

## DEVELOPMENTS

### Judging Nuremberg: The Laws, the Rallies, the Trials

*by Tobias Lock and Julia Riem\**

#### A. Introduction

The 60th anniversary of the trial against the major war criminals of World War II before the International Military Tribunal Trial (IMT) in Nuremberg was the subject matter of an international conference held in Nuremberg from Sunday, July 17 to Wednesday, July 20, 2005. The conference was presented by Touro College Jacob D. Fuchsberg Law Center, Institute on the Holocaust and the Law, Huntington, USA, in association with the Foundation "Remembrance, Responsibility and Future" – "Remembrance and Future" Fund, supported, amongst others, by the Higher Regional Court of Nuremberg, the Faculty of Law, Friedrich-Alexander University, Erlangen-Nuremberg and the German-American Lawyers' Association.

The pre-conference session was opened by the President of the Nuremberg Higher Regional Court, Dr. Stefan Franke, who welcomed the audience in "the room where world history was made", the original setting of the IMT in courtroom 600 at the Nuremberg Palace of Justice. He was followed by Prof. Dr. Mathias Rohe (Dean of Law, Friedrich-Alexander University, Erlangen-Nuremberg), who, as a sign of remembrance, read out a list of those members of the University who were deprived of their doctorates during the Third Reich.

#### B. Historical and national perspectives in the IMT

An expert on each Allied nation and a German Scholar presented the different interests and expectations of the participating nations. Prof. Raymond Brown (Seton Hall School of Law, New Jersey, U.S.) emphasised the impact of the Nuremberg trials on the development of modern international criminal law, stating that Nuremberg had created a "normative architecture" in this respect. Brown perceives irony in the fact that today, there is a tendency to take the IMT for

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granted. According to Brown, in the US there were disputes regarding the establishment of a military tribunal, as summary executions or national proceedings had been discussed as competing ideas for a long time. Brown critically drew parallels between the American commitment in Nuremberg, in particular with respect to the crime of aggression, and the United States' current political position regarding Art. 51 of the UN-Charter and the question as to whether there can be a justification for the use of military force outside of Art. 51. In the face of the American engagement at Nuremberg, Brown sees yet more irony in the impression, which sometimes arises that America is not bound by international law.

Historian Prof. David Cesarani (Royal Holloway, University of London, U.K.) explained that for a long time Great Britain was undecided as to whether or not to take the main war criminals to an international court. Despite the fact exile governments, mainly located in London, pleaded in favour of trials, the British were hesitant. This was due to their negative experience after WWI, when the trial against the German Kaiser failed because the Netherlands were not ready to extradite him and a fear for their own war prisoners. The British government also had objections concerning the *tu-quoque*<sup>1</sup> argument in the light of their own engagement in Yugoslavia, and because of the Soviet involvement in the proceedings. However, public opinion demanded trials after more and more photographs from Concentration camps became public. Overall, Britain tried to keep the proceedings to a minimum regarding the number of defendants as well as the scope of the evidence.

In France, on the other hand, the public call for a war crime tribunal was heard rather early, according to Prof. Hervé Ascensio (University Paris I, Panthéon-Sorbonne, France). The French had a special interest in taking part in the prosecutions in order to declare themselves as one of the winners of the War. Another reason, which added strength to the call for justice, was the large number of French victims. Ascensio stated that the offence of crimes against humanity proved to be an especially important part of the Nuremberg heritage for France. Accordingly, in 1977 the *Cour de Cassation* (Supreme Court of Appeal) ruled that the IMT statute was directly applicable in French courts. The IMT statute then served as an important tool in French trials against collaborators.

Soviet-born Prof. Michael Bazylar (Whittier Law School, Costa Mesa, U.S.) presented a paper on the Soviet perspective on the IMT, which was rather different from those of the other Allied nations. The Soviets regarded the guilt of the defendants as having already been established, even before the proceedings had

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<sup>1</sup> An argument in which the accuser is accused of a similar offense or behavior.

begun. In their view, the aim of the trial should only be to determine an appropriate sentence and impartial judges would unnecessarily lengthen the trial. The Soviets were in favour of a show-trial and therefore played a substantial role in obtaining the evidence that served as important documentation of the Nazi crimes. The U.S.S.R.'s double role as the main victim and a victimiser, because of their attack on Poland, constituted a particular problem. The U.S.S.R. seemed to be especially vulnerable as far as the *tu-quoque* argument was concerned. Bazylar explained that this argument is more of a diversionary tactic than a defence. Whether or not the prosecutor is guilty of the same crime does not prove in the least whether the charge against the defendant is right or wrong and therefore not a valid defence in international criminal law.

As the last speaker on the panel, Prof. Albin Eser (University of Freiburg, Germany) represented the German views on the IMT. He stated that the legal and political evaluation of the trials had differed in Germany. Some voices had raised suspicions of victor's justice. For example, the question arose as to why one did not choose judges from neutral countries, instead of taking them only from the Allied nations. Also criticised was the fact that the people who had drafted the IMT statute were the same people who were to apply the law. Eser then invalidated the argument of *nulla poena sine lege*<sup>2</sup>, stating that the term *lex* here needs to be read as "justice", not as "law of the time". The self-legitimation of the Nazis had to see a boundary in human rights. In particular, the offence of crimes against peace which was not an *ex post facto* law, as war had already been outlawed with the Kellog-Briand Pact<sup>3</sup> in 1928.

All the speakers agreed in their evaluations that the IMT played a vital role in the development of modern international criminal law. Cesari stated that the IMT "laid down law for the future, even if it was imperfectly applied and often disregarded".

#### **B. The role of victims in the IMT and the public perception of them**

Prof. Michael Marrus (University of Toronto, Canada) considered the Holocaust victims to have been quite adequately represented at the IMT. He based this impression on the view of Jacob Robinson, who at that time represented the interests of the Jewish lobby before the American chief prosecutor Robert Jackson. A minor point of regret was that the Institute of Jewish Affairs was not granted an *amicus curiae* status, but the IMT established the figure of six million victims, a special wish of Robinson's.

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<sup>2</sup> The legal principle that penal law cannot be enacted retroactively.

<sup>3</sup> Kellog-Briand Pact, 27 August 1928, Articles I and II.

In contrast to Marrus' evaluation, Prof. Sam Garkawe (Southern Cross University, Lismore, Australia ) criticised the inclusion of victims and survivors of the Third Reich in the trial as being inadequate. As a comparison, there is a lot more victim awareness in today's war crime trials; before the International Criminal Court (ICC), for example, victims are entitled to have their own legal representation, and there is also a possibility of reparation. In Nuremberg, very few survivors were heard as witnesses; the prosecution was mainly focused on documentary evidence. Garkawe even called the IMT "largely victim-free", stating that victims' testimonies could have made the trials more dramatic and thus more memorable for the public, as there would have been a personalisation of the crimes. The proceedings would thereby have been legitimised, and there would also have been a therapeutic effect for the community of the survivors.

Dr Donald Bloxham (University of Edinburgh, U.K.) reported on the mark the IMT had imprinted on the collective memory. He stated that the longer the proceedings dragged on, the less interest there was from the public and press. In the years immediately following the war, most states were busy dealing with their own problems, but most of them prosecuted collaborators, resulting in most nations' own war criminals being convicted. The beginning of the Cold War made it even less important to reappraise the Nazi atrocities as they could not be used for propaganda purposes on either side of the Iron Curtain. On the whole, the real meaning of the Nuremberg trials did not form part of the collective memory for a long time.

Prof Lawrence Douglas (Amherst College, Massachusetts, U.S.) focused on the importance of war crime tribunals as a political and social tool that can be used for didactic purposes. Society has an interest in seeing that it can defend itself by way of judicial means. The 19 convictions achieved were important in this respect, whilst the three acquittals helped to legitimate the trials and showed that the IMT was not a mere show trial where the victor's justice was done. The problems with the Nuremberg trial were its length and the reliance on documentary evidence, which let the attention of the public dwindle lessening the didactic impact of the trial.

The motto of the conference, "returning to courtroom 600", was especially fitting for the speaker of the evening event, as Whitney R. Harris was a member of the American prosecution team at Nuremberg. Introduced by Prof. Lawrence Rafal (Dean of Touro Law Center), who had earlier officially welcomed the conference members, Harris proceeded to give the audience a vivid impression of his historical task. He principally talked about his relationship to Robert Jackson and Jackson's famous cross-examination of Hermann Göring.

### C. Civilised people and Heinous crimes

Prof. Herbert Reginbogin (Touro Law Center, Huntington, U.S., Potsdam University, Potsdam, Germany, and Bogazici University, Istanbul, Turkey) gave a paper on "Learning to deal with crimes against humanity, from Leipzig to the Nuremberg trials". After a short introduction on the history of ideas behind German nationalism, Reginbogin pointed out how the Leipzig trials of 1921/1922 came into being. The treaty of Versailles arranged for the German Kaiser to be extradited to the Allies so he could be tried. This attempt to try war criminals was the first step towards Nuremberg. As the Netherlands refused to actually extradite the Kaiser, the trial against him never took place. Instead, Germany was to try a number of war criminals by itself in the Leipzig trials. Initially, the Allies had demanded that 3000 war criminals be taken to court. In the end, only twelve were indicted, of which six were convicted. Despite the small number of convictions the Leipzig trials, according to Reginbogin, brought into existence some new legal concepts, such as *Kriegsnotwendigkeit* (necessity of war), *Kriegsbrauch* (custom of war) and *Handeln auf Befehl* (defence of superior orders).

Afterwards Prof. Klaus Kastner (University of Erlangen-Nuremberg, Germany and former President of the District Court of Nuremberg-Fürth) spoke about "The History of the Nazi Party, the Rallies and Racial Laws". Kastner focused on the role the city of Nuremberg played during the Third Reich. The Nazi Party managed to establish itself in the at that time "red" city of Nuremberg, mainly because of the infamous head of the local branch of the Nazi Party, gifted demagogue, and infamous Anti-Semite, Julius Streicher, who was sentenced to death by the IMT. In July 1933 Nuremberg was declared the City of the Party Rallies, which subsequently took place every year until 1938. During the rally of 1935 another significant event happened: the Nuremberg racial laws<sup>4</sup> were passed by the Reichstag, which had convened for a special session in Nuremberg. The name of Nuremberg and the Nazi dictatorship were finally linked when the Allies decided to make Nuremberg the seat of the IMT. Interestingly, the main motivation was not the city's past. Rather, Nuremberg happened to be the only city within the American zone to have a large and mainly intact courthouse, which had direct access to a large-enough prison.

Finally, Prof. John Q. Barrett (St. John's University School of Law, New York, U.S.) gave an insight into the life of Robert H. Jackson, the American chief prosecutor. Barrett described Jackson's rapid rise from an ordinary civic attorney to lead counsel in several well-attended criminal trials in the 1930s. After that Jackson became Attorney General and in 1941 Justice of the Supreme Court of the United

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<sup>4</sup> RGBl. I, p. 1146.

States. Jackson's main themes were firstly a strong anti-war theme as he was a rural pacifistic isolationist American. Secondly, he was strongly committed to human rights. After having been appointed American representative in charge of the IMT by President Truman, Jackson's first task was to prepare the trials. Jackson went to London where he pursued diplomatic efforts and finally reached the conclusion of the London Agreement of August 8, 1945. At Nuremberg, Jackson excelled as chief prosecutor. The highlights were his opening and final addresses as well as the cross-examination of Hermann Göring. After Jackson had reported to President Truman about the trials, Truman merely noted in his diary: "One good man".

#### **D. The Later Nuremberg Trials**

The first speaker was Prof. Benjamin B. Ferencz (Pace University, New York, U.S.) who served as the prosecutor in the Einsatzgruppen Trial. He reported about his personal experiences during the war. As a soldier, Ferencz was sent to concentration camps immediately after the war in order to obtain evidence on the crimes committed. Later, after having been released from the army, he was asked to become a prosecutor in Nuremberg. He chose 22 high-ranking officers to be tried for crimes against humanity and genocide and secured convictions for all of them; 13 were sentenced to death.

Next was Prof. Harry Reicher (University of Pennsylvania Law School). He spoke about the Jurists Trial in which 16 leading Nazi jurists were tried for crimes against humanity. Prof. Reicher especially mentioned three cases: the cases of Schleglberger, Rothenberger and Rothaug. What all the defendants had in common was that they raised the defence of having acted according to the law. However, Reicher rejected that argument as the legal system itself was at issue in the case and as such the defendants could not raise this as a defence.

Then Prof. Louise Harmon (Touro Law Center, Huntington, U.S.) raised the issue of the Medical Trial, which was the first of the twelve trials following the IMT in Nuremberg. In the Medical Trial, twenty three physicians who had experimented on human beings were tried. Most of these experiments had fatal results, like for example experiments with extremely low temperatures, height, poisonous injections, twins, sterilisation and euthanasia. The judges in the trial developed the Nuremberg code on how doctors should behave. This code constituted the first ever code on medical experiments performed on human beings and established the requirement of an informed consent by the subject to an experiment.

The last speaker of the day was Dr. Roland Blank, former legal advisor at the foundation "Remembrance, Responsibility and Future" (Berlin, Germany). After a

brief report on the Trial of the German Industrialists, Blank addressed the issue of compensation after the war. Compensation started with the Luxembourg Agreement of 1952<sup>5</sup> in accordance with which Germany paid about three billion Deutschmarks to Israel. One year later, a final settlement of claims concerning the issue of reparation was delayed pending a final peace treaty by the London Debt Agreement.<sup>6</sup> Yet, even the 2+4 treaty of 1990<sup>7</sup> does not contain any provision with respect to reparations. Instead, in the year 2000 the aforementioned foundation for the compensation of forced labourers was established, after enormous pressure on German companies by class action proceedings in the USA, in order to close the gap with respect to the compensation of such labourers.

In the late afternoon participants took a tour of the Nazi Party rally grounds and the documentation centre in Nuremberg.

#### **E. After Nuremberg**

The first speaker was Prof. Hinrich Rüping (University of Hanover, Germany). His topic was prosecutions in West and East Germany.

Law Nr. 10 of the Allied Control Council provided a legal basis for prosecutions in all four German zones of occupation, while also penalising crimes against humanity. However, as a large number of Western German judges had served as judges during the Third Reich and the attempt at denazification was mainly unsuccessful, the federal German judiciary was rather friendly to offenders.

The GDR had to deal with war criminals, too. However, the trials were hardly conducted in accordance with the rule of law. As in the West, defendants who were still of use for the state could avoid prosecution. Instead of providing a means for coming to terms with the past, the many show trials were mainly intended to sustain the current political system.

The second speaker was Justice Gabriel Bach, former Justice at the Supreme Court of Israel. He reported about the prosecution of war criminals in Israel, in which he was deeply involved as prosecutor in the famous Eichmann Trial. The legal basis for the prosecution of Nazis and their collaborators was a 1950 law, which was

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<sup>5</sup> Luxembourg Agreement, 10 September 1952, UNTS Vol. 162, 205.

<sup>6</sup> Agreement on German External Debts, 27 February 1953, UNTS Vol. 224, 13; Vol. 330, 217.

<sup>7</sup> Treaty on the Final Settlement with Respect to Germany, 12 September 1990, UNTS 1696, 124; ILM 1186 (1990).

mainly intended to be used against Jewish collaborators such as the Kapos.<sup>8</sup> When Adolph Eichmann, the organiser of the Holocaust, was arrested in Argentina in 1960 and taken to Israel, this law was also applied to him. During the trial<sup>9</sup> the prosecution succeeded in proving many details of the Holocaust. Eichmann was found guilty on all accounts and sentenced to death.

During the trial, several issues were raised as to why Israel did not have a right to prosecute Eichmann. One of the arguments was that the Israeli law being retroactive was a violation of the rule of law. However, Bach pointed out that it was impossible that the Nazis were not aware of the fact that their deeds were actually wrong, thus the rule on retroactivity could not be applied here. Another argument was that Israel had not existed at the time the crimes were committed nor had they been committed on Israeli soil and therefore Israel had no right to prosecute Eichmann. Bach rebutted that argument by reference to the principle of universal jurisdiction.

After Bach, Greg James, former Chief Justice of the Supreme Court of New South Wales, reported about Australian efforts to try war criminals. In the years immediately after the War, Australians were mainly concerned with their country's involvement in the Pacific theatre. Consequently, the War Crimes Act (1945)<sup>10</sup> was only applicable to crimes committed in that area. However, when it became known that a number of European suspects lived in Australia, the newly elected Labour Government instigated a formal investigation. They also changed the War Crimes Act so it would cover war crimes in Europe as well.

Three suspects were apprehended altogether, one of which was acquitted. The other two trials never happened because in one case the suspect was sick and in the other there was not enough evidence. Nonetheless, James considered that the Australian effort was a success as the proceedings had shown that there was no sanctuary for war criminals, regardless how far away they were.

The last speaker on this topic was Prof. Michael Bazylar (Whittier Law School, Costa Mesa, U.S.) who presented on America's treatment of war criminals, which differed greatly from that of other states. He first pointed out that according to the US Supreme Court the burden of proof in criminal proceedings was "beyond a reasonable doubt". In contrast to that the standard for denaturalisation was only that of "clear and convincing evidence". Therefore, the US decided not to instigate

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<sup>8</sup> Kapos were trustee inmates, sometimes Jewish, who carried out the will of the Nazi camp commandants and guards.

<sup>9</sup> *Att.-Gen. of the Government of Israel v. Eichmann* (1961) 36 I. L. R. 5.

<sup>10</sup> War Crimes Act 1945 (Cth), No. 48, 1945.

criminal proceedings against war criminals living in the country, but rather to denaturalise them. This was possible because many of the war criminals who had immigrated to the US had become US citizens. When entering the US, these people were asked to indicate whether they had been involved in war crimes, a question which all of them had answered in the negative. Thus they had been given American citizenship on the basis of that false information, which constituted a reason for denaturalisation. Since 1979, when the Office of Special Investigations was founded, 100 persons have successfully been prosecuted that way.

Next to speak was Prof. Claus Kress (University of Cologne, Germany) who talked about "Germany's Attitude Towards International Criminal Law - Continuity or Change?"

Kress divided Germany's attitude into two phases. The first phase began with the Leipzig trials 1921-1922 and ended with Germany becoming a member of the UN in the 1970's. This phase was filled with scepticism towards and rejection of international criminal law. Already during the Leipzig trials, the will to prosecute war criminals was lacking. That scepticism continued when Germany refused to accept the Nuremberg judgment, which became evident when Germany formulated a reservation to Art. 7 para. 2 of the European Convention on Human Rights.<sup>11</sup>

The second phase happened mainly in the 1990's. Germany embraced the creation of the ad hoc tribunals of Rwanda and Yugoslavia and became an active participant in the creation of the ICC. The current German position can be described as tending towards a narrow understanding of international criminal law. However, Germany does not wish the ICC to be an alibi court. Hence Germany pleaded for universal jurisdiction for the court but failed in that respect. However, Germany was successful when it came to cutting back on immunity and achieving equality before the court.

Kress went on to predict the future German position on the question of continuity or change. He argued that the application of international criminal law on German soldiers might become a political problem. Also, the exercise of universal jurisdiction by Germany might lead to diplomatic irritations. Finally, the next conference on the ICC-statute, where the crime of aggression is to be defined, might result in a step back behind Nuremberg.

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<sup>11</sup> UNTS 213, 221.

### F. Legacy of Nuremberg

The first speaker was Judge Hans-Peter Kaul of the ICC, who first gave an overview of the key features of the ICC.<sup>12</sup> He pointed out that its jurisdiction was limited to the most serious crimes, the UN Security Council had the right to suspend proceedings for a year, and it is the primary responsibility of states to prosecute such crimes. In addition, the Court does not have universal jurisdiction, but is instead limited to the principles of nationality and territoriality.<sup>13</sup>

Kaul then reported on the current tasks and challenges which the Court is facing. First, the Court must be consolidated to become an efficient international organisation. Then it will have to establish a new network of international criminal cooperation agreements, as the Court can only be as strong as the State parties make it. Today he considers the Court to be a functioning reality, as evidenced by the Security Council's referral of the Darfur situation. Kaul finished his speech by pleading to the United States to join and support the ICC.

Next to speak was Prof. Anne Bayefsky (Touro Law Center, Huntington, U.S.). Her topic was the legacy of Nuremberg, the most important aspect of which to her was the universality of human rights. However, today she regards the situation as being worse than it was in 1948 when the Universal Declaration of Human Rights was adopted by the UN General Assembly. She fears that today that declaration could not be adopted. In fact, most modern declarations highlight regional particularities, which Bayefsky considers to be an assault on universality.

Bayefsky particularly criticised Anti-Semitism within the world community, as there has never been a UN resolution dealing with Anti-Semitism. According to Bayefsky, Nowhere is inequality as clear as with respect to the UN's treatment of Israel, which is the only State that does not belong to any of the UN's five regional groups. All emergency sessions of the General Assembly in UN history have concerned Israel. The basis of the ICJ's decision<sup>14</sup> on the Israeli security fence was a report by Secretary General Annan which did not mention the terrorist acts preceding its construction. Thus Bayefsky concludes that the state of Israel is demonised. She reckons that the ICC statute was obviously directed against Israel, as the definition of war crimes, for instance, included the transfer of a state's own population into the territory of an occupied state. In addition, terrorism had not been made a crime under the ICC statute. Consequently, Israel's acts of self-defence would be covered by the statute. This, according to Bayefsky, proves that Israel and

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<sup>12</sup> See also his article in AJIL Vol. 99, 2005, p. 370.

<sup>13</sup> Art. 13 ICC Statute.

<sup>14</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory opinion), 9 July 2004, 43 I.L.M. (2004), 1009.

the rest of the world are measured by two standards. She thus concludes that the international criminal law of the 21st century was directed against those who support Israel.

Then Prof. Wanda Akin (Seton Hall School of Law, New Jersey, U.S.) presented a paper on the "lessons learned from Nuremberg." She mainly spoke about her own experience as a defence counsel before the Special Court for Sierra Leone, pointing out that the Court was lacking high-ranking defendants which resulting in a zeal to convict those that had been caught, whether their guilt was proved or not. She maintained that this was a bad example of dealing with Nuremberg's legacy as the legacy was weakened by such conduct.

Before actually addressing his topic "The International Criminal Court", Prof. Andreas Zimmermann (University of Kiel, Germany) responded to Anne Bayefsky's speech. He made it clear that the ICJ had not judged on the legality of the security fence as such, but only upon its actual position. Also stating, the definition of war crimes in the ICC statute was not aimed against Israel, but simply repeated article IV Geneva Convention's<sup>15</sup> definition of war crimes.

He then elaborated on whether or not the development of international law had been influenced by the IMT. Initially the IMT statute was allegedly a treaty providing for an obligation of third persons, which is not accepted in international law. The IMT retorted this argument by stating that it would have been each state's right to prosecute these crimes and that the IMT was only exercising jurisdiction delegated to it by the parties to the IMT statute. This argument can also be applied to the ICC-Statute. Another important objection to the IMT was the alleged violation of the principle of non-retroactivity. This argument cannot be made against the ICC as it only has jurisdiction over crimes committed after its entering into force.

However, there are also significant differences between the IMT, International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The ICC will only act when a national prosecution fails to take place. Moreover, the above-mentioned ad hoc tribunals only dealt with one conflict whereas the ICC will have to deal with a multitude of conflicts. As such the ICC will not be accused of executing victor's justice. The IMT partly provided definitions for the crimes punishable under the ICC statute, *e.g.* the definition of crimes against humanity.<sup>16</sup> However, in the Nuremberg judgment, the crime was

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<sup>15</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS, Vol. 75, 287.

<sup>16</sup> Art. 7 ICC Statute.

related to an armed conflict. That is now no longer necessary as the ICC statute follows the seminal *Tadic*<sup>17</sup> decision by the ICTY. With respect to command responsibility Zimmermann appreciates that there is now a clarification that civilians can also be held responsible. When it comes to the defence of superior orders however, Zimmermann regards the possibility of raising this defence as a step back behind Nuremberg. Zimmermann considers the fact that the death penalty is not available as a means of punishment as a great achievement, even regarding it as evidence of developing customary international law in that respect.

The next speaker was Prof. Dan Derby (Touro Law Center, Huntington, U.S.) presenting the topic "the Future of Indirect Enforcement". He maintained that the ICC's possibilities in the field of enforcement were rather limited as its jurisdiction only applied to crimes committed after its creation. Another impediment was the UN Security Council's power to suspend proceedings for a year. In addition, crimes against peace were not included in the statute, jurisdiction was limited to the principles of territoriality and nationality, and the ICC would only deal with the most serious crimes.

One problem was whether the ICC would be able to cope with international terrorism. Acts of terrorism do not constitute war crimes as they are not related to an armed conflict. However, one might contend that they constitute crimes against humanity. This view, however, was not shared by the prosecutor of the ICC. Derby then addressed the advantages of national prosecution over international trials. For example, national criminal procedure will usually be well established, while international crimes tend to become show trials. Furthermore, national courts are also able to convict criminals of lesser crimes like manslaughter, thus, the ICC must normally adduce more evidence for a conviction. However, while national courts have universal jurisdiction they face problems as well, the most important being the allegations of bias.

The last speaker of the day was Prof. Roger P. Alford (Pepperdine University School of Law, Malibu, U.S.). His topic was "the ICC and the Rights of Victims". Alford started off by stating that there was little international law on the compensation of victims. Yet, there was a doctrine in international law that victims of dispossessions were to be given prompt, adequate and effective compensation. In general there are two opposing interests when it comes to compensation, the interest of the victims to be fully compensated and that of the vanquished state to pay as little as possible. In the past, there have been examples of prevalence on both sides. The treaty of Versailles obligated Germany to fully compensate its victims. In contrast to that, the peace treaty with Japan after World War II expressly precluded

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<sup>17</sup> *Prosecutor v Dusko Tadic*, ICTY, Case No.: IT-94-1-T.

the rights of victims. After the Gulf War an attempt was made to embrace both the vanquished state and the victims, which left many of the victims discontent as they only received partial reparation. Present examples of the victim rights mainly relate to the Holocaust. Some of them were successful, such as the case against Switzerland, whereas others were not, like the case against Japan. With respect to the future, the ICC statute<sup>18</sup> provides for two approaches. Art. 75 of the statute contains the classic approach whereas Art. 79 enables the creation of a trust fund, which Alford considers to be a very interesting alternative.

### **G. National war crimes in the light of new research**

Elisabeth Yavnai (United States Holocaust Memorial Museum, Washington D.C., U.S.) presented a paper on the American military tribunals against commanders and watchmen of concentration camps, which took place in Dachau from 1945 to 1948. Yavnai emphasised that one of the aims of these trials was to illustrate the extent of Nazi atrocities in order to denazify and democratise the German audience. In comparison to the IMT, there was more eyewitness evidence given at the Dachau trials in order to live up to the expectations that the trials should serve as a history lesson for the public. According to Yavnai, this aim was hindered by timing problems, such that the prosecutors themselves did not have a thorough grasp of the Nazi system, and therefore could not adequately present it to the public.

Prof. Rebecca Wittmann (University of Toronto, Canada) directed the audience's attention to the criminal proceedings against Nazis in Germany from 1960 to 1980. She identified a divide between the young and ambitious prosecutors and the older members of the judiciary who often had a Nazi past. On the whole, there was no public will to prosecute war criminals and problems arose with respect to the application of the German Criminal Code. For example, crimes other than murder were subject to the statute of limitations.<sup>19</sup> Also, it was difficult to prove that the defendants knew that their deeds were illegal, which, as an element of intent, must be proved in German criminal law in order to find someone guilty. Wittmann stated that German judges had a tendency to acquit those who only followed orders, thus on the whole, it was difficult to convict those who did not show individual initiative. She concluded that the courts did not teach the Germans much about the responsibility of a whole generation, but that instead this task was fulfilled by left-wing activists and television.

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<sup>18</sup> Rome Statute of the International Criminal Court, 17 July 1998, UNTS No. 38544.

<sup>19</sup> S. 78 of the German Criminal Code (StGB).

The next speaker was Prof Rodger Citron (Touro Law Center, Huntington, U.S.). He gave a lecture on the profound impact which the Nuremberg Military Tribunal had on the development of legal philosophy in the US, on both the schools of legal relativism and positivism. In the case of legal positivism the impact resulting in it being pushed back more and more in the years to come.

The focus was then turned to the resistance movement in Germany. On the anniversary of Stauffenberg's attempt to assassinate Hitler on July 20, 1944, Dr. Winfried Heinemann (German Military History Research Institute, Potsdam) spoke about this military coup. The soldiers' prime motive was Hitler's dilettantism regarding strategic warfare and the interconnected senseless sacrifice of soldier's lives. Hitler's war policy was regarded as a crime against his own people. For its leaders, the resistance had a moral dimension, as they saw Hitler's atrocities as crimes against the whole world.

Dr. Joachim Gauck (former "Special attaché of the Federal Government for the Personal files of the former State Security Service") gave a comparative analysis of the totalitarianism of the Third Reich versus that of the German Democratic Republic. He explained the difference in mentality between eastern and western Germans by reference to the fact that Eastern Germans had to live within a totalitarian regime, not only for the twelve Nazi years, but also for the 44 years of the GDR's existence, which created a distinct feeling of helplessness. There was a series of uprisings against Communism, the best known being that of June 17, 1953, which all ended in a defeat of the people. The powerlessness against the state seemed to be unbreakable. This existence as "state-inmate with no civil rights", as Gauck called it, shaped the eastern German mentality. According to Gauck, a parallel between the two totalitarian regimes of the National Socialists and the GDR was the use of the law as a "subservient maidservant" of the authorities and the withdrawal of civil rights.

In the afternoon participants were invited to visit the former concentration camp at Dachau.

## **H. Conclusion**

Together, all the speakers at the conference created many varied and interesting images of the Nuremberg trials. It was clearly revealed just how topical the questions addressed in the trials still are for both historians and lawyers. Of equal interest are the different approaches taken by American and European lawyers when addressing the subject. The fact that a Jewish College and German institutions organised this conference together is a sign of progressing reconciliation between Jews and Germans.