶⁴

For others, the Tribunal's real concern was the quality of the supporting evidence, rather than the argument itself. Günther Joel, for example, was a senior advisor in the Ministry of Justice and liaison officer with the SS (*Schutzstaffel*). He also submitted that he 'felt obligated by the existing laws and so complied with them.'⁶⁵ He was convicted because he had, in this role, 'obtained extensive information and exercised far reaching power in the execution of the law against Jews and Poles,' therefore taking an active part in the plan for their persecution.⁶⁶ Interestingly from this perspective, the Chief of the Legal Division in the German High Command testified that certain extraordinary powers given to the Gestapo and the judiciary with respect to the disappearance of civilians in occupied territories followed in part from Hitler's frustration that 'the administration of justice by the armed forces ... did not sufficiently support his manner of conducting the war' to these ends.⁶⁷

⁶² Ibid 983, 1010. See also 972–3 on the exclusion in Control Council Law 10 of compliance with national law as a defence to violations of international law.

⁶³ Ibid 1061, adopting verbatim the ruling of the International Military Tribunal that crimes 'against international law are committed by men, not by abstract entities:' *Trial of the Major War Criminals* (International Military Tribunal, *Official Documents*, vol 1, 1947), 222–3. See also *Nazi Judges* (n 3) 983, on governmental involvement as an element of the crime against humanity.

⁶⁴ Ibid 1127.

⁶⁵ Ibid 1140.

⁶⁶ Ibid 1141.

⁶⁷ Ibid 1037–8, citing testimony of Rudolf Lehmann, who was also a defendant in the *High Command* case.

This legal technical analysis neatly avoided discussion of judges' moral responsibility to judicial institutions in terms of criminal guilt. It was reinforced by the Tribunal's finding that, as Nazi judges lacked independence and were not administering 'impartial justice,' there was 'no merit in the suggestion' that they were 'entitled to the benefit of the Anglo-American doctrine of judicial immunity.'⁶⁸ Subsequent German courts took a different approach, but with the same result, ascribing primary blame to Nazi leaders and convicting judges and Ministry officials as accessories to the crimes of these 'indirect perpetrators.'⁶⁹ In some cases, defendant jurists were acquitted for lack of evidence that they had ever 'doubted the validity' of Nazi regulations.⁷⁰ In the *Rehse Case*, for example, the Bundesgerichtshof held that the Nazi judge was 'independent under the then-valid law ... subject only to law and responsible to his conscience. His duty demanded that he follow only his own conviction *of the law*.'⁷¹

The second way in which the *Nazi Judges* Tribunal dealt with individual conscience related to the cognitive element of crimes against humanity when committed by judges. The Tribunal sought evidence that

the accused knew or *should have known* that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind and that he knew or *should have known* that he would be subject to punishment if caught.⁷²

In the Tribunal's view, it was not contrary to the principle against retroactivity of criminal law to impose liability for crimes against humanity in this sense because 'notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the states at war with Germany.'⁷³

The Tribunal drew heavily on constructive knowledge based on an individual's judicial appointment in ascertaining what they 'should have known' in this sense, including what they ought to have known to be contrary to international law despite their view that they were bound to apply domestic law. This included the place of the Martens clause in reinforcing legal proscriptions. Lautz, for example, as 'a lawyer of ability ... must have known that the proposed procedure was in violation of international law,' but 'if German law were a defense, which it is not, many of his acts would

⁶⁸ Ibid 1023–4.

⁶⁹ See, eg, the discussion in Müller (n 56) 250–1 of the Augsburg Landgericht trial of Judges Walter Huppenkothen and Otto Thorbeck (15 October 1955). The judges had sentenced the leaders of the 20 July 1944 plot to assassinate Adolf Hitler.

⁷⁰ Ibid 222. The Karlsruhe Appeal Court concluded in 1964 that Public Prosecutor Fränkel could not be prosecuted in these circumstances.

⁷¹ *Verantwortlichkeit des berufsrichterlichen Beisitzers des Volksgerichts* (Bundesgerichtshof Urt v. 30.4.1968 — 5 StR 670-67), reported in (1968) 21 *Neue Juristische Wochenschrift* 1339–40 (emphasis added).

⁷² *Nazi Judges* (n 3) 976–7 (emphasis added).

⁷³ Ibid 976–7.

be excusable.⁷⁴ A similar approach was applied generations later by the Iraqi High Tribunal, in determining that Awwad Hamad al-Bandar as-Saadoun, who conducted a 1984 trial against the Dujail villagers said to have attempted to assassinate Saddam Hussein, as a judge and law graduate ‘had qualifications that others among the common people who contribute in the perpetration of a crime may not have.’⁷⁵

Of all the defendants, the question of conscience was considered at greatest length by the Tribunal in the case of Franz Schlegelberger, a judge of long standing and acting Minister of Justice, who was released from office on his own request in 1942. He submitted to the Tribunal that he had attempted to ameliorate the worst impacts of Nazi laws and therefore was not guilty of participation in its excesses. The Tribunal accepted as ‘true’ the premise of the defence, that the administration of German justice was ‘under persistent assault’ by the functionaries of the Nazi police state, and if they were to take control ‘the last state of the nation would be worse than the first.’⁷⁶ In Schlegelberger’s case, he argued that ‘if he were to resign, a worse man would take his place,’ a standpoint in which the Tribunal also found ‘much truth’ based on the course of events when Otto Thierack replaced Schlegelberger in 1942.⁷⁷

The Tribunal described Schlegelberger’s moral defence as ‘plausible,’ but ultimately rejected it as inconsistent with ‘truth, logic, or the circumstances.’⁷⁸ For example, they found that in 1936 Schlegelberger had supported the policy of sentencing people in accordance with ‘the sound instincts of the people’ even where there was no relevant codified law;⁷⁹ he had supported anti-Jewish measures, even if not as brutally as others;⁸⁰ and had himself signed the so-called Night and Fog decree as Acting Minister of Justice, initiating the ‘systematic rule of violence, brutality, outrage, and terror against the civilian population’ of Nazi-occupied territories.⁸¹ The Tribunal

⁷⁴ Ibid 1076, 1128. See also the dismissal of defence submissions for Curt Rothenberger: 1109.

⁷⁵ *Prosecutor v Saddam Hussein Al Majeed et al (Dujail Trial)* [Iraqi High Tribunal], Case No. 1/E First/2005, 5 November 2006, [International Crimes Database trans] <http://www.asser.nl/upload/documents/3272012_3403305-11-2006%20-%C2%A0Iraqi%20High%20Tribunal%20Judgement%C2%A0Saddam%20Husseini.pdf> 63.

⁷⁶ *Nazi Judges* (n 3) 1086.

⁷⁷ Ibid 1085–6.

⁷⁸ Ibid 1085.

⁷⁹ Ibid 1021, with reference to NG-538, Prosecution Exhibit 21.

⁸⁰ Ibid 1081.

⁸¹ Ibid 1037. This decree had originally been signed by Keitel in the German High Command on 7 December 1941, and was reissued under Schlegelberger’s signature on 7 February 1942 to transfer ‘Night and Fog’ operations to the Ministry of Justice. Under the decree, ‘civilians of occupied countries accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts of the Ministry of Justice within the Reich; ... the victim’s whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victim’s relatives and associates and barring recourse to evidence, witnesses, or counsel for defense’: at 1030.

also rejected the argument that the conduct of the defendants generally was a lesser wrong than the crimes of the Gestapo and Nazi police, calling it a ‘poor excuse,’ as the ‘prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.’⁸² Thus, the measure of judicial conscience by which the tribunal rejected the defence argument appeared to have been used in fact to reinforce the consciousness of guilt in criminal findings; that is, rather than a defence, it was almost an aggravating aspect of the crime that the acts were committed under colour of judicial authority.

For Schlegelberger, the Tribunal considered his resignation ‘too late’ — ‘We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security.’⁸³ They gave weight to his receipt, on release from office, of a large monetary gift from Hitler (von Leeb, as below, would receive a similar gift),⁸⁴ indicating that his resignation did not register as a conscientious protest with the Nazi regime. Schlegelberger was convicted of war crimes and crimes against humanity and sentenced to life imprisonment, although he served only three years before release and was, for a time, awarded a full pension.⁸⁵

Where in Schlegelberger’s case the Tribunal appeared open to accepting a defence of individual conscience that would affect the shock to global conscience underpinning a charge of crimes against humanity, their approach to Hermann Cuhorst appeared considerably more closed. In acquitting him for lack of evidence, after records of cases he had tried were lost during the war, the Tribunal commented that

certain things can be said in his favor. He was severely criticized for his leniency ... He was tried by a Party court for statements considered to reflect upon the Party, which he made in a trial involving Party officials. Subsequently he was relieved as a judge in Stuttgart because he apparently did not conform to what the State and Party demanded of a judge. *This Tribunal does not consider itself commissioned to try the conscience of a man or to condemn a man merely for a course of conduct foreign to its own conception of the law.*⁸⁶

That is, for Cuhorst, individual conscience did not appear relevant at all, perhaps influenced by the separate and unrelated lack of surviving evidence of his criminal wrongdoing.

These approaches to the problem of reconciling moral collapse, the defence of conscience, and criminal guilt in the Nazi era can be compared with suggestions

⁸² Ibid 1085.

⁸³ Ibid 1085–6.

⁸⁴ Ibid 1082.

⁸⁵ See Eli Nathans, ‘Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice’ (2000) 18(2) *Law and History Review* 281, 300–1.

⁸⁶ *Nazi Judges* (n 3) 1157 (emphasis added).

in the judgment that the Tribunal members allowed some room for conscience and morality in ascertaining their own jurisdiction. The Tribunal remarked that it ‘would have been possible’ to treat Control Council Law 10 ‘as a binding rule regardless of the righteousness of its provisions, but its justification must ultimately depend upon accepted principles of justice and morality’ — in determining punishment for international crimes, the Tribunal felt it should consider ‘the moral principles which underlie the exercise of power.’⁸⁷ Later, however, the Tribunal insisted it was ‘keenly aware of the danger of incorporating in the judgment as law its own moral convictions or even those of the Anglo-American legal world,’ despite their ‘abhorrence’ of certain Nazi laws, refocussing itself on the legal elements of war crimes and crimes against humanity.⁸⁸ To that end, the Tribunal did not hold the passage and enforcement of certain legislation, such as restrictions on freedom of speech ‘in the presence of impending disaster,’ as inherently a crime against humanity, although its discriminatory application was so.⁸⁹

The *Nazi Judges* case is important given its treatment of individual conscience, especially relative to public conscience, but it is equivocal in significant respects. The Tribunal appeared to have left open the possibility of a defence based on individual conscience, as a cause for action as well as inaction, and set the expected standard at a level particular to the values and judgment inherent in judicial office — a form of ‘professional conscience’ as well as individual conscience. The Tribunal gave some indication that they had themselves applied this standard to their judgment, tempering it with the positivist call to laws as clearly written, but without any supporting reference to the Martens clause as normative authority. Importantly, the professional judicial conscience appeared to be employed in fact to reinforce criminal guilt rather than excuse it, as a judicial ‘consciousness of injustice,’ reflecting the Tribunal’s moral shock that the ‘dagger of the assassin was concealed beneath the robe of the jurist.’⁹⁰

2 *The High Command Case and the Commander’s Conscience*

The concept of professional duty informing individual conscience reappeared the very next year in the US Military Tribunal’s consideration of the criminal liability of field commanders of the German forces. They again appeared to allow room for conscience in the assessment of individual guilt, and appeared more willing to accept it on the evidence, although not to the extent of entirely acquitting the major defendants.

⁸⁷ Ibid 962.

⁸⁸ Ibid 1024–5.

⁸⁹ Ibid 1025–6, 1062. See also *High Command* (n 4), where the Tribunal conceded that cutting off supplies to the besieged civilians of Leningrad was not contrary to international law and therefore did not entail criminal responsibility, much as they ‘might wish the law were otherwise’: at 84.

⁹⁰ *Nazi Judges* (n 3) 983–4.

In the *High Command* case, the Tribunal considered that moral opposition from a military commander to an illegal order could be expressed in four forms, by: countermanding it (for which the Tribunal observed that the commander would lack ‘legal status or power’ and it would have been ‘utterly futile’ at the time); resigning, which ‘was not much better,’ probably not available under wartime military regulations and likely to have resulted in ‘the most serious consequences’ for the individual; sabotaging its enforcement, which a commander ‘could do only verbally by personal contacts’ and which would not ‘annul its enforcement;’ or doing nothing.⁹¹ Of these, they gave credence to the third. This very argument had been made by von Leeb, in his closing statement on behalf of all the defendants, that

under the dictatorship of Hitler, we found ourselves faced with a development which was in contrast to our principles and nature ... In regard to Hitler’s instructions, which went against our humane and soldierly feelings, we were never merely his tools without a will of our own. We did oppose his instructions as far as we deemed this to be possible or advisable, and we have toned their wording down and rendered them ineffective or mitigated them in practice.⁹²

Applied in the case of the ‘Commissar Order,’ which directed the execution of Soviet political commissars and others in occupied territories, the Tribunal accepted evidence that von Leeb had only ‘passed on’ the order in an administrative sense, and ‘he had protested against the order in every way short of open and defiant refusal to obey it,’ notwithstanding that his subordinates had ‘permitted’ its enforcement.⁹³ He was not guilty of the crimes committed as a result.

In comparison, von Leeb was convicted for transmitting an order known as the ‘Barbarossa Jurisdiction Order’ while he was commander of Army Group North, without such opposition.⁹⁴ The Tribunal accounted for his conscience-based explanation only in mitigation of sentence. This time, they were satisfied that he

⁹¹ *High Command* (n 4) 74.

⁹² *Ibid* 15.

⁹³ *Ibid* 27. The Tribunal made similar findings in the case of Hans von Salmuth (at 28), but not other defendants. The Tribunal was referring to the ‘Directive for the Treatment of Political Commissars,’ issued by the Führer Headquarters on 6 June 1941. It characterised ‘political Commissars of all types’ as ‘the actual leaders of the resistance’ in occupied Russian territory, directing that they were ‘to be liquidated at once when taken in combat or offering resistance’: at 24.

⁹⁴ *Ibid* 94. The Barbarossa Jurisdiction Order was issued by General Keitel on 13 May 1941, titled ‘Decree on Exercising Military Jurisdiction in the Area of Barbarossa and Special Measures by the Troops.’ The Tribunal summarised its effect as having ‘dispensed with court-martial jurisdiction over the civilian population and provided that civilians in the occupied areas would be subjected to arbitrary punishment upon the decision of an officer. The second part provided that there was no obligation to prosecute members of the Wehrmacht or its auxiliaries who committed crimes against enemy civilians except in cases involving discipline which were restricted to certain types of offences’: at 31.

was not a friend or follower of the Nazi Party or its ideology. *He was a soldier* and engaged in a stupendous campaign with responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area. It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval.⁹⁵

As the *Nazi Judges Tribunal* imposed a high standard of moral duty from the defendants' role as jurists, the Tribunal in the *High Command* case appears to have assessed the culpability of the defendants in light of the perceived professional duties and honour of a senior military commander. In the context of the charge of waging aggressive war, for example, the Tribunal observed specifically that the refusal of commanders to implement the Nazi war of aggression 'would have been the honourable and righteous thing to do ... But however much their failure is morally reprimandable,' they did not consider that field commanders without policy responsibility were then liable in international law for the crime.⁹⁶ Thus, like the *Nazi Judges* case, the Tribunal's acceptance of conscience as relevant was not complete, and their evidentiary doubts with respect to defendants who were part of the Nazi machine, but never targeted by it, leaves the judgments equivocal in key respects.

3 *Subsequent Application of the Nuremberg Judgments*

The *High Command* judgment, and with it the same Tribunal's judgment in the *Hostages* case,⁹⁷ in so far as they concern individual conscience, have been subsequently applied by the ICTR. In *Bagilishema*, the defendant argued that he had remained in his provincial government role during the 1994 Rwandan genocide 'for the purpose of "serving the people", not the government; he stayed on "to save human lives".'⁹⁸ While allowing that as *bourgmestre* he had to follow 'some' government directives, Bagilishema 'denied that he would ever implement a policy that went against his conscience'.⁹⁹ Bagilishema's evidence was that he had told his superiors 'he was not prepared to accept sole responsibility for the management of the refugees, and that if the Prefect did not assist him he was "ready to resign"', and that he had seen to the departure of refugees in his area when informed that attackers were on the way.¹⁰⁰

The ICTR specifically turned its mind to the 'tangent' question of whether 'remaining as bourgmestre, with the full knowledge of the interim government's criminal

⁹⁵ Ibid 94 (emphasis added).

⁹⁶ Ibid 69.

⁹⁷ *United States v List et al (Judgement)* (United States Military Tribunal, 11 TWC 757, 19 February 1948).

⁹⁸ *Prosecutor v Bagilishema (Judgement with Separate Opinion of Judge Gunawardana and Separate Dissenting Opinion of Judge Güney)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-95-1A-T, 7 June 2001) [132].

⁹⁹ Ibid.

¹⁰⁰ Ibid [135]–[136].

objectives, gives rise to personal liability.’¹⁰¹ It did not consider the question ‘novel,’ and relied on its interpretation of the *High Command* and *Hostages* cases (but not the *Nazi Judges* case) in finding the need for the ‘intentional commission of a criminal act or the wanton failure to fulfill a legal duty,’ manifested in both knowledge of illegal activities and authority or power over them, to found guilt of an international crime.¹⁰² This, thought the ICTR, could only be determined case by case.¹⁰³ For Bagilishema, the ICTR considered at length his argument as to conscience, finding no evidence that he was ‘associated with a criminal “conspiracy” which he positively assisted or from which he declined to extricate himself.’¹⁰⁴ It did, however, accept on the evidence that he had ‘remained at his post voluntarily’ rather than by moral compulsion;¹⁰⁵ his intention to resign arose from ‘practical rather than principled considerations ... It was not the grain of governmental policy that disturbed him, but he felt that his capacity to manage had been exceeded.’¹⁰⁶ Interestingly, the prosecution led expert evidence that the defendant was a ‘political conformist’ seeking to maintain his own position in supporting the interim government’s policy to counter the conscience-based argument, but the Tribunal rejected this particular argument as one outside the indictment as framed.¹⁰⁷

These decisions could be explained on the basis that there was to be no moral justification for an act which contributed to a crime against humanity, genocide or a war crime — that is, that conscience could never apply as an excuse — but closer study shows that the issue has been left open. The tribunals considered individual conscience might be, but was in fact generally not, relevant to the establishment of guilt; indeed, the measurement of individual conscience by professional values was used to reinforce the required consciousness of guilt and criminal responsibility, that is, what the defendants ‘should have known’ to be wrong, particularly in the *Nazi Judges* case. This reflects a conscience-based judgment on the part of the Tribunals themselves, and their difficulty in reconciling their own moral appreciation of the law with positivist interpretation and the contention that a person could at once participate in a crime shocking to the global conscience and yet have a clear individual conscience.

The treatment of alleged Jewish ‘collaborators’ in Israeli law offers an alternative viewpoint in circumstances in which, had the defendant not engaged in the act charged, they would have been at risk *regardless* because they were a member of the group targeted for persecution.

¹⁰¹ Ibid [142].

¹⁰² Ibid [142]–[144].

¹⁰³ Ibid [144].

¹⁰⁴ Ibid [146].

¹⁰⁵ Ibid [138].

¹⁰⁶ Ibid.

¹⁰⁷ Ibid [138]–[141].

IV INDIVIDUAL CONSCIENCE AND CRIMES BY VICTIMS: THE ISRAELI MODEL

Instances of explicit provision for a conscience-based defence, as a negation of guilt, are uncommon in international criminal law. Perhaps the clearest model is set out in an Israeli domestic law instrument, the *Nazi and Nazi Collaborators (Punishment) Law 1950* (Israel), criminalising crimes against humanity, war crimes and, as sui generis, crimes against the Jewish people. Without a mitigating circumstance specified in sections 10 or 11, the penalty on conviction was mandated to be death. The statute was used in 1961 to prosecute Adolf Eichmann and later John Demjanjuk as perpetrators of the Holocaust, though it has been suggested that it was initially envisaged as a means to address the emotive question for Israeli society of collaboration by Jewish people with the Nazis.¹⁰⁸ The statute did follow a practice of non-legislative, community-based ‘Courts of Honour’ in the immediate post-war period in Europe, in which members of the Jewish community accused of collaboration in genocide were ‘tried,’ and either ‘sentenced’ to exile from the Jewish community or ‘rehabilitated’ within the group.¹⁰⁹

Use of the law to this end was highly sensitive. Trial records of Jewish people charged under it with having been camp *kapos* — prisoners with a supervisory role over others — were sealed for 70 years following trial, so researchers are unable even to say with confidence how many there were other than an estimate of 30 to 40 prosecutions from 1951 to 1964.¹¹⁰ However, it appears that no members of the Jewish Councils, which were established by the Nazis as governing bodies in many major towns of Eastern Europe, were tried under the law.¹¹¹

This involvement of individuals on the one hand as victims, having been Jews in Europe during the Nazi era, and on the other as collaborators in the persecution of their own people, gave greater scope than ordinary international law for conscience-based defences. In fact, the statute provided explicitly that individuals would be acquitted if the charged crime was committed to ‘save himself from the danger of immediate death threatening him and the court is satisfied that he did his best to avert the consequences of the act or the omission,’ or ‘with intent to avert consequences more serious than those which resulted from the act or omission, and actually averted them.’¹¹² This was a true defence, as negation of guilt. In addition, as the kind of mitigation accounted for in Nuremberg and Arusha, punishment following a finding of guilt could be reduced to a minimum of 10 years if ‘the person ... did his best to reduce the gravity of the consequences of the offence,’ and ‘the offence was

¹⁰⁸ Michael J Bazyler and Julia Y Scheppach, ‘The Strange and Curious History of the Law Used to Prosecute Adolf Eichmann’ (2012) 34(3) *Loyola Los Angeles International and Comparative Law Review* 417, 424–6.

¹⁰⁹ Isaiah Trunk, *Judenrat: The Jewish Councils in Eastern Europe under Nazi Occupation* (University of Nebraska Press, 1996) 548–61.

¹¹⁰ Bazyler and Scheppach (n 108) 429.

¹¹¹ Trunk (n 109) 562.

¹¹² *Nazi and Nazi Collaborators (Punishment) Law 1950* (Israel), ss 10(a)–(b).

committed with intent to avert, and was indeed calculated to avert, consequences more serious than those which resulted from the offence.’¹¹³

A notable case tried under these provisions was the prosecution of Hirsch Berenblatt, who commanded the Jewish police in the Polish ghetto of Bedzin. His case was heard shortly before, but determined after, the Eichmann trial. He was initially convicted under section 5 of the statute, for ‘delivering up a persecuted person to enemy administration’.¹¹⁴ That is, he had, with others, assisted the Nazis in rounding up his townspeople for deportation, including handing over children from the orphanage, and had prevented people potentially identified for deportation to their death from rejoining the groups staying in the ghetto or being sent for labour.¹¹⁵ The trial court relied on the evidence of a single ‘reliable’ witness, sentencing Berenblatt to five years in prison.¹¹⁶

The question of conscience and morality in the commission of crimes against humanity occupied the court both at first instance and on appeal. The trial court rejected the argument advanced by the Jewish Council in Bedzin that some people would be saved by ‘severing the [gangrened] arm.’¹¹⁷ The court considered this kind of argument was not within the intention of the statute but was ‘a paraphrase for the sacrifice of thousands of souls, mostly of old people, children, the ill, and the weak, in order to delay the war of destruction.’¹¹⁸ Neither did the statute justify decisions as to ‘what part of the people was to be considered the gangrened arm,’ the court finding that ‘synonymous with the decision as to who is superior to whom.’¹¹⁹ The court did, however, doubt that ‘the historical and psychological criteria of this case [would always] correspond to the legal criteria of the legislator,’ although they felt bound to apply the intent of the legislation as written as a reflection of the ‘will of the people.’¹²⁰ Finally, the court found that Berenblatt could have resigned but chose not to for ‘egoistic reasons,’ even though after a time he knew what would happen to those who were deported.¹²¹

¹¹³ Ibid ss 11(a)–(b).

¹¹⁴ Ibid s 5.

¹¹⁵ Trunk (n 109) 564–5, citing *Bet hamishpat hamkhozi, Tel-Aviv-Yafo, tik plili 15/63, psak din*. As the original judgment is in Hebrew and various sections have been translated in slightly different terms in different publications, this article identifies the quoted source with the original reference as cited.

¹¹⁶ Idith Zertal, *Israel’s Holocaust and the Politics of Nationhood*, tr Chaya Galai (Cambridge University Press, 2005) 69 [trans of: *Ha’Umah ve Ha’Mavet, Historia, Zikaron, Politika* (2002)], citing *Berenblatt v Attorney-General* (Supreme Court of Israel), (22 May 1964) Criminal Appeal No. 77/64, 18 Legal Verdicts 70.

¹¹⁷ Trunk (n 109) 564, quoting *Bet hamishpat hamkhozi, Tel-Aviv-Yafo, tik plili 15/63, psak din*, 9–10 [author trans].

¹¹⁸ Trunk (n 109) 564.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid 567.

Berenblatt appealed successfully to the Israeli Supreme Court in 1964 in reliance on section 10 of the statute. The Court issued separate judgments. Judge Landau, who had sat on Eichmann's trial the year before, found that those who were not there should not be critical of

these 'puny people' because they did not rise to a high moral level at a time when they were being persecuted by an authority whose supreme aim was to deprive them of God's image. We should not interpret the basis of the individual crime, as formulated in the Nazi and Nazi Collaborators (Punishment) Law, by a yardstick of moral behaviour of which only a few were capable. ... Everyone cares for himself and his family, and the prohibitions of the criminal law ... were not written for heroes, extraordinary individuals, but for simple mortals with their simple weaknesses.¹²²

Unlike the Tribunal members at Nuremberg, Judge Landau's individual quality of conscience was marked in his observations and, in the circumstances of an individual also faced with persecution, the measure of conscience required was not exacting.

Judge Olshan, the President of the Court, who had sat on Eichmann's 1962 appeal, agreed that the question of collaboration in these circumstances was 'a question for history and not for the courts.'¹²³ His Honour considered that section 10 did encompass the possibility that some people might be forcibly delivered up to the Nazis in order to save the majority of others, a conscience-based act not entailing criminal responsibility. However, such determinations could only be case by case, he cautioned, for the argument of 'avoiding worse consequences' did not encompass all of the actions of the Bedzin Jewish authorities.¹²⁴

The distinction in the treatment of individual conscience in Berenblatt's case and in the *Nazi and Nazi Collaborators (Punishment) Law 1950* (Israel) on the one hand, and the Nuremberg and ICTR jurisprudence on the other, is remarkable. Where the latter equivocally conceded the relevance of individual conscience to determining guilt where the crime shocked the public conscience, but generally rejected it on the facts, the former allowed explicit room for conscience-based defences, provided that the basis of the criminal act was both a moral intent to avoid a worse outcome and success in doing so. The difference is in the character of the defendant and the likelihood that, not having involved themselves in any criminal act, they would nonetheless have been among the victims of the broader crime. This is in itself a moral relativity affecting the legal relevance of conscience.

¹²² Ibid 568, quoting *Piskey-din shel bet hamishpat haelyon beisrael*. Vol. XVIII (1964/5), *khelek sheni*, 101 [author trans]. See also Orna Ben-Naftali and Yogev Tuval, 'Punishing International Crimes Committed by the Persecuted: The Kapo Trials in Israel' (2006) 4(1) *Journal of International Criminal Justice* 128, 173.

¹²³ Ben-Naftali and Tuval (n 122) 174.

¹²⁴ Trunk (n 109) 565.

V CONCLUSION

The treatment of conscience in international law is troubled. The public conscience in the much-lauded Martens clause has been reduced to a positivist approach to authority, not just jurisprudentially but increasingly in public discourse, including in the Australian governmental narrative with respect to its military operations. This is at odds with the treatment of individual conscience from an international criminal perspective, itself equivocal. There, individual conscience, while apparently preserved as a potential defence, as a matter of fact has not been given precedence over the 'public conscience' (with its attendant difficulties), except in the moral quandary of the victim as perpetrator/collaborator. Moreover, the quality of individual conscience has been measured externally with reference to the qualitatively different professional values of the judiciary and of military command. The effect of this externalisation of moral duty at Nuremberg was to use the individual professional conscience in effect as an element of the public conscience, not as a defence but instead to reinforce criminality by characterising what the defendants 'should have known,' on this standard, to be wrong as evidence of their criminal responsibility.

This is a problematic result, because the possibility of the defence of conscience offers to those charged with making the most difficult of decisions reassurance in a principled approach. This would include Adams' commander receiving an executive direction to commence hostilities which conflicts with the deepest registers of individual conscience. At the same time, it offers the international community the legal scope to demand individual consideration of right and justice in the exercise of lawful powers such as the taking of lives in armed conflict. Subsuming individual conscience into different forms of a collective conscience, and then conflating the source of that public conscience with a positivist approach to law as the ultimate authority (although perhaps the consequence of including conscience in law and thus making it the preserve of lawyers), is both circular and defeating of the safeguards implicit in this ethical code. It is the viable preservation *in law* of conscience, but with an acknowledged meaning greater than positivist law alone, that could meet Plato's doubts in the opening epigraph as to the completeness of legal systems.

