

THE CZECHOSLOVAK QUESTION IN THE NUREMBERG WAR CRIMES TRIALS

Viktor Böhmert

The question whether Czechoslovakia came to an end as a state with the establishment of the Protectorate of Bohemia and Moravia on 16 March 1939, or whether it was at that time merely placed under a German belligerent occupation, was not answered uniformly by the Nuremberg War Crimes Trials. The continued existence of Czechoslovakia was affirmed by those Nuremberg Military Tribunals which declared it possible that acts committed in the „Protectorate“ in the period from 16 March to 1 September 1939 (the outbreak of World War II) were „war crimes“ in the strict sense of the word, i. e. could violate the laws and customs of land warfare compiled in the Hague Rules of land warfare (RLW). Those Military Tribunals which rejected the thesis of a belligerent occupation tended toward the opposite view.

Already during the consultations of the United Nations War Crimes Commission in London, 1943—45, the representative of the Czechoslovak government-in-exile repeatedly attempted to extend the concept of „war crime“ so as to reach, on the one hand, back to the beginning of invasions i. e. the march on Prague in March 1939, as a violation of the Kellog-pact and, on the other hand, to include acts committed already before 1 September 1939 in member states of the United Nations „in hostile occupation“. These endeavours remained unsuccessful, because the Allied Great Powers decided, in the London

Charter of 1945 (LC), to create, next to the punishable offense of the „war crime“, in the traditional sense of a violation of the RLW committed during a war, two new punishable offenses: the „crime against peace“, which consisted only in the unleashing of a „war of aggression“ or a „war in violation of international treaties“, thus not including the mere armed invasion not encountering any resistance and therefore not endangering the state of peace; and the „crime against humanity“, which, in contrast to the „war crime“, could be committed „before and during the war“.

The judgement of the International Military Tribunal (IMT), whose basis of decision was constituted by the LC, contains profound contradictions regarding the possibility of committing war crimes *stricto sensu* in peacetime. On the one hand, it differentiates between the wars of aggression begun by Germany from 1 September 1939 on and the „acts of aggression“ prior to this date directed against Austria and Czechoslovakia in March 1938 and 1939, respectively: accordingly, the point of departure in numerous passages is that „war crimes“ *stricto sensu* were only possible while a state of war existed. On the other hand, it holds the view — though solely to the advantage of Czechoslovakia — that the RLW was valid from 15 March 1939 on in the Protectorate, as an area under enemy occupation. Substantiation for this legal claim is not made: only the re-annulment of the RLW on 16 March 1939 is denied, with the argument that the decree on the establishment of the Protectorate was not a declaration of incorporation as understood by international law.

Of the judgements of the American Military Tribunals (MT) which dealt in more detail with the Czechoslovak question, the „IG Farben Judgement“, and indirectly also the „Justice Judgement“, as well as „Judge Powers' Dissenting Opinion“ on the „Wilhelmstrasse Judgement“, denied the possibility of committing war crimes in the Protectorate before 1 September 1939. The „Wilhelmstrasse Judgement“ and „Judge Wilkins' Dissenting Opinion“ on the „Krupp Judgement“, on the other hand, affirmed this possibility. The basis of the decisions of the MT, Control Council Law No. 10, deviates in the definition of punishable offenses from the LC, among other things, in that the „crime against peace“ can consist not only in the unleashing of a war, but also in an invasion. The MT therefore had either to regard the newly added fact of the „invasion“ as a subcase of the „wars of aggression“, or to ignore it. The „IG Farben Judgement“ chose, as did „Judge Powers' Dissenting Opinion“, the latter course. It distinguished between war and invasion, and therefore came to the conclusion that no war crimes *stricto sensu* could have been committed in Czechoslovakia prior to 1 September 1939. The „Wilhelmstrasse Judgement“, following „Judge Wilkins' Dissenting Opinion“, chose the first course, thus affirming the belligerent occupation of Czechoslovakia.

Untenable, at least for the period before September 1939, is the thesis — asserted without substantiation by the IMT and legally supported in the „Wilhelmstrasse Judgement“ by means of subsumption of invasion under wars

of aggression — of the applicability of martial law to occupationes pacificae of the type of the German occupation of Czechoslovakia. It clearly contradicts the practice according to which an invasion does not bring about a state of war, the precondition for the validity of martial law. In the literature on international law, this thesis was also not presented before 1945. Through the application of individual rules of the occupatio bellica by way of analogy with the occupationes pacificae, these rules can become rules of peacetime international law, but the reverse, that occupationes pacificae can become occupationes bellicae, does not hold.

The IMT's interpretation of Hitler's decree of 16 March 1939 also does not hold up under detailed examination. The decree grants unilaterally a limited autonomy to a part of the area of the Czechoslovak state — regarded as no longer in existence — declared as a part of the German Reich. Reinterpreting this as a bid for the conclusion of a protectorate treaty under international law thus appears impermissible. Even if the „Protectorate“ were to be considered as a German satellite state newly called into existence by Hitler, its relations with the German Reich would have been of a kind not coming under international law, but rather solely under constitutional law. The decree thus fulfills the criteria under which an act of state is to be regarded as one of incorporation in accordance with international law.