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ASIL

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# Proceedings of the Tenth International Humanitarian Law Dialogs

Held in Nuremberg, Germany, in  
Commemoration of the Seventieth  
Anniversary of the Closing of the  
International Military Tribunal

September 29–30, 2016

Edited by Mark David Agrast and David M. Crane



American Society  
of International Law

**Proceedings of the Tenth  
International Humanitarian Law Dialogs**

*September 29–30, 2016  
at Nuremberg, Germany*

**Edited by**

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# Tenth International Humanitarian Law Dialogs

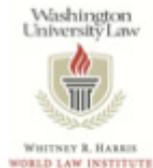
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ASIL is a volunteer-led organization governed by a sixty-member Executive Council elected by its membership. In partnership with the elected leadership, ASIL is led by an executive director and supported by a professional staff.





*This volume is dedicated to*

***Christian Wenaweser***

2016 Recipient of the Joshua Heintz Award  
for Humanitarian Achievement



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*From left to right: Ekkehard Withopf, Serge Brammertz, Brenda J. Hollis, David M. Crane, Fatou Bensouda, James Stewart, Stephen J. Rapp, Hassan Jallow, Robert Petit, Nicholas Koumjian*

## **In the Shadows of Nuremberg**

*For Henry Barbanel*

Because we are forever weak  
and wounded, looking for someone  
to follow or blame; sometimes  
we become savage and change  
the rules to ease our minds.  
Clouded by delusions  
of power or fame, human  
beings can justify anything.

Too often things can go wrong  
in a hurry, and the masses  
go along as if their hearts  
were turned inside out, and hatred  
was something long hidden  
but there, like a riptide  
pulling below the glittering  
smooth surface of the sea.

Abandoning everything  
we know is right, we become  
tribal and primitive,  
tearing the ties that bind us  
one to another, as if  
they were made of air. And love  
dissolves into something  
lost in the cruel cacophony.

And though it may be far,  
there is always a storm  
swirling somewhere. The sea  
that connects and creates us,  
holds the seeds of our destruction.  
Still, God keeps nothing from us.

Each new wave is a renewal;  
every day a gift of our own making.

As we stumble from the shadows  
of the twentieth century,  
covered in blood and ash,  
cradling the bones of those who are lost,  
we know there can be justice;  
the pattern has been set.  
No matter how long it takes,  
there is no peace without redemption.  
Without shadows, there is no light.

Marjory Wentworth  
Poet Laureate of the State of South Carolina

*This poem was read during the opening ceremony of the Tenth  
International Humanitarian Law Dialogs in Courtroom 600.*



# Foreword



## Foreword

**Mark David Agrast\***

For each of the past 10 years, the Society has joined the Robert H. Jackson Center and the other partners noted below in convening the International Humanitarian Law (IHL) Dialogs, held annually at the Chautauqua Institution in New York. The Dialogs, for which the Society publishes the proceedings, bring together leading experts in international criminal and humanitarian law, including most of the current and former chief prosecutors for the various UN courts and tribunals dealing with war crimes and mass atrocities, including the special courts for Rwanda, Sierra Leone, Cambodia, and the former Yugoslavia, as well as the International Criminal Court.

This past September 29–30 brought a change of venue, with the Tenth IHL Dialogs taking place in Nuremberg, Germany, to mark the 70th anniversary of the closing of the International Military Tribunal.

Arriving in Nuremberg, the visitor struggles to reconcile the image of the charming Bavarian city, famous as the center of the German Renaissance, the home of Albrecht Dürer and the medieval guild of Meistersingers, with the identities it acquired in the twentieth century—first, as the center of Nazi racist ideology, forever associated with the party rallies, book burnings, and the infamous Nuremberg laws of 1935; and later, as the site of the great tribunal convened amidst the ashes of the Third Reich. The latest chapter in that history is being written today, as institutions based in Nuremberg document, preserve, and bear witness to what happened there.

The opening ceremonies of the Dialogs took place in Courtroom 600 of the Nuremberg Palace of Justice (now the Memorium Nürnberger Prozesse)—the very room in which the verdicts were handed down in

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\* Executive Director and Executive Vice President, American Society of International Law.

the trial of major Nazi war criminals on September 30 and October 1, 1946. The speakers included David Crane, the founder and convener of the Dialogs; Ulrich Maly, lord mayor of Nuremberg; Joachim Herrmann, interior minister of Bavaria; Don Ferencz, head of the Planethood Foundation and son of famed Nuremberg prosecutor Benjamin Ferencz; and keynote speakers Fatou Bensouda, chief prosecutor of the International Criminal Court (ICC), and Loretta Lynch, then attorney general of the United States.

In her address, Bensouda spoke of the responsibility of nations to ensure accountability for war crimes and mass atrocities. Her words have taken on even greater urgency in the wake of the threatened withdrawal of South Africa and Burundi from the ICC.

In her remarks, Lynch paid tribute to her distinguished predecessors Robert Jackson, the chief American prosecutor at the Nuremberg trials, and Francis Biddle, the American judge: “By seeking the justice of the liberator rather than the vengeance of the conqueror they gave powerful witness to the principle of equal justice.” She also expressed her pride in having served as a special counsel for the International Criminal Tribunal for Rwanda—“a formative experience that brought me face to face with the devastation that ensues when the rule of law collapses and justice is nowhere to be found.” She acknowledged that “Nuremberg did not put an end to atrocities; none of its architects were so naïve as to think it would.” But she spoke for all of us when she said, “Let us never forget that within these walls, evil was held to account and humanity prevailed.”

The second day’s proceedings took place at the Documentation Centre, which stands at the site of the Nazi Party Rally Grounds. Like Courtroom 600, this place has a powerful resonance that could not fail to impart a special gravity to the proceedings.

The day's sessions included an opening keynote address by Joseph Kamara, attorney general of Sierra Leone and a former prosecutor for the Special Court for Sierra Leone; a presentation on "The Legacy of Nuremberg" by John Barrett, a renowned expert on Robert Jackson; a luncheon address by Hans Corell, former UN under-secretary-general for legal affairs; a prosecutors' roundtable on "The Impact of the International Military Tribunal on Modern International Criminal Law"; a panel on "German Perspectives on the Prosecution of Nazi Crimes"; and "Reflections on Nuremberg" by David Scheffer, the first U.S. ambassador-at-large for war crimes issues, and William Schabas, a leading expert on genocide and international law. The Dialogs concluded with the issuance of the traditional declaration by the chief prosecutors.

These *Proceedings* present an invaluable account of the state of international criminal justice 70 years after Nuremberg—the extent to which the principles and procedures established during and after the trials have taken root in international law and the degree to which they have been accepted around the world and in Germany itself. Together with the nine previous volumes of *Proceedings*, they represent a singular contribution to the literature of humanitarian law.

The Society wishes to thank the Robert H. Jackson Center and our fellow sponsoring organizations: the American Bar Association, the American Red Cross, Case Western Reserve University School of Law, Impunity Watch, the International Bar Association, IntLawGrrls, NYU School of Professional Studies Center for Global Affairs, the Public International Law & Policy Group (PILPG), the Planethood Foundation, Syracuse University College of Law, International Peace and Security Institute, the Whitney R. Harris World Law Institute at Washington University School of Law, and in association with the United States Holocaust Memorial Museum.



## **Lectures and Commentary**



## Words of Greeting

**Joachim Herrmann\***

Lord Mayor, Dr. Ulrich Maly; Ms. Henrike Claussen; U.S. Attorney General, Ms. Loretta Lynch; Chief Prosecutor of the International Criminal Court (ICC), Ms. Fatou Bensouda; honored guests; ladies; and gentlemen, I extend a warm welcome to you in the Free State of Bavaria and from the Bavarian State Government on the opening of the Tenth International Humanitarian Law Dialogues.

Court Room 600 is a worthy venue for such an event. This is where—almost seventy years ago to the day—the main defendants were sentenced. Now Court Room 600 is considered the cradle of modern international criminal law.

While there were previous codifications of international humanitarian law—in particular, the Hague Conventions of 1899 (II) and 1907 (IV Laws and Customs of War on Land)—the mass atrocities and the astounding number of civilian victims killed during World War II resulted in international law history being written in 1945. The Nuremberg Charter (also referred to as the London Charter) and its annex, the Charter of the International Military Tribunal, defined war crimes and crimes against humanity. Together, these charters are considered the birth certificate of International Criminal Law.

What was new about the definition of crimes against humanity? It was independent of a state of war and could apply to crimes against a state's own civilian population. Crimes against humanity also encompassed the horrendous mass exterminations in the Nazi concentration camps. On December 11, 1946, the General Assembly of the United Nations unanimously adopted a resolution affirming the Nuremberg Principles as universally valid legal principles. These

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\* Bavarian Minister of Inner Affairs, Building, and Transport.

seven principles have formed the basis of war crime tribunals through to the International Criminal Court (ICC) in The Hague. Therefore, it was obvious that we should establish the International Nuremberg Principles Academy here in this place.

The Free State of Bavaria, as one of the three partners, is happy to make these historic and impressive rooms available to the International Nuremberg Principles Academy free of charge. As soon as the construction of the new court room at the west end of the Palace of Justice is finished, the judiciary will largely leave the eastern wing and make room for the Academy's offices and seminar rooms.

Ladies and gentleman, unfortunately, we still see attacks on civilian populations and on humanitarian aid workers. In August, a UN report concluded that the Assad regime had used chlorine gas against its own people in Syria. Then, not quite ten days ago, on September 20, 2016, air strikes targeted a transport of relief supplies near the city of Aleppo. Such crimes need to be punished. This is why we need answers on the European and international levels.

I am pleased that we have with us the Chief Prosecutor of the ICC, Ms. Fatou Bensouda, who will give us some insight about the Nuremberg legacy for today's practice at the ICC.

We must cooperate much more, in particular in the struggle against the issues that cause people to flee their countries. It is important that, together with our European partners, we make sure that our developmental policies dovetail with our economic and foreign policies. In particular, we must make more money available for developmental aid. The same thousand Euros we pay for expensive accommodations for one refugee in Germany could do good in many refugees' home countries. But first and foremost, we must make it as clear as possible that in war zones at least a minimum of humanity is ensured in view of the civilian population. This means that

international humanitarian law must be followed and that there is no impunity for violations of the law.

This is why I hope that the international community will live up to its responsibility and that the ICC will be able to play an important part in this process. I wish the Tenth International Humanitarian Law Dialogues the best of success. May the Nuremberg Principles be a lasting legacy for the future!



## Welcome Address

**Donald Ferencz\***

*Guten Abend.* It is a privilege to be part of the opening greetings here in this courtroom tonight. On a personal note, some of you may know that I was born in the city of Nuremberg, the son of a prosecutor, Benjamin Ferencz—who at the age of twenty-seven opened the prosecution in the subsequent proceedings against the *Einsatzgruppen* leaders. The *Einsatzgruppen*, by their own records and own formal reports, condemned themselves for the cold-blooded murder of over a million defenseless and innocent men, women, and children. He opened with the words, “The case we present is a plea of humanity to law.” It is a plea we still hear today. It is a plea that none have worked harder to answer than those at the International Criminal Court, whom we are privileged to have with us tonight.

We have heard already some of the distinguished words of Robert Jackson, who talked about the great tribute of power to reason. For Robert Jackson, and particularly for the Americans, the legacy of Nuremberg and the Nuremberg trials themselves were not simply about punishing and bringing to justice those who had committed war crimes and crimes against humanity. You will know that crimes against peace—the waging of aggressive war—was the centerpiece for Robert Jackson.

Because we have a number of prosecutors here with us tonight, I cannot resist telling a little story of my own with respect to a prosecutor and the crime of aggression. I was giving a talk in The Hague to the International Bar Association in January, this year. At the end of the talk, which was on the illegal use of force, someone in the audience identified himself as a seasoned criminal prosecutor and put forward a very tough question with such intensity that a hush

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\* Executive Director of the Planethood Foundation.

came over the entire audience. He said, “Can you tell me why as a prosecutor I would ever want to prosecute for the crime of aggression when skilled defense counsel would simply tie me up in knots?” And then he added, “Can you answer me that one? Can you?” The audience was as quiet as you are tonight. I think I surprised some people in the audience. I paused, and I said, “No, I can’t. But I know someone who can,” and I quoted the words of Robert Jackson, who stood in this room and explained why we were prosecuting people for starting wars. He said—and certainly former Ambassador Rapp knows these words, I have heard him quote them as well—”The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils, which leave no home in the world untouched.” And we see it today, bombs fall in Aleppo and the counter-attack is in a stadium in Paris. They leave no home untouched.

There is another voice from Nuremberg that I would like to mention, not by way of paying tribute but rather by way of reminder. Hermann Göring—former Reich Marshal, at one time Hitler’s number two in command, who was interviewed in his jail cell, below where we’re sitting today, in April 1946—offered a chilling and blunt assessment. He said words that I think are worth remembering:

Naturally, the common people don’t want war, neither in Russia nor in England nor in America nor, for that matter, in Germany. That is understood. But, after all, it is the leaders of the country who determine policy, and it is always a simple matter to drag the people along, whether it is a democracy or a fascist dictatorship or a parliament or a communist dictatorship. Voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce

the pacifists for lack of patriotism and exposing the country to danger. It works the same in any country.

Now, Robert Jackson worked in the United States Supreme Court as a justice, and he was on leave to Nuremberg as the U.S. Chief of Counsel. Some of you may know, if you have ever been to Washington, D.C., and visited the court, it has a portico with four important words etched above it: Equal Justice Under Law. If it isn't equally applied, it isn't real justice. Jackson knew this, and in fact, in some of his concluding statements, which I would like to quote briefly, he reminded the court in this very room. He said, "The ultimate step in avoiding periodic wars is to make statesmen responsible to law," after which he added, "[a]nd let me make clear that while this law is first applied against German aggressors, the law includes and must condemn aggression by any other nations, including those which sit here now in judgment." These are words for us to remember today.

As some of you will know, the International Criminal Court has an opportunity to fulfill the legacy of Nuremberg by having the Assembly of States Parties criminally outlaw aggressive war as well as aggressive acts which are serious violations of the United Nations Charter. This will come up for a potential re-approval process next year. I hope that we will see the legacy of Nuremberg fulfilled in our time.

So, it is with pleasure that I greet you all and welcome you to my hometown of Nuremberg, and to this courtroom and all that it stands for. Thank you very much.



## **The Arc of Justice: From Nuremberg to the International Criminal Court**

**Fatou Bensouda** \*

Allow me at the outset to express my sincere appreciation to David Crane, the International Humanitarian Law Dialogs, the City of Nuremberg, and the Memorium Nuremberg Trials for extending a gracious invitation to me to address you in this historic venue: Trial Courtroom 600 of the Nuremberg trials.

It is indeed a privilege to address you today in the very same room where seventy years ago, for the first time, those who committed some of modern history's most shocking atrocity crimes were held accountable before a court of law. That these men, in Robert Jackson's words, "were put to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."

In this picturesque city, which has seen the worst and the best that humanity has to offer, we started an important mission—and that was to ensure that during war and conflict, the laws will no longer remain silent.

Through the important and symbolic achievements of the Nuremberg trials, we, in effect, declared that war and violence as simply politics by other means is no longer acceptable to our cultural ethos. A paradigm shift in thinking had crystalized. The seeds had been planted towards the realization of an international criminal justice system.

To be sure, Nuremberg, together with its sister Tribunal in Tokyo, was a watershed moment. The General Assembly of the newly created United Nations was quick to adopt the principles set out in

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\* Chief Prosecutor of the International Criminal Court.

the judgment of the International Military Tribunal and to request the International Law Commission to prepare a draft code of offences against the peace and security of mankind.

Upon adopting the Genocide Convention the following year, the Assembly further requested the Commission to study the desirability and possibility of establishing an international criminal court to try perpetrators of genocide and other international crimes.

However, as we know, the world was not ready to transform such a landmark into a lasting institution. The dynamics of the Cold War and the bipolar system in which the world was divided produced mass crimes in Europe, Latin America, Asia, and Africa; the latter was still very much under the rule of colonialism and apartheid. The world's political landscape was not yet ready to allow that necessary leap forward for humanity.

In the end, the world would wait for almost half a century more after Nuremberg and Tokyo, and would witness again two genocides—first in the former Yugoslavia, and then in Rwanda—before the Security Council decided to create the UN ad hoc tribunals of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, on which my Deputy James Stewart and I, as well as many others in this room, had the privilege to serve, thus connecting again peace to international criminal justice.

The sense of urgency that gripped the international community in the early 1990s was similarly reflected in the request of the General Assembly in 1993 for the International Law Commission to complete its work on the draft statute for a permanent International Criminal Court (ICC). The Commission presented its final draft in 1994, paving the way for the Rome negotiations.

The arc of justice, which started during the modern era in Nuremberg, thus continued towards Rome.

I believe we are yet to fully appreciate and measure the contributions of the Nuremberg and Tokyo Trials, as well as of the ad hoc tribunals, to international law and international criminal justice. Truth be told, it is these institutions that first developed the necessary principles and jurisprudence that has allowed for the prosecution of the most responsible perpetrators, including sitting members of government and powerful warlords.

They also contributed towards the prevention of crimes in conflict-torn regions and helped reestablish the domestic rule of law, as revitalized and reformed national jurisdictions have increasingly shouldered the burden of investigating and prosecuting such crimes.

In these, and so many other ways, the International Criminal Court is a direct result of the legacy of Nuremberg.

Indeed, in Rome in 1998, the once unthinkable happened. More than 120 states, supported by the robust activism of civil society and victims' groups, created an International Criminal Court, a permanent court, with jurisdiction over genocide, crimes against humanity and war crimes, and soon, over the crime aggression—or “crimes against peace”—also a unique legacy of Nuremberg.

On this latter crime, I would like to acknowledge, in particular, the pioneering and heroic work of our dear friends present here today, Christian Wenaweser, Don Ferencz, and of course, Ben Ferencz who, while not present here with us today, still inspires so many of us as we engage in this evolving discipline.

International justice was neither a moment in time any longer, nor an ad hoc solution dependent on the political will of the Security

Council: it became a permanent institution, with the capacity to act independently of the political machinery of the Council.

The bricks had been laid for the creation of a global system based on the international rule of law. That goal was no longer the stuff of fantasies but a work in progress. That work, dear friends, deserves to be supported in all four corners. *Not* for me, not for the Court, but for the betterment and progress of humanity.

As Prosecutor of the International Criminal Court since 2012, my objectives are to seek to hold perpetrators of the worst international crimes to account where I have jurisdiction, to bring a measure of justice to victims and affected communities, and to contribute to the deterrence for such crimes.

I undertake this mandate with full determination, and with complete independence and impartiality; to be clear, *without fear or favor*.

For those who are closely following the Court's work, they would know that my Office has never been busier.

We are conducting multiple investigations and prosecutions in more than twenty-three cases, involving thirty-nine alleged perpetrators, across the ten situations where we are operating. In addition to our investigations and prosecutions, my Office is also conducting preliminary examinations in nine different situations. Earlier today, I announced the opening of yet another preliminary examination; this time concerning the Gabonese Republic following a self-referral we received just recently.

The responsibilities placed on the Court are great; in short, there is no room for errors or deficiencies. Each case is complex: the evidence is voluminous, the operational environment fragile or even hostile, and leadership structures are often difficult to penetrate.

Our efforts have been geared towards continuously producing positive results in all our activities. We do this through a continuous process of self-assessment and a *bona fide* commitment to hone our practices to be as effective and efficient as we can be. I have been unbending in this regard since I assumed office as Prosecutor.

Moreover, my Office continues to work on the promulgation of a number of policies that give clarity and guide the Office's work in accordance with the Rome Statute.

As you may know, based on a number of strategic priorities I set for the Office, in December 2014, we adopted a comprehensive Policy Paper on Sexual and Gender-Based Crimes. Since then, Jean-Pierre Bemba, the former vice-president of the Democratic Republic of the Congo, was convicted earlier this year for, largely, the crime of rape committed by his troops in the Central African Republic. This conviction is a crucial landmark for my Office, and the Court, and, I hope, for the cause of international criminal justice.

We are also in the process of finalizing our Policy on Children in and affected by armed conflict, which will be officially launched at the Assembly of States Parties in November of this year.

On the heels of the successful outcome of the *Al-Mahdi* case—where we charged the defendant with deliberate attacks against historic monuments and buildings dedicated to religion in Timbuktu—I have decided to focus our next policy paper on the protection of cultural property to further highlight the severity of these offences and to hone our ability to investigate and prosecute these serious crimes.

I would like to take a few moments to mention the recently promulgated Policy Paper on Case Selection and Prioritization.

One of the main goals of my tenure as Prosecutor is to strengthen trust and respect for the Office and its crucial mandate by ensuring further transparency and predictability in our operations.

In short, the Policy Paper sets out the considerations that guide the exercise of prosecutorial discretion in the selection and prioritization of cases for investigation and prosecution. It provides a detailed description of the policy and practice of my Office in relation to the process of choosing the incidents, persons, and conduct to be investigated and prosecuted within a given situation and across different situations.

In addition to taking a positive view towards complementarity, a strategic goal of my Office is to develop with partners a coordinated investigative and prosecutorial strategy to close the *impunity gap* in accordance with our respective independent mandates.

This also applies to other types of criminality, which may constitute serious crimes under national law and that are often connected with ICC crimes, such as arms trafficking, human trafficking, terrorism, financial crimes, or the illegal exploitation of natural resources.

After all, the arc of justice can only be complete when the various aspects of criminality are effectively addressed, through effective cooperation of committed institutions, and the victims of all those crimes are able to seek redress.

This last aspect builds directly on the legacy of the Nuremberg trials, including the subsequent proceedings, which sought to capture the true extent of responsibility across the various institutions and sectors of society that contributed to the commission of such terrible crimes during World War II—such as the *Flick*, *IG Farben*, and *Krupp* trials against major industrialists of the time.

We have long stated at the Office of the Prosecutor that we wish to pursue the true extent of criminality in the situations within our jurisdiction. If we are to truly reflect the drivers of conflict, this means also examining the economic drivers of conflict.

We still have far to go, in this regard, to build on the full legacy of the Nuremberg trials, but it is a path we are committed to following.

Seventy years after the historic Nuremberg trials, the arc of justice is filled with strong, consistent legal principles, instruments, and institutions; it has seen the development and the strengthening of impressive and far-reaching jurisprudence.

It bends ever closer towards ensuring the protection of citizens all over the world from mass atrocities.

But one consistent need remains: the full and timely support of the international community, through cooperation, diplomatic support, and the granting of the necessary resources, to fully exercise its mandate.

I would be remiss not to recognize here the important role that academia can play in further analyzing and explaining the work that we do and the role and impact that the ICC has had inside this arc, and beyond—just as the work of researching and commemorating the Nuremberg trials continues.

On this day, we must all re-commit to this same idea, this same goal, as seventy years ago: bring justice to victims of mass atrocities and to put an end to impunity.

You can count on my absolute commitment, as well as that of my Office, to continue on this path.

In closing, allow me to observe that the fight against impunity, the International Criminal Court and the international criminal justice system it is aiming to create in its own image will persevere and thrive.

They will do so not because of hopeful aspirations of their supporters or faltering by their detractors. But because of what they stand for as powerful ideas; because they meet *vital* needs for humanity's progress in the modern era; because without them, we will regress into an even more turbulent world where chaos, volatility, and violence are seen as inevitable norms. This, humanity will not allow.

We owe it to ourselves, our children, and to future generations to nurture the ICC so that it carries on with its crucial work to fight against impunity and to foster the Rome Statute system of international criminal justice.

We must do all we can to ensure that security, stability, and the *protective embrace of the law* become a reality to be relished *by all, in all corners of the world*. Our responsibilities remain great, but our resolve *must* endure.

On this path, humanity has come a long way indeed, but “we have miles to go still before we sleep.”

Thank you for your attention.

## **Commemoration of the Seventieth Anniversary of the Nuremberg Trials**

**Loretta E. Lynch\***

Good evening, everyone, and thank you for that warm welcome. Thank you, Mayor Ulrich Maly for your hospitality in welcoming me to this beautiful and historic city. Thank you, Chief Prosecutor Fatou Bensouda for your inspiring words and for your dedication to the cause of international law and justice. I also want to thank the Robert H. Jackson Center for hosting this annual dialogue and for inviting me to speak to you this evening. And I want to thank this outstanding group of lawyers, public servants, advocates, and educators for being here this evening. I am especially pleased that so many law students are here tonight, including delegations from some of America's finest law schools. We are here to celebrate the cause of justice—a cause that will soon be yours to carry on. I hope that your visit to Nuremberg will inspire you for years to come.

It is an honor to address this distinguished body. And it is especially meaningful to stand here in Courtroom 600 as Attorney General of the United States. Many men and women associated with the department that I am proud to lead—the Department of Justice—participated in the Nuremberg trials. The most famous of them, of course, was one of my predecessors as Attorney General: Robert H. Jackson, the chief American prosecutor and one of the trial's architects. Jackson's deputy was Thomas Dodd, a Justice Department prosecutor who later became a prominent U.S. Senator. Another former Attorney General, Francis Biddle, was America's representative on the judges' panel. And there were many others here who were less well known—people like Assistant Counsel Sadie Arbuthnot, a Justice Department secretary who went to law school at night, and Cecelia Goetz, the first female attorney to be offered a supervisory role at the department—

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\* Eighty-third U.S. Attorney General, 2015–2017.

an offer she turned down in order to come to Nuremberg. Today, the Department of Justice carries on their legacy through our Office of Human Rights and Special Prosecutions, which is responsible for bringing to justice those responsible for genocide, torture, war crimes, and other extraordinary violations of human rights.

Not all who served here were famous. But all who served here made a difference—not just in their own time, but for all time. Simply by holding judicial proceedings, they made clear that war crimes and crimes against humanity are not beyond the reach of justice; rather, they are crimes that each of us has a responsibility to address. By seeking the justice of the liberator rather than the vengeance of the conqueror, they demonstrated that war does not have to be the final arbiter of human affairs. And by extending the rights of due process to those responsible for the most barbaric crime in history, they gave powerful witness to the principle of equal justice.

These were important precedents, ones that have shaped our world ever since. Nuremberg helped lay the foundation for the international tribunals that have followed—including the Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court. It also helped to inspire the Universal Declaration of Human Rights and an expanded view of human rights generally. And the legacy of Nuremberg certainly has shaped my life and career as well. I was proud to serve as special counsel to the prosecutor for the International Criminal Tribunal for Rwanda—a formative experience that brought me face to face with the devastation that ensues when the rule of law collapses and justice is nowhere to be found.

That devastation is all too real, and—despite the progress we have made—it is still all too present in our world. Nuremberg did not put an end to atrocities; none of its architects were so naïve as to think it would. Indeed, the cry of “Never again” has echoed far too often in the face of new atrocities.

Certainly the onslaught of evidence of man's inhumanity to man can leave one dispirited and discouraged. But we cannot—and we should not—give in to despair, because the legacy of Nuremberg is that when we are called to confront the evil that walks this earth, we turn to the law. When we need to mete out justice to those who have reaped the whirlwind and revel in the chaos resulting therefrom, we turn to the law. And through the law we give voice to those shattered souls who seek redress, and we provide a reckoning to those who trade in fear and trembling. Let us never forget that within these walls, evil was held to account and humanity prevailed.

And because of Nuremberg, never again can future generations turn a blind eye to the atrocities committed against their fellow human beings. Never again need future generations respond to war crimes or crimes against humanity with abject resignation. Because the lesson and legacy of Nuremberg is that if humankind is determined enough and united enough, no crime—no matter how far beyond the pale—is beyond the reach of justice.

These are the lessons of Nuremberg—and so today, as we gather in this hallowed space, let us pause to learn them once again. Let us leave here renewed in our devotion to justice—not just for the people of our own countries, but for the people of all countries. Let us leave here refreshed in our determination to defend human rights, to protect human liberty, and to uphold human dignity wherever and whenever it is threatened. And let us leave here with a new resolve to build a world worthy of those who served in Courtroom 600, as well as the victims they represented—a world where every life is accorded equal value, where no one lives in the shadow of arbitrary power, and where all enjoy the shelter of impartial law.

That is the vision that has brought us here tonight—and it is the mission that binds us together. So let me thank all of you—both the lawyers who do this work today, and the students who will carry on

this work tomorrow—for your commitment to that vision, and your contributions to that mission.

Thank you.

# The Future of International Criminal Law Looking Back at Nuremberg

Hans Corell\*

First, thank you for inviting me to participate in these, the Tenth International Humanitarian Law Dialogs. As always, it is a great pleasure to participate in the Dialogs. And on this occasion it is very special since we are meeting not at Chautauqua but in Nuremberg to celebrate the seventieth anniversary of the verdicts of the International Military Tribunal.

Let me iterate that my first experience of working on international criminal law was as a war crimes rapporteur in the former Yugoslavia in 1992–1993. My colleagues and I presented the first proposal for the tribunal that eventually became the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>1</sup> In the UN, I was involved in the establishment of this tribunal, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC). I was the Secretary-General’s Representative at the Rome Conference in 1998. In my last official function in my capacity as the Legal Counsel of the United Nations I represented Secretary-General Kofi Annan at the inauguration of the court house for the SCSL in Freetown in March 2004.

I have been asked to address the topic, “The Future of International Criminal Law Looking Back at Nuremberg.” Before I do this, let me mention that some of the contents in my keynote address at the Sixth Annual International Humanitarian Law Dialogs in August

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\* Former Under-Secretary-General for Legal Affairs and Legal Counsel of the UN from 1994–2004.

<sup>1</sup> HANSCORELL, GROHILLESTADTHUNE, & HELMUTTÜRK, PROPOSALFORANINTERNATIONALWAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA (1993), *available at* <http://www.havc.se/res/SelectedMaterial/19930209csceproposalwarcrimestribunal.pdf>.

2012, “Reflections on International Criminal Law over the Past Ten Years,” are relevant also in this context.<sup>2</sup> The same applies to the presentation that I delivered a couple of months later at the Whitney R. Harris World Law Institute at Washington University, St. Louis, entitled, “Reflections on International Criminal Justice: Past, Present and Future.”<sup>3</sup> In this context, I might also mention my Dean Fred F. Herzog Memorial Lecture in September 2009, entitled, “International Prosecution of Heads of State for Genocide, War Crimes, and Crimes against Humanity.”<sup>4</sup>

However, today I will present with a more circumspect perspective, looking further into the future than I have done before. It will be in three main parts:

- The Nuremberg legacy,
- The present geopolitical situation, and
- The future of international criminal law.

### **The Nuremberg Legacy**

With respect to the Nuremberg Legacy, let me mention that I had read about the Nuremberg trials and the Nuremberg Principles in the past. But when I was appointed a Commission on Security and Cooperation in Europe (CSCE) (now Organization for Security and Cooperation in Europe (OSCE)) war crimes rapporteur for the former Yugoslavia from 1992–1993, it was natural to dive deeper into the subject matter. In particular, I remember reading with

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<sup>2</sup> Hans Corell, *Reflections on International Criminal Law over the Past Ten Years*, in PROCEEDINGS OF THE SIXTH INTERNATIONAL HUMANITARIAN LAW DIALOGS (2013).

<sup>3</sup> Hans Corell, *Reflections on International Criminal Justice: Past, Present and Future*, 12 WASH. U. GLOB. STUD. L. REV. 621 (2013).

<sup>4</sup> Hans Corell, *International Prosecution of Heads of State for Genocide, War Crimes and Crimes Against Humanity*, 43 J. MARSHALL L. REV. XXV, 25–41 (2009).

great interest and admiration Telford Taylor's "The Anatomy of the Nuremberg Trials: A Personal Memoir."

The Nuremberg Trial was a historical event. As a matter of fact, it put international criminal justice on the agenda of the United Nations, which had been established in 1945. However, as we all know, it would take a long time before the heritage of Nuremberg bore fruit within the Organization.

Today, I think the Nuremberg heritage is best summarized by referring to the "Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal," the so-called Nuremberg Principles. They were elaborated by the United Nations International Law Commission and presented to the General Assembly in 1949–1950.<sup>5</sup> The hallmark of the seven principles is that "[a]ny person who commits an act which constitutes a crime under international law, [including persons acting as head of state or responsible government official,] is responsible therefor and liable to punishment." The crimes defined in the principles are crimes against peace, war crimes, and crimes against humanity. Now, these principles are translated into the Rome Statute of the International Criminal Court (ICC).

With respect to the legacy of Nuremberg, I would like to refer to the excellent keynote address Professor Leila Sadat delivered to the International Nuremberg Principles Academy—on November 20, 2015, at a conference commemorating the 70th anniversary of the Nuremberg Trial—entitled "The Nuremberg Trial, Seventy Years Later."<sup>6</sup> I must say that I agree very much with the analysis that Professor Sadat makes in this address and in particular when she

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<sup>5</sup> U.N. Rep. of the Int'l L. Comm'n, Apr. 12 1949–June 1949, U.N. Doc. A/925; GAOR, 4th Sess. Supp. No. 10 (1949).

<sup>6</sup> Leila Sadat, *The Nuremberg Trial, Seventy Years Later*, Wash. U. in St. Louis Sch. of L. Legal Stud. Res. Paper Series. Paper No. 16-06-01 (2016).

concludes by restating the obvious: “The record of compliance with the Nuremberg principles is mixed. At the same time, the Nuremberg legacy itself is extraordinary, and its importance is hard to overstate.”

Two of the situations she mentions I remember with particular concern, since they occurred during my tenure as the UN Legal Counsel, namely the attack on the World Trade Center in 2001—commonly referred to as 9/11—and the attack by the United Kingdom, the United States, and their allies on Iraq in March 2003.

With respect to 9/11, I am afraid that this was a dangerous turning point, which could be seen as the first step in the global development over the past years—namely that Western democracies have backtracked with respect to the protection of human rights. Guantánamo is still not closed, and many countries, including my own, have participated in extraordinary renditions and incarcerations under conditions that are totally incompatible with applicable international human rights standards. I therefore completely agree with Professor Sadat when she says that “[p]articularly since the attacks of September 11, 2001, the Nuremberg principles have been undermined by the policies of the very nations that gave them birth, including my own country.”

With respect to the attack on Iraq by the United States and the United Kingdom in March 2003, this was a flagrant violation of the UN Charter. Since the attack was not in self-defence, a resolution by the Security Council was a necessary precondition for the use of armed force in this situation. The United Kingdom clearly understood this, but the efforts by the U.K. Permanent Representative to the UN to gain support for such a resolution were in vain. The Chilcot Commission has now clarified what happened on the United Kingdom side at the time.<sup>7</sup>

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<sup>7</sup> See Report of a Committee of Privy Counsellors, *Report of the Iraq Inquiry – Executive Summary* (July 6, 2016), available at [http://www.iraqinquiry.org.uk/media/247921/the-report-of-the-iraq-inquiry\\_executive-summary.pdf](http://www.iraqinquiry.org.uk/media/247921/the-report-of-the-iraq-inquiry_executive-summary.pdf).

However, the attack was not only a violation of the UN Charter. It was also a clear violation of Nuremberg Principle VI, which defines crimes against peace as:

- (i) Planning, preparation, initiation or waging a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

Another permanent member of the UN Security Council has resorted to his kind of behavior. I am referring to the Russian attacks on Georgia in 2008 and Ukraine in 2014, including the annexation of Crimea. In my view, the issue of Crimea could have been solved through negotiations and an agreement if Moscow, Kiev, and the West had demonstrated sufficient statesmanship.

Under all circumstances, the fact that the permanent members of the Security Council behave in this manner constitutes a serious threat to international peace and security since the Council is entrusted with the primary responsibility for the maintenance of international peace and security.

### **The Present Geopolitical Situation**

Let us now focus on my second section: the present geopolitical situation. Here, I will address three aspects: the world population, the global economy, and refugees, in particular refugees generated by climate change.

*The World Population*

With respect to the world population, we were some two billion people on the globe when the United Nations was established in 1945. We are presently some 7.4 billion people in the world. And, according to the United Nations Population Division, we will be about 9.6 billion people at mid-century. The Population Division has looked further into the future and concluded that the world population will probably stabilize somewhere around nine billion people in the next 300 years. Under all circumstances, this is a major growth of the world population, and it is inevitable that this will have very great effects on the human habitat.

*The World Economy*

As far as the world economy is concerned an article published by Keystone India around ten years ago contains a presentation of the distribution of the world Gross Domestic Product (GDP) in 2004 with estimated figures for 2050.

Distribution of the world GDP in 2004 and 2050 (estimated):

	2004	2050
European Union	34 %	15 %
USA	28 %	26 %
China	4 %	28 %
India	2 %	17 %
Japan	12 %	4 %
Others	20 %	10 %

The estimated figures for 2050 must of course be understood as estimates. When, a few weeks ago, I looked at the GDP figures published by the World Bank, I realized that China has already bypassed the United States in GDP terms. The GDP figures for 2015, based

on “purchasing power parity” (PPP), are 17,946 billion USD for the United States and 19,524 billion USD for China. I wanted to mention this as an indication of the enormous geopolitical shift that we will see over the next few years, which will also affect the global legal situation.

### *Refugees*

Refugees must also be kept in mind, in particular refugees generated by climate change and its effects on the living conditions of humankind. Last week, I moderated a panel discussing who is a refugee at the Annual Conference of the International Bar Association (IBA) in Washington, D.C. By coincidence, this happened on September 20, the day after the General Assembly high-level plenary meeting addressed large movements of refugees and migrants at its seventieth session. On September 19, the Assembly had adopted the New York Declaration for Refugees and Migrants.<sup>8</sup> At the IBA Conference, the highly qualified panelists discussed the refugee topic from various points of departure.<sup>9</sup> References were made to the declaration just adopted by the UN General Assembly and the present situations in Europe and Asia. The number of forcibly displaced persons in the world today is about 65 million, including 21 million refugees, 3 million asylum seekers, and over 40 million internally displaced persons. Therefore our panel concluded that the 1951 United Nations Convention Relating to the Status of Refugees is still relevant in today’s world.

However, in the discussion there was special focus not so much on the articles of the Convention as on one of the provisions in the

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<sup>8</sup> New York Declaration for Refugees and Migrants, U.N. Doc. A/RES/71/1 (Sept. 19, 2016), *available at* [https://refugeesmigrants.un.org/sites/default/files/a\\_71\\_11.pdf](https://refugeesmigrants.un.org/sites/default/files/a_71_11.pdf).

<sup>9</sup> Speakers on the panel included Assistant Professor Idil Atak, Department of Criminology, Ryerson University, Toronto, Canada; Baroness Helena Kennedy QC, London, United Kingdom; Hon Justice Michael Kirby, Former Justice of the High Court of Australia, Sydney, Australia; and Alex Neve, Amnesty International, Ottawa, Canada.

preamble: “[C]onsidering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.” The conclusion in our panel was that such cooperation is absolutely necessary, but that there is a serious risk that it is not forthcoming in spite of the recently adopted UN Declaration for Refugees and Migrants. As for me, I can see consequences for international criminal law here.

The 1951 Convention Relating to the Status of Refugees must be seen against the background of the situation caused by the Second World War. However, another phenomenon might generate refugees, namely climate change. The main factors here are desertification and sea level rise, since both will cause situations where land becomes uninhabitable with the result that people who now live in these areas will be forced to flee.

After I left the United Nations in 2004, I focused specifically on the polar regions and the effects that climate change in these regions will have on the rest of the globe. I have come to realize that not many people are aware of the size of these regions and the differences between the two.

In Antarctica, fifty-three states have a well-functioning co-operation within the framework of the Antarctic Treaty, signed in Washington on December 1, 1959. The main purpose of the Treaty is to ensure Antarctica shall continue to be used exclusively for peaceful purposes and shall not become the scene or object of international discord. The treaty applies south of 60 degrees south latitude. Antarctica is a continent of some 14 million square kilometers surrounded by sea, compared with the surface area of the United States, which is 9.6 million square kilometers, and the Russian Federation, which is 17 million square kilometers. About 90 percent of the freshwater

resources of the globe are frozen on the continent Antarctica. With global warming some of this ice will start melting.

The Arctic is the opposite in several ways. The Arctic is a sea—the Arctic Ocean—surrounded by continents. This sea is also some 14 million square kilometers. The overarching legal regime here is the 1982 United Nations Convention on the Law of the Sea. This means that the rules on the territorial sea, the exclusive economic zone, and the continental shelf apply. The sea ice is melting in the Arctic Ocean. This does not directly affect the sea level, but it will contribute to the thermal expansion. Furthermore, the albedo effect of the white sea ice, which rejects the radiation from the sun, is disappearing. Instead, the dark sea surface attracts the radiation. This is why the rise of temperature is twice as fast in the Arctic as elsewhere. But there are also glaciers melting, particularly in Greenland, which will have an effect on the sea level. Another effect of warming is that permafrost in the region is melting and releasing methane, an effective greenhouse gas.

Taken together, the effects of climate change, in particular in the polar regions, will lead to a considerable rise of the sea level and could generate millions of refugees. This will have serious consequences for international peace and security. Therefore, it is important that political leaders around the world realize that they must focus on the long-term effects of these phenomena when they discuss how to maintain international peace and security. In this context it is crucial that they also understand the importance of establishing the rule of law, of which human rights is a core element, at the national and international levels. In this analysis the subject matter that we discuss here at Nuremberg—international criminal law—is an important component.

### **The Future of International Criminal Law**

So, having now looked back at the Nuremberg legacy and briefly discussed three aspects of the present geopolitical situation let

me now address my third main part: the future of international criminal law. The focus of this part will also be on three elements: the law, the performance of the International Criminal Court, and the performance of states.

### *The Law*

With respect to the law, it is codified in various sections of the Rome Statute of the International Criminal Court: establishment of the court; jurisdiction, admissibility, and applicable law; general principles of criminal law; composition and administration of the court; investigation and prosecution; the trial; penalties; appeal and revision; international cooperation and judicial assistance; enforcement; assembly of states parties; financing; and final clauses.

The other international criminal tribunals are gradually being phased out, and the Rome Statute will be the remaining core criminal law at the international level. This is not to say that additional special criminal tribunals may not be established in the future. By way of example, the Rome Statute does not prevent the UN Security Council from establishing new courts of the same kind as the ICTY and the ICTR. However, this should not be necessary in view of the fact that under Article 13(b) of the Rome Statute, the Security Council—acting under Chapter VII of the UN Charter—has the authority to refer situations in which one or more of the crimes referred to in Article 5 of the Statute appears to have been committed to the ICC Prosecutor.

With respect to the development of this international criminal law, I see no major difference from the manner in which criminal law develops at the national level. It will develop through the application of international law by the different organs and actors under the Rome Statute. The main contribution to its development will be the case law produced by the ICC. However, there might also be amendments

to the Rome Statute. Reference in this case could be made to the so-called Kampala amendments adopted in 2010.

With respect to amendments, it is crucial that the integrity of the Rome Statute is maintained. By way of example, it is important that the attempts by some states to exempt persons at the level of head of state or government from the jurisdiction of the ICC are prevented. This is a very serious threat to the integrity of international criminal law. If evidence leads the Prosecutor to persons at this level, those individuals should be subject to the jurisdiction of the ICC. This is for the simple reason that they normally have immunity under national criminal law. Here, I agree with former UN Secretary-General Kofi Annan when he was asked a question regarding this phenomenon in 2013: “Those leaders who chose to withdraw from the Court will earn a badge of shame.”<sup>10</sup>

Looking further into the future of international criminal law, we may experience additional efforts to administer justice at the international level. This may happen in areas like transnational organized crime, trafficking in persons, terrorism, and corruption. If this happens, a complementarity principle should likewise be applied.

### *The Performance of the International Criminal Court*

Let me now address the second element: the performance of the International Criminal Court. A key factor for the future of international criminal law will be how the ICC and its organs perform. It is obvious that it takes time before an organ of this complexity functions as intended. A complicating factor here is of course that the ICC is critically dependent on co-operation from national authorities. The needed cooperation is not always forthcoming.

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<sup>10</sup> See Kofi Annan, Third Annual Desmond Tutu International Peace Lecture (Oct. 7, 2013), available at <http://www.kofiannanfoundation.org/videos/the-third-annual-desmond-tutu-international-peace-lecture-2/>.

With respect to the performance of the organs of the ICC, I have followed the Kenyan cases closely. You may recall that after the general and presidential elections in Kenya in December 2007 there followed a period of extreme violence in the country. Some 1,300 people lost their lives and around 650,000 were internally displaced. This prompted the African Union to appoint a Panel of Eminent African Personalities, chaired by former UN Secretary-General Kofi Annan, to engage in what became known as the Kenya National Dialogue and Reconciliation. For almost six years, I served as the Legal Adviser to this Panel.

To make a long story short, a few persons were indicted before the ICC, among them Uhuru Kenyatta and William Ruto, now President and Vice President of Kenya respectively. In an article published in 2014, I developed my thoughts regarding these cases as they stood then. Let me quote from my conclusions in this article:

In my view, the Kenyan cases before the ICC went wrong from the very beginning, and there is now a serious risk that they might become unmanageable at the trial stage. Needless to say, since I am not familiar with all the details of the cases it is difficult to know exactly where the fault lies. But it is obvious that serious mistakes have been committed. The responsibility might rest with the Prosecutor who may have taken the cases to the Court before he had made sufficiently thorough investigations. The responsibility might also rest with the judges who obviously have not understood what a court must do if it confirms charges against persons for very serious crimes under international law and commits them to trial.

A possible scenario is that the Prosecutor approached the Court before he had solid cases and that the judges (judge Hans Peter Kaul dissenting) did not realize that they should have sent the cases back to the Prosecutor asking him to make

a more reliable investigation before reverting to the Court, cf articles 54(1)(a) and 61(7)(c) of the Rome Statute.<sup>11</sup>

Now we know that the cases against Uhuru Kenyatta and William Ruto were terminated before the ICC. Time does not allow me to go into detail here, but let me express grave concern over how the ICC dealt with these cases. I maintain that the *presumption of innocence* is a given. As I said in my article quoted above, under no circumstances can anyone be considered guilty of crimes before he or she is found guilty by a competent court of law. However, the question that presents itself here is how a court should deal with persons who are suspected of very grave crimes. One of the first things that I learned as a young court clerk more than fifty years ago is that if someone is indicted as suspected for very grave crimes, by definition this person should be arrested and put in detention on remand. Otherwise, he or she may try to evade the trial and also interfere with the evidence. Today I ask if this is not precisely what happened in the Kenyan cases.

I am now following the work of the ICC and its Office of the Prosecutor with great expectations. We are glad to see Fatou Bensouda, the present Prosecutor, among us here. I wish you all the best in your important charge!

Another concern I have is that the work of the ICC risks becoming too academic. My experience from ten years on the bench in my own country is that justice must be done with precision and pragmatism.

### *The Performance of States*

As I said, a complicating factor is the ICC's critical dependence on cooperation from national authorities. In my previous presentations on

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<sup>11</sup> Hans Corell, *Challenges for the International Criminal Court*, INTERNATIONAL JUDICIAL MONITOR (Winter, 2014), [http://www.judicialmonitor.org/archive\\_winter2014/specialreport1.html](http://www.judicialmonitor.org/archive_winter2014/specialreport1.html).

this topic, I have pointed to Part 9 of the Rome Statute, and in particular to Article 86 containing a general provision that obligates states to cooperate fully with the ICC in its investigation and prosecution of crimes within the jurisdiction of the Court. This provision is followed by a number of detailed rules on the topic, and the question is to what extent states fulfill these obligations.

ICC Prosecutors and other representatives of the Court have discussed this issue, and it has also been examined in the literature. Let me quote from the conclusion in an article published before the Rome statute entered into force:

The ICC will rely heavily on the cooperation of States Parties for its success. States Parties will be asked to arrest and surrender suspects, investigate and collect evidence, extend privileges and immunities to ICC officials, protect witnesses, enforce ICC orders for fines and forfeiture and, at times, prosecute those who have committed offenses against the administration of justice. Key to this cooperation will be domestic legislation permitting the State Party to assist the ICC when requested.<sup>12</sup>

As I have said in the past, this means that states have an obligation to carefully examine their national criminal justice systems in the process of ratifying the Rome Statute. It is obvious that in many cases it will be necessary to introduce rather elaborate implementation legislation. A natural ingredient in this process should be to see if improvements of a more general nature can be made to the national system based on the Rome Statute.

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<sup>12</sup> Valerie Oosterveld, Mike Perry, & John McManus, *The Cooperation of States With the International Criminal Court*, 25 *FORDHAM INT'L L.J.* 767 (2001).

Other aspects come into the picture when looking at the specific responsibility that rests with the states parties to the Rome Statute. A proper administration of the ICC is heavily dependent on the support of the Assembly of States Parties (ASP). In the past, I have expressed concern in relation to three problems and suggested ways to solve them:<sup>13</sup>

- First, in addressing the question of the qualifications of candidates for election to the Court, the solution should be to abolish List B for ICC judicial candidates.
- Second, on the question of age, the solution should be not to elect judges who will turn seventy years old before the expiration of their nine-year term.
- Third, in regard to the method of electing judges, the solution should be appointing an independent committee of experts to review not only the candidates for election, but also the judges who remain on the Court, so as to be able to propose candidates who would be most suitable from the point of view of the composition of the ICC as a whole.

I am fully aware that the first suggestion may be problematic. However, surely it must be possible to find candidates with not only courtroom experience, which in my view should be an absolute prerequisite for serving on the court, but also academic expertise. With respect to the third suggestion, I was very pleased when the Assembly of States Parties appointed the Advisory Committee on Nominations of Judges. With respect to the second suggestion, I found that it was a step in the right direction when this Advisory Committee included “date of birth” in the suggested arrangement for the CVs of candidates.

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<sup>13</sup> Hans Corell, *Foreword to ON THE PROPOSED CRIMES AGAINST HUMANITY CONVENTION* (Morten Bergsmo & SONG Tianying eds., 2014).

A particular problem is that many states—including the permanent members of the Security Council, China, the Russian Federation, and the United States of America—are not parties to the Rome Statute. This is one of the major challenges to the future of international criminal law. It also brings to the forefront the role of the Security Council. I have also addressed this issue in the past, pointing to the contribution that members of the Security Council could make to our efforts to establish the rule of law both at the national and international levels and the need for crime prevention and protection of human rights.

Against this background, it is of tremendous importance that the Security Council applies Article 13(b) with consequence, using the same yardstick everywhere. In addition, the Council should act in accordance with its own resolutions. It goes without saying that applying this provision in the Rome Statute and then not following suit in support of the Court organs is unacceptable. I also reiterate that in these cases the United Nations should provide the funding of the ICC.

Finally, in this context I would like to mention a project called Law & Diplomacy. It is a multi-year project conducted by the International Bar Association and Académie Diplomatique Internationale. The Academy is an international organization dedicated to promoting modern diplomacy and contributing to the understanding and analysis of emerging dynamics in global affairs. The project intends to identify principles and guidelines for avoiding contradictions between diplomatic and judicial processes, as well as potential areas for cooperation, in responding to international crises that involve potential violations of international humanitarian and criminal law. In the near future, the project will publish five case studies that draw conclusions based on the experiences of the operations in Bosnia, Darfur, Kosovo, Libya, and Rwanda. Hopefully, this will be of assistance in the future, in particular to the United Nations.

## Conclusion

To conclude, the future of international criminal law is an important matter, closely linked to the development in all sectors of our global village. In the past, I have asked whether it would be possible to administer a country if all of a sudden the criminal justice system did not apply in certain municipalities or counties. Obviously not! I therefore reiterate with great emphasis that the globalization means that international criminal law must apply and an international criminal justice system must function all around the world. This is a goal of paramount importance for the future.

International prosecutors have an important role to fulfill here. Based on their unique and special competence and experience, they can assist in explaining this to those who make decisions regarding these matters at the political level.

Finally, my *praeterea censeo*: empowerment of women is a precondition for international peace and security—and for justice.

Thank you for your attention!



## Joseph F. Kamara Introduction

David M. Crane<sup>\*</sup>

Welcome, everyone, friends, and colleagues. This is a celebration of all of we have done in representing victims of atrocities around the world. I think the Dialogs have taken on a special moment every time we meet, each different, but always fun. As you can tell from last night, for those of you who have never been to a Dialog, we tend to become informal quickly. I am always humbled when we do meet. But last night was an especially humbling moment on so many levels for me. When you walk into Courtroom 600—which is not any bigger than this room in many ways—you take a deep breath, and you smell justice, do you not? I certainly do, every time I go into Courtroom 600. I want to thank you for all that you have done, are doing, and will continue to do in seeking justice for the oppressed.

I have the real honor of introducing a longtime friend. His formal biography is in the materials so I am not going to go through it all. We all understand the Attorney General and Minister of Justice of the Republic of Sierra Leone has a distinguished career. Instead, I want to introduce Joseph Kamara by telling you how I met him.

I was sitting in my office in September 2002. There were about twenty people in the entire Special Court for Sierra Leone. The Office of the Prosecutor probably included about twelve people as we began our operation of creating a justice plan for the people of Sierra Leone. Mike Penn, who was my special assistant, came in and said, “Joseph Kamara is here for the interview.” He was the first Sierra Leonean barrister to interview to assist us in our work assembling a task force against the warring factions of Sierra Leone.

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<sup>\*</sup> Professor of Practice, Syracuse University College of Law and Founding Chief Prosecutor, Special Court for Sierra Leone, 2002–2005.

It was a nice day, and there were not many people in the Office of the Prosecutor, so I said, let us hold the interview out on the patio. So sitting in a chair on the patio—which is right next door to Solomon Berewa’s house, the vice president of Sierra Leone—was Joseph Kamara. We chatted, and I was deeply impressed. It was a challenge, amazingly, to get Sierra Leoneans to join us at the Special Court for Sierra Leone but Joseph was going to stand up. I remember traveling through Canada and the United States, urging various Sierra Leonean barristers and associations to support us. As you know, the international court for Sierra Leone is an international hybrid tribunal, so one of my key prosecutorial strategies was to make sure that we had a good representation of investigators and barristers. We ended up having Sierra Leoneans represent about a third of my office. But Joseph was the first Sierra Leonean barrister to step forward and say, “I would like to be a part of this important venture.”

For many years since, my friend and I, along with seventy other great human beings, have done our best to seek justice for the people of Sierra Leone. It is now my honor and privilege to introduce our keynote speaker, Joseph Fitzgerald Kamara, the Attorney General and Minister of Justice of the Republic of Sierra Leone.

## **Keynote Address**

**Joseph F. Kamara** \*

Friends, colleagues, distinguished ladies and gentlemen, on behalf of the government and people of Sierra Leone, I express profound gratitude to the facilitators of this conference for letting me deliver the keynote address to this august conference of academics, politicians, practitioners, journalists, and well-wishers.

As we commemorate the seventieth anniversary of the Nuremberg trials, we are gathered to consider lessons learned and to map out new directions and strategies to offer justice and peace to the millions of the people around the world. We have a duty to preserve the legacy of accomplished work and to bridge the impunity gap in international communal justice systems. Today, as we search our consciences in the delivery of peace and justice, we must reflect on how far we have gone or how high we have jumped, or, more poignantly, as Michelle Obama stated, while others go low, we go high. Have we jumped so high? Have we scaled the steps upward in promoting justice for all and injustice to no one?

Today, as we review the legacy of the Nuremberg trials, widening gaps continue threatening the needs and aspirations of ordinary people around the world. For instance, there is a continuing need for objective and sincere analysis of the issues. The emerging trend of proselytizing international conventions to suit state aggression and dominance of weaker nations by the rich must stop. This must stop if we want peace and harmony, for there is no peace without justice. Currently, we are experiencing an unbridled wave of attacks against large numbers of civilians. These attacks also target civilian objects under the guise of justifying the proportionality rule or expanding the breadth of what constitutes a civilian population.

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\* Deputy Prosecutor of the Special Court for Sierra Leone.

Indeed, some seventy years ago, the bold and beautiful of our times rose to the occasion of the moment and sounded a clarion call for justice in Nuremberg. Fifty-eight years later, in a small country on the west coast of Africa named Sierra Leone, another generation of the bold and beautiful bestrode the narrow walls of colossus and sang from the same hymn sheet as Robert Jackson, prosecutor of Nuremberg fame. And what was that song? It was a song of justice for all.

As I recall, the day Professor David M. Crane and I opened the case against the civil defense forces in the first trial of the Special Court, our opening was so powerful and effective that I am sure it made the famous Robert Jackson sick with envy. Yet, he must have been proud that in a land yonder in Africa, the vibes and echoes of justice resonated like a drumbeat celebrating a royal wedding in the lower savanna.

Over the intervening years, between the Nuremberg trials and the Sierra Leone trials, many jurists have pondered the phenomenon of how to secure and preserve justice. At the international level, the preservation of justice has burned large: the sense to strengthen the rule of law, to dispense justice fairly and efficiently, to enforce international law, and to build a new body of law. However, if we dive beyond strictly legal aspects, securing justice also entails larger goals of benefiting victims and rebuilding societies; this can be accomplished by building a new body of jurisprudence, securing trust and confidence in a legal system, and, last but not least, deterring potential perpetrators.

As we examine the legacy of Nuremberg, I will show the impact that it has on international criminal justice generally, on Sierra Leone specifically, and in the context of Africa.

I would like to begin with a historical context for Sierra Leone. In 2002 the Sierra Leone government and the United Nations set up the Special Court for Sierra Leone through Security Council resolution 1315. The Court's mandate was to try those who bore the greatest responsibility

for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone. The Special Court had four distinguished trials spanning slightly over a decade: the Civil Defense Forces (CDF) case; the Revolutionary United Front case; the Armed Forces Revolutionary Council (AFRC) case; and the case of Charles Taylor, the former president of the Republic of Liberia.

The AFRC trial judgment was issued on June 20, 2007. That case was a success for the Office of the Prosecutor; each of the accused was found guilty and convicted on eleven counts out of the fourteen counts of the indictment. The first accused, Alex Tamba Brima, and the third accused, Santigie Borbor Kanu, were sentenced to fifty years imprisonment, while the second accused, Ibrahim Bassy Kamara, was given a forty-five-year sentence. The CDF appeal judgment in May 2008 substantially revised the sentences imposed on Moinina Fofana and Allieu Kondewa. It increased the sentences from six to fifteen years for Fofana and from eight to twenty years for Kondewa. The judgment in the Revolutionary United Front case—delivered in February 2009—sentenced Issa Sesay to fifty-two years, Morris Kallon to forty years, and Augustine Gbao to twenty-five years imprisonment.

The Charles Taylor case is a *locus classicus*. Charles Taylor was the first former head of state to be indicted, subsequently tried, and convicted for war crimes and crimes of humanity by an international criminal tribunal since Nuremberg. On April 26, 2012, the Trial Chamber found Charles Taylor guilty on eleven counts, finding him liable for planning attacks and for aiding and abetting crimes committed by rebel forces in Sierra Leone. The Court sentenced the former Liberian president to fifty years imprisonment.

Regarding the legacy of the Special Court, the first issue of controversy was head of state immunity, which turned out to be a “crucible” in ascertaining the Special Court’s jurisdiction. In particular, Charles Taylor filed a motion to quash his indictment and annul his warrant

of arrest issued while he was head of state in office on the ground that he is immune from the jurisdiction of the Special Court. The Appeals Chamber then had to determine whether it was lawful for the Special Court to issue an indictment and to circulate an arrest warrant in respect of a serving head of state. After careful consideration, the Appeals Chamber found that international jurisprudence established that the sovereign equality of states does not prevent an international criminal tribunal from prosecuting a head of state.

The Appeals Chamber additionally followed the ruling of the International Court of Justice (ICJ) in *Democratic Republic of the Congo v. Belgium*, in which the ICJ concluded that customary international law makes provision for a serving foreign minister to enjoy full immunity from a foreign national court, but such persons may be tried before certain international courts. However, it is instructive to note that the Appeals Chamber adopted and endorsed this view of this case due to the need to draw a distinction between the proceedings of a foreign national court and an international criminal court. The choice for the distinction stems from the principle that one sovereign state may not exercise adjudicative powers on the conduct of another state. In the final analysis, the Special Court was considered an international criminal tribunal, not a foreign national court, and therefore could adjudicate President Taylor's criminal proceedings.

The value of this lesson—and I am sure Robert Jackson never contemplated that the long arm of the law would stretch into Africa—is that punishing leaders for war crimes and crimes against humanity is no longer inconceivable. Every man and woman can now be held accountable for international war crimes, regardless of status or title.

It is interesting: as I stand here, having been the hunter as a prosecutor, I now feel a sense of belonging to the hunted as a politician. But it is all part of the legacy. I am now positioned to know I am guarded by the rules of engagement of international law, and that is the benefit

of hindsight that I am bringing on board in my work as Attorney General and Minister of Justice.

Now, let us take the African context in general. Here the message is loud and clear; respect the human rights and dignity of your people, failing which, the long arm of the law will pull you aside and demand accountability. In east Africa, we witnessed the issuance of an arrest warrant for the Sudanese president. However, some Sierra Leoneans still seem divided over the quality of justice as delivered by the Special Court. Opponents of the court think that the huge amounts of money spent could have been better used to improve the quality of lives of the victims. They also point out that sentencing a few people the court had in its custody will not be enough to deal with the culture of impunity in Sierra Leone. And to those critics I say, “Wrong.” Yes, they are wrong. The impact of the Special Court goes beyond the ordinary levels of justice. Today in Sierra Leone, I have experienced three consecutive peaceful elections. That is unprecedented.

On the other hand, supporters of the Court have opined that the Special Court’s presence staved off the postelection violence that usually follows presidential elections. We saw this happen in Kenya but it did not happen in Sierra Leone. People did not resort to arms for fear of criminal prosecutions before the Court. There is a call for the ICC to come to Sierra Leone whenever there are elections, and there will be elections again in 2018. So, yesterday, I invited the prosecutor of the ICC to Sierra Leone, and I am willing to offer the building of the Special Court. The mere presence of such a person could cause a difference. I will continue to implore her to engage me further in the discussions so that we might have it there to change the narrative. Distinguished ladies and gentlemen, the ICC is coming to Africa!

Now, let me examine the case law jurisprudence. Prior to World War II, rape and sexual crimes committed during armed conflict were only criminalized to a limited extent. In general, however, crimes of sexual

violence were not treated as serious crimes, and they were seldom prosecuted. The recognition of sexual violence as an international crime is quite recent. The AFRC trial judgment is the very first in history to find the accused guilty for the crime of conscripting children and forcing them to participate in hostilities. Yes, the very first time in a court of law, in an international criminal tribunal, persons were charged for the crime of conscripting children and forcing them to participate in hostilities. This case also saw the world's first ever conviction of sexual slavery as a war crime. These were huge landmarks in the landscape of the jurisprudence of international criminal law.

In my early days as a prosecutor—I think it is about twenty-six years ago—I was prosecuting a case of rape and armed robbery. A lady of seventy years old was in the house, and a few youths went into the house late at night, took all of her jewelry, took things of high value, and the youngest one amongst them was trying to wrench away her wedding band. Not being able to do that, he attempted to rape the elderly lady. I never paid attention to the aspect of the attempted rape. That was not the charge. The lawyers in the case of the World War II Tokyo trials had the same thought, as little attention was paid to rape or attempted rape, so to speak. I focused on the robbery in the prosecutions.

And while I was interviewing her, leading her in evidence, she spoke quite well of the incident, and when it came to the attempted rape, she was so emotional and said, “Had I been raped by this boy, I would rather have died.” That changed my perception about rape completely from that day forward. Before, as a prosecutor, I was emotionless, dispassionate about the issue. You go to court, you do your job, and you turn your back. But, that statement came back to me, and I asked myself, was it so important that she compared it to death? My mentality about it changed completely. So you can see, all of us had fallen into the same trap, focusing on other aspects, other elements of the offense, forgetting the thrust of sexual violence and matters similar to that.

Despite the widespread commission of rape and violence, especially during the Second World War, the charter of the International Military Tribunal of Nuremberg did not mention or refer to rape or sexual assault, and no form of sexual violence was included in any of its indictments. The earliest explicit reference to rape in international humanitarian law was in Article 27 of the Fourth Geneva Convention of 1949, which states that women should be protected from attacks on their honor, in particular against rape and forced prostitution or any form of indecent assault. The notion that sexual violence is a crime against honor has been criticized as ignoring the physical, psychological, and social damage to women, which goes far beyond an affront to honor, but also because it appears to reinforce the impression that the victim is soiled or ruined and of no value to society. So today, our senses are awakened as prosecutors say that yes, we must not let offenses like that slip by.

Both tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), made tremendous advancements with regard to the rules of procedure and evidence, as well as groundbreaking decisions in their case law, to improve the status of women. Furthermore, the judgments of the ICTY and ICTR have been instrumental in interpreting the scope of the criminalization of sexual violence under international criminal law and in advancing jurisprudence in this area. The jurisprudence of the Special Court has built on these historic precedents and further advanced international humanitarian law with regard to the prosecution of sexual violence, and it has done so through several key areas of prosecution. At this stage I must take off my hat to all of those in this room who have worked assiduously in ensuring recognition of women's rights and the status of international criminal law as a whole.

Another significant landmark in the work the Special Court for Sierra Leone was the designation of the crime against forced marriage. The Appeals Chamber considered that there was evidence that the

perpetrators of forced marriage intended to impose the forced conjugal association on the victims rather than exercise an ownership interest. Now what is this forced marriage about? In these cases women are subjected to forceful conjugal relations and to serve as wives. They are forced to serve as wives—forced to cook, do laundry, fetch wood, and whatever else—and are treated like slaves. The prosecution team was bold enough to see how we could make that offense recognized under international criminal law. The Appeals Chamber underlined the particular psychological, moral suffering, and stigmatization of the victims, which is different from other forms of sexual violence and particularly sexual slavery.

Ladies and gentlemen, we must also hasten to point out international criminal justice is no panacea for the ills of a failed nation-state. There are many remedies to fix a failed nation-state; international criminal justice is only a part of the remedy. Transitional justice mechanisms must go hand in hand to secure justice at all levels. It must be considered that long-lasting, expensive international trials can only serve a very limited purpose, namely, to bring justice to those who are the most responsible for grievous crimes, and more specifically, those who sat at the top when genocides, crimes against humanity, and war crimes were committed.

We must also accept that we cannot bring everyone to justice. One cannot secure full justice by international criminal tribunals alone. International criminal tribunals are only instruments of securing justice. They go far and beyond mere prosecutions for gross violations. It is also about creating a legacy for the victims, and that is key. It is sometimes a point we miss. It is not just about sending the bad guys to jail. It is also about creating a legacy for the victims. As I stand here today telling the success story of the Special Court, I also want to tell the victims' stories. In telling their stories, there are difficult moments.

I do recall in one of our sessions during the tenure of David Crane when we were examining whether to charge child soldiers. It was a difficult question because most of the most egregious offenses were committed by child soldiers. There was a girl who specialized in cutting off the limbs of the victims. She was fifteen years old. The question was, do we charge her? We decided that these child soldiers were victims and our policy was not to charge them.

I also recall a particular rape victim. We travelled through the provinces to convince her to testify. She was called. She took the witness stand. Then she broke down sobbing and could not continue. We took a short adjournment, thinking that would resolve the issue. She felt calm, ready to proceed, and came back again but she just could not continue. We could not use her as a witness. She could not be compelled. But it is something that stayed in my mind, and I have come to understand the difficulty of the prosecutor and sometimes the challenges that the victims face in reliving their stories.

On a lighter note, I also recall a particular rape victim who was being led in evidence, and because of the number of years that the trial and the investigative process took, defense counsel thought that the witness could not remember the accused. Defense counsel asked the ridiculous question, “Are you able to identify the perpetrator, the man that you said raped you? Is he in this room?” In the couple of months that the accused had been in a cell, he had grown pot-bellied. His face was round. Counsel thought there is no way this lady could recall him after eight years and asked the question, “Do you see the rapist in this room?” It is a large courtroom. She turned around, looking at the audience, not even looking at the accused. The lawyer got excited—“I think I’ve got her.” I saw him whispering to his counsel on the side. Then she inadvertently turned around to the accused where they were sat, and there were three of them. She just glanced quickly and was already poised to answer. Then the judge asked, “Do you see that person in this room?” She said, “Yes.” He said, “Can you point him

out?” The lawyer prompted that: “Point him out if you see him in this room.” She did not even look at him. She said, “The man in the middle of those three. I will never forget him.”

“I will never forget him.” Defense counsel learned a valuable lesson; do not ask a question to which you do not have the answer.

While we point out the importance of international criminal tribunals in securing international justice, we must also underline that the development of national prosecutions is absolutely essential for the successful functioning of international justice. We have to strengthen national institutions. That should be the baseline. We had a challenge, even while we were the Special Court, as to whether the Special Court was not a foreign imposition. We had to go to the Supreme Court. So, in hindsight, as we look back, what we need to do is to strengthen the national justice systems so that it is only they that feel, “Yes, we cannot handle this,” and then they go to the next stage. International criminal justice should be a last resort.

As prosecutors, we exercise *a proprio motu* mandate. We must be very careful in how we go into local matters and how we take over those matters. My suggestion—a humble prosecutor’s suggestion—is that we strengthen the local institutions and build upon them, because they are the ones that will serve the immediate needs of justice. The capacity for using transitional justice to mediate change and build a legal culture of accountability and fairness is diminished when local communities are unaware or disinterested in the trials. These problems are exacerbated by failure to publicize the Tribunal’s work, which compounds as self-interested third parties report unfamiliar law and proceedings, and this can lead to gross distortion and disinformation.

The outreach is one of the greatest strengths of the Special Court, and I want to congratulate the outreach coordinator who is here with us—Binta Mansaray—for the brilliant work you did in ensuring that

the work of the Court is understood by the people it serves. The local communities must be aware and must be interested in the trials and their outcomes. In this regard, the Special Court for Sierra Leone has been most successful in terms of its exemplary outreach information system and the recognition of the fair rights of the accused. It has set a positive example for the domestic courts in applying contemporary rules of procedure and evidence to avoid undue delays that were usually fraught with technicalities.

So, as we examine the legacy of Nuremberg, we see that it has crossed the Atlantic. It has crossed the savanna. It is with us in Africa. I am sure it was not in contemplation that the effects of Nuremberg would go so far, but never before has so much been done on the African continent to achieve accountability for international crimes. We welcome the trial of Hissène Habré in Senegal, the Central African Republic's plan to set up a special communal court, South Sudan's proposed hybrid tribunal, and the expansion of the jurisdiction of the African Court on Humans and People's Rights to include international crimes. We also welcome and congratulate the International Criminal Court for the work that it has done. But while none of this is perfect in itself, these and other recent developments point to a continent with the potential to take a leadership role in international criminal justice if its leaders were to keep to their pledges.

The future of Nuremberg poses opportunities for the international community to engage in a respectful and context-specific judicial capacity building process.

Friends, as I close, it has been a pleasant experience to participate in the Nuremberg discourse. It made flying across the Sahara desert and the hazards of security checks a worthwhile endeavor. I remain grateful for having the opportunity to address this coterie of distinguished ladies and gentlemen. On this note, I wish us all fruitful

deliberations as we chart a way forward and explore a reformist agenda for international criminal justice.

Thank you.

## Introduction of John Q. Barrett

**Mark David Agrast\***

Good morning. It is my honor to bring you greetings on behalf of the American Society of International Law.

The Society has been honored to cosponsor these Dialogs since their inception. They are among the many ways in which we advance and renew our mission, now 110 years old, of fostering the study of international law and promoting international relations based on law and justice.

As part of our contribution to the Dialogs, the Society publishes the *Proceedings*, and I am pleased to announce that the *Proceedings of the Ninth International Humanitarian Law Dialogs* have just been published and are available for purchase online. We have flyers and display copies on hand today, as well as complimentary copies for sponsors and speakers who participated in last year's sessions.

It is now my honor to introduce our next speaker.

The figure of Robert H. Jackson has always loomed large in these gatherings, but never more so than here, in the place that is indelibly associated with his name.

In fact, Jackson's role at Nuremberg sometimes threatens to eclipse his other achievements, including his distinguished service on the Supreme Court. He was deeply admired for the clarity of his thinking and his legal craftsmanship. His immensely influential concurrence in the Steel Seizure Case alone has generated libraries of scholarly commentary on the separation of powers and the scope of executive authority.

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\* Executive Director and Executive Vice President, American Society of International Law.

As Attorney General Loretta Lynch said last night, he is also revered as one of our finest attorneys general. That is especially true for those of us who have served in the Department of Justice. During my tenure there, you might say that I saw Robert Jackson on a daily basis: Attorney General Holder chose to adorn his conference room with the portraits of the four of his predecessors whom he most admired—Robert F. Kennedy, Edward Levi, Elliot Richardson—and Robert H. Jackson.

Still, it is chiefly for his role here at Nuremberg that Jackson will be remembered by generations to come.

Few living scholars know as much, or have thought as deeply, about the life and legacy of Robert Jackson—and his contributions to the Nuremberg Tribunal—as John Q. Barrett.

John is Professor of Law at St. John’s University in New York City, where he teaches constitutional law and legal history. He also is the Elizabeth S. Lenna Fellow and a Board member at the Robert H. Jackson Center, which has long played a central role in the organization and sponsorship of these Dialogs.

John is a renowned teacher, writer, and lecturer. He spoke in Courtroom 600 only last year, at the bookend to this week’s events: the City of Nuremberg’s commemorations of the seventieth anniversary of the start of the trial. In 2003, John discovered, edited, and introduced Justice Jackson’s unpublished memoir, *That Man: An Insider’s Portrait of Franklin D. Roosevelt*—a kind of dual biography of FDR and Jackson himself. Fans of that remarkable book will be glad to know that John is now at work on a full-fledged biography of Jackson. Admirers of the occasional essays, reflections, and historical notes John posts to his “Jackson List,” will eagerly await its publication.

John is a graduate of Georgetown University and Harvard Law School and served as a law clerk to Judge A. Leon Higginbotham

Jr. on the U.S. Court of Appeals for the Third Circuit. He served as an associate counsel to the Iran/Contra investigation, and was an attorney at the Department of Justice.

I would be surprised if John did not have some illuminating things to say today about Robert Jackson. But this morning, he will be speaking more broadly about the meaning of Nuremberg. He has entitled his remarks, “Legacies of Nuremberg.” He has told me that he intends to address “some of the under-remembered realities of the Nuremberg trial” and its historical, political, and legal legacy. Please join me in welcoming him.



## Legacies of Nuremberg

**John Q. Barrett\***

I am very grateful to the leaders and sponsoring organizations that have brought the Dialogs together for ten years, particularly this year in this very special place. I also thank, humbly, Germany and Nuremberg. We are seventy years out from a Nuremberg trial process that was filled with participants who could not have imagined the Germany, the Nuremberg city of human rights, and their sponsorship and teaching, that we all are beneficiaries of today. It is to the great credit of today's generations of German leaders that they have built this Nuremberg.

My topic, "The Legacy of Nuremberg," is not a Justice Robert H. Jackson topic, although I will make some points that concern Jackson or are "Jacksonian." I am in this lecture trying to imagine some of how I think Justice Jackson and his Nuremberg trial colleagues would have thought seventy years ago, looking ahead to our day and farther, about the potential legacies of the Nuremberg trial.

### **"Nuremberg" the Word**

I begin by stepping back from Nuremberg trials expertise, which each of you has, to consider a more general question: What does "Nuremberg"—which is, as a single word, the short form way

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This publication is based on my September 30, 2016, lecture at the Tenth International Humanitarian Law Dialogs, held at the Documentation Center Nazi Party Rally Grounds in Nuremberg, Germany. I am very grateful to my friends and colleagues David M. Crane, James C. Johnson, Susan Moran Murphy, Gregory L. Peterson, Mark Agrast, Caitlin Behles, Ulrich Maly, Florian Dierl, Henrike Claussen, and Christoph Safferling, to their respective organizations and colleagues, and to each of the Dialog's cosponsoring institutions.

of referring to the post-World War II Nuremberg trials of Nazi war criminals—mean today, out in the world? Where does one find references to “Nuremberg”?

To answer these preliminary questions, I reviewed popular press during the past few months. Here is some of what I found about how the word “Nuremberg” gets used, invoked, and also tossed around today, outside of the legal and historical literature.

*“Nuremberg” Is a Word That Pertains to Nazis*

I found, no surprise, that the word “Nuremberg” is often used to refer to something about World War II-era Nazis and their crimes—the people and matters that the Nuremberg trials of course began to address immediately after the War.

Those usages break down into two categories. One concerns the original, WWII-era Nazis. For example, in the United Kingdom, stories report public outrage concerning twenty former members of the Waffen-SS, now elderly, retired, men, who live in the United Kingdom and receive public pensions. The Waffen-SS was, of course, convicted here in Nuremberg in 1946 as a criminal organization. Press regarding what those aging, real Nazis are getting away with invokes Nuremberg.

Another context in which “Nuremberg” is mentioned in press today concerning World War II-era Nazis is in reporting on current German efforts to prosecute Nazi war criminals—*spät, aber nicht zu spät*. These efforts include the John Demjanjuk trial in Munich in 2011. Identified, eventually and accurately, as a guard at Sobibor, Demjanjuk was convicted as an accessory to the murders in that camp. These efforts also include the 2015 conviction of Oskar Gröning, the so-called Auschwitz bookkeeper; the Spring 2016 conviction of Reinhold Hanning, who was an Auschwitz guard; and the trial, begun this month in New Brandenburg but proceeding very fitfully,

of former Auschwitz guard Hubert Zafke, who is charged for his work in the month in which Anne Frank was delivered by train and became an Auschwitz prisoner, before she then was shipped to Bergen Belsen and perished. In the context of criminal cases against these real, if old and increasingly scarce, former cogs in the crimes of Nazi Germany, the Nuremberg trials are remembered as history, precedent, and, for the legal system, performance challenge.

The second category of “Nazis,” if you will, are today’s alleged Nazis. I use the word carefully—my point is only that people do point their fingers and accuse others of being Nazis.

One example, almost amusing but really just deeply appalling, is Ursula Auerbach, age eighty-seven. A friend of Heinrich Himmler’s daughter, Auerbach is the so-called “Nazi Granny” in today’s Germany. She was convicted in 2016 in Holmberg and sentenced to eight months in prison for incitement and Holocaust denial. That is her hobby, it seems, and it is against German national law. She has assumed Nazi culpability, and Nuremberg-invoking legal liability, by her speaking and its criminal consequences.

Other examples of mentioning Nuremberg when accusing persons of Nazi behavior today come from outside Germany. Just last week, at the Commonwealth of Independent States summit in Kurdistan, the leaders of those former Soviet Republics adopted many statements, including one noting this seventieth anniversary year of the international Nuremberg trial, its verdicts, and its principles. Also last week, at the United Nations General Assembly, the representative of the Russian Federation spoke emphatically about the need to permit no revision of the history of WWII, no glorification of Nazism . . . and then, for some reason, his next paragraph was about Ukraine. Russian Federation memory, celebration, and rhetoric about Nuremberg are not, in other words, limited to historical discussion of the Great Patriotic War. They also have contemporary political context. The

Russian Supreme Court, for instance, recently affirmed the criminal conviction of a blogger who had reposted an article stating—this will not shock you—that Nazi Germany and the U.S.S.R. were allies in 1939, 1940, and into the middle of 1941, and that they invaded Poland together, from their respective sides, in September 1939. This blogging, the Court held, was ground for criminal conviction.

*“Nuremberg” Is a Word That Pertains to Rule of Law Excellence*

These uses of the word “Nuremberg” bridge into a second category: the word as a high legal standard. “Nuremberg” and the Nuremberg trial are invoked as a great rule of law achievement, a gold medal, a world championship in some respect.

Examples are prominent in popular culture. In the 2015 film “Bridge of Spies” concerning a 1960s U.S.-U.S.S.R. prisoner swap in Berlin, Tom Hanks portrays James B. Donovan. He had been a senior U.S. Office of Strategic Services (O.S.S.) official during World War II and then a senior member of Justice Jackson’s prosecution team prior to and at Nuremberg. Early in the film, Hanks/Donovan is introduced as a Brooklyn-based insurance lawyer. Why is he being recruited into a Cold War spy case? Well, a colleague explains to him, “You distinguished yourself at Nuremberg.” “I was on the prosecution team,” he concedes—and no further credential is required. Oliver Stone also invoked Nuremberg in his recent film about Edward Snowden. It says many things, including, to explain the actions of Stone’s “Snowden,” a passing lecture about the Nuremberg principles.

Writers also mention Nuremberg-trial-as-great-legal-achievement as they cover and consider the U.S. military commissions in Guantanamo. They aspired to become regarded, in our time and then in history, as a twenty-first century Nuremberg. The commission conveners and leaders, including some highly principled and talented people, have pointed explicitly to Nuremberg as their model. That

military commission process, now ten years on since its creation and fifteen years on since 9/11 and the war in Afghanistan, is mired in enormous, probably fatal, logistical and legal issues, including some concerning governmental misconduct. People now, when discussing the military commissions, mention “Nuremberg” to make arguments about what has not happened.

*“Nuremberg” Is a Word That Pertains to Historical Significance*

A third context in which the word “Nuremberg” is used these days is as a trope outside of the realms of adjudicative and legal endeavors. The word is used here as a mark of historical significance and high brand value.

It appears, for example, in many recent obituaries and death notices of men who were World War II soldiers. These reports note that, among life highlights, these men “attended” the Nuremberg trials. (Apparently Courtroom 600 had thousands of seats that are not quite visible in late 1940s photographs.) I love, for its modesty combined with its recognition of the significance of “Nuremberg,” one recent obituary that noted a man’s wife, children, career, hard work, community endeavors, and that he was “stationed in Europe during the Nuremberg trials.”

On the other hand, and I hope that you catch this as a note of true absurdity, I noticed a recently published letter in which the writer, making his point that “following orders” is no defense for the evil of one’s own actions, drove home the emptiness of that purported excuse by reporting that Adolf Eichmann had offered it when he took the stand at Nuremberg to explain his role in perpetrating the Holocaust. I believe that if Eichmann had dropped by Nuremberg in the late 1940s to testify, someone would have noticed . . . and arrested him. (The writer of course was confusing Eichmann with Auschwitz commandant Rudolf Hoess—the writer got the name wrong but otherwise made a cogent point.)

The conclusion to draw?: “Nuremberg” is, around the world, the word for something that is big, great, and permanent in modern history.

### **The International Nuremberg Trial as It Was—Its Legacies for the Future**

This seventy-year anniversary moment is not merely an occasion to note the continuing, varied, and striking number of references to “Nuremberg” and the Nuremberg trials. It is, I think, an occasion to step back, look hard, and locate core aspects of what Nuremberg really was, and thereby to think carefully about what it means and what some of its legacies are, for us and for the future.

I will not presume to teach Nuremberg to this crowd. We are the Nuremberg Academy, including in fact, plus professionally and informally in our individual pursuits—historical knowledge of the Nuremberg laws, the Nuremberg trials, and the Nuremberg principles and their applications is part of the deep background that many participants in these Dialogs plus many in their public audience share.

Today, September 30, 2016, is the anniversary of the first of the Nuremberg “Judgments Days.” That double plural is an awkward phrase, and I use it deliberately. On September 30, 1946, and on October 1, 1946, the International Military Tribunal (IMT), filling two extensive courtroom days, rendered a series of judgments. September 30 was the day of factual and legal findings—in Courtroom 600 seventy years ago, the seated persons, listening to the judicial reading of the start of the Judgment or to a simultaneous interpreter’s voice, heard no judgment on an individual defendant. That all came the next day—October 1 was the day of convictions and acquittals and then, in the afternoon, the sentences imposed on the convicted.

The September 30 IMT judgments were about what the trial evidence had shown, beyond a reasonable doubt, about the defendants’ conduct,

and what the Third Reich had done across the years 1933–1945 to consolidate totalitarian power here in Germany, and then as a military aggressor, occupying power, and perpetrator of atrocities across Europe. Note that this is the history that this Documentation Center tells so factually and powerfully. In 1946, the IMT’s Judgment was the first official delivery, in what amounts to a substantial book, of this factual record. It was based on the captured Nazi documents and the live witness testimony that the prosecutors had presented as evidence.

The IMT, after making those factual findings, turned to the validity of legal theories that had been the bases for the London Agreement creating the tribunal, and for the indictment that had brought individuals and Nazi organizations to the IMT for adjudication as charged criminals. The IMT held that the waging of aggressive war was indeed, by the late 1920s and into the 1930s, a crime against the international legal order. The IMT also pronounced the legal validity of the war crimes and the crimes against humanity charges, limited to the temporal constraints of Nazi war-waging (September 1939 and later).

In addition to the substance of these judgments, the legacies of Nuremberg include these eight aspects of the trial as it really was:

### *The Nuremberg Trial Followed War-Winning*

We must not overlook that the Nuremberg trial was a war-won endeavor. Robert Jackson called it a “post-mortem” of the Third Reich. In other words, the Nazis were killed, as in defeated militarily, as a predicate to what the Nuremberg trial was able to do. As you can see on maps, including here in the Documentation Center, Nazi Germany ceased to exist in May 1945. Its unconditional surrender meant complete relinquishment of sovereignty, Allied military occupation of Germany’s former landmass, and division of it into respective zones of French, U.K., U.S., and U.S.S.R. control and total power. Without that Allied power, the Nuremberg trial could not have happened as it did.

*The Nuremberg Trial Grew Out of Allied Power and Will*

Connected, the Nuremberg trial occurred in a moment—a brief, shining moment—of power and political will. Succeeding war, succeeding Nazi Germany, in the occupation, and in the world’s 1945 moment, there was a broad, deep consensus among nations. It is easy to see how this binary situation developed: a world war pitted evil against good, and good prevailed; those allies were the united nations; in peacetime, they created immediately the United Nations, and the international tribunal created through the London Agreement, and soon the Universal Declaration of Human Rights, the Genocide Convention, the Geneva Conventions. . . . These things were possible during that short interval of time, from 1945 until spring 1949, when Telford Taylor and his U.S. prosecution colleagues concluded the Ministries Case, the last of the U.S. subsequent proceedings at Nuremberg. Only that unity of power and will made Nuremberg happen as it did.

*The Nuremberg Trial Was Focused on the Crime of War*

A third point, in thinking about finding Nuremberg and focusing on what its core legacies are, is to take very seriously the war focus. The Allies, in their moment of victory, power, and consensus, looked back on what had happened. At the core, they identified the Nazi war-waging as the evil. The IMT adjudged it the “supreme” crime against the international order and the basis for individual criminal liability. This is the reality that our friend and hero Benjamin Ferencz continues to represent and develop in his work: war is at the center of the concentric circles of evil.

*The Nuremberg Trial Occurred in Its Crime Scene*

The Nuremberg trial occurred *in situ*—it was about Nazi Germany, which had happened here in the land that had been Nazi Germany. That meant not only the land. In 1945 it also meant the physical

devastation, enormous piles of rubble, the stench of decaying bodies, and desperate, starving people.

The crime scene also included things that were not captured well in photographs. Displaced Persons in organized camps surrounded Nuremberg, some very close to the Palace of Justice. Other survivors were living on their own, for example under wood shelters built in Nuremberg's large Jewish cemetery. These survivors included the remnants of what had been the Jewish communities of Nuremberg and Fürth, the adjacent city. Some had stayed in Nuremberg during the war, and some had fled, endured, and then made it home.

These persons were in the sightlines of everyone who was a lawyer, an investigator, an interrogator, and a jurist at Nuremberg. Justice Jackson's staff, which grew to be very large, included superb lawyers who did very good work, often day and night. Some took breaks on occasion to eat and drink at the Grand Hotel, to dance in its Marble Room, and to fraternize. Others, who happened to be Jews (as many of Jackson's original team were), were more what the lingo of the time called "straight arrows." They were very aware of the refugees and survivors who surrounded the Nuremberg trial, and they visited, interacted with, and did things to support them. On one occasion, for example, they diverted U.S. ice cream—occupation-government ice cream, if you will—to the children of the Fürth synagogue, celebrating *Rosh Hashanah*. This might have been Nuremberg's finest "crime."

Nuremberg *in situ* meant the investigation-prosecution endeavor occurring in the war theater, in the nation, on the land mass, connected to the people. In some war crimes situations, that will be impossible, or at least very difficult, to replicate—Nuremberg could and did happen this way because the Allies had won the war unconditionally, it had ceased entirely, and their power as occupiers was total. But that is exactly my point.

*The Nuremberg Trial Judgment Was Self-Evident*

A fifth dimension and legacy of Nuremberg is its mindset of necessity: the Allies were, in the end, allied in the conviction that they had to undertake this criminal trial project and that it had to obtain, through fair processes to be sure, convictions.

Nuremberg was the Allied response to the self-evident horrors that their people had confronted, first in war, as the Nazis' military adversaries, and then at governmental, diplomatic, policy, and occupation levels following the Nazi surrender. For the Allies, this situation demanded action. The possibility of walking away—calling it a day; concluding the war by being fatigued and not doing anything more—was an implausible alternative, and one that never was considered.

At the other extreme, brutal executive actions—firing squads and so forth—were another alternative, and also one that was not really considered. As Justice Jackson stated publicly at the start of the project, although that option would have been fueled by understandable vengeance, it would have “violate[d] pledges repeatedly given, and would not [have] set easily on the American conscience or be remembered by our children with pride.”

For the Allies, there was, in between doing nothing and doing too much with brutality and potential unfairness, the need to conduct the international Nuremberg trial as they did it, and reaching outcomes as it did.

Justice Jackson explained this at the conclusion of his July 26, 1946, closing statement to the IMT:

It is against such a background [of evidence introduced at the trial] that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to

commit this long list of crimes and wrongs. They stand before the record of this trial as bloodstained Gloucester stood by the body of his slain king. He begged of the widow, as they beg of you: "Say I slew them not." And the Queen replied, "Then say they were not slain. But dead they are . . ."

If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.

This statement is much quoted but not, I think, much analyzed or "unpacked." Justice Jackson, a man of words who is remembered for his famously talented pen, was a close, lifetime student of William Shakespeare. As a schoolboy in 1909 and continuing into his years as a law apprentice, Robert Jackson learned from his English teacher and *de facto* second mother to read and to love Shakespeare—he read plays aloud at her home, into the wee hours, in front of the fireplace. And he memorized Shakespeare, as people then did with great literature and oratory. Decades later, here in Nuremberg, Jackson was not carrying the collected works of Shakespeare. Nor did he have a good Internet connection. He did have, however, a fair amount of Shakespearean genius packed into his mind. And one can see, in archives, the paper on which Justice Jackson in 1946 drafted his closing statement at Nuremberg.

In his statement, Jackson was quoting from Shakespeare's *Richard III*. He quoted the scene in which the queen, Lady Anne, confronts Richard, the Duke of Gloucester, as he stands over the dead body of King Henry VI. Richard begs Anne to, in effect, let this and other murders go: "Say I slew them not. . . ." Jackson quoted that line, and then her rejoinder: "Then say they were not slain. But dead they are. . . ." In doing so, Jackson was comparing and equating Richard's request of Anne to what the Nuremberg defendants were, in seeking

acquittal, asking of the IMT. And he urged it to respond as Anne had responded to Richard. In other words:

- say I slew them not . . . but he is dead;
- say we are not guilty . . . but there was this war, covering the continent with death.

Jackson's statement was, in the open, a statement that the facts of World War II, including its human toll, required the IMT to convict Nazi defendants of crime—at the basic, human, moral level, this was a no-brainer, a crime if anything is a crime.

I will add that this Nuremberg belief that heinously destructive conduct must produce a judgment of criminal guilt is also the best of modern international humanitarian law—it is where world consensus exists, without much need for complex diplomacy or persuasion, and where nations act on their agreement that, “Yes, this is it. This is a crime.”

### *The Nuremberg Trial Was Educational*

Nuremberg was also an educational process. It of course was a documentary case. Robert Jackson had been, maybe for ill from the perspective of people who wished for trial excitement in Courtroom 600, the Assistant Attorney General who headed the Antitrust Division in the U.S. Department of Justice for a year (1937). He knew documents cases, and notice that the Third Reich was prosecuted at Nuremberg as Alcoa had been by U.S. Department of Justice in the late 1930s for market domination and price fixing: it was all there in their own documents. Metal market monopolization is not remotely the evil recorded in Nazi documents—I am comparing only the methods of proof.

Nuremberg's educational process occurred in the context of prosecutors carrying their burden of proving individual criminal

culpability. But Nuremberg, simultaneously, reached the external, public audience around the world. And the published record of the trial is the foundation of historical understanding of the Third Reich. It is a repository of depth and complexity. Every generation uses it, and study, teaching, and understanding thereby grow. The Nuremberg trial record permits us to wrap our minds around the biggest, and what otherwise might be the least comprehensible, of horrors: the Nazis in power and World War II.

### *The Nuremberg Trial Was Efficient*

The Nuremberg trial was relatively selective and brief. As Jackson boasted at the time, it happened in an amazing hurry. To go from nothing in May 1945—no judicial institution, no evidence, no Allied agreement on how to proceed—to the commencement of a trial five and a half months later was, he said, faster than many automobile injury cases went to trial in New York State (which is still true). The trial was expeditious because the Tribunal sat for six days, and long days, each week. It rationed witness allocations to the defendants and then cracked down on their extraneous demands. The prosecutors were permitted to present evidence in summary documents, and the IMT restricted their slowing moves too. In part this reflected political will to address public impatience. In part this was just a commendable commitment to focusing on the core issues, to getting right to them.

### *The Nuremberg Trial Was Carefully Optimistic*

I do mean both of those words. Yes, Nuremberg's optimism included some very high universal ideals—the “poisoned chalice” line, for example, which Justice Jackson drafted but never uttered in court, but then published in the trial record. I suspect that he never said that “[t]o pass these defendants a poisoned chalice is to put it to our own lips as well” because he had borrowed it from Shakespeare (*Macbeth*, Act 1, Scene 7), and perhaps so obviously that to 1945 Nuremberg

courtroom ears it would have sounded corny. So although it was in the opening statement that he drafted, he drew a line through it on his reading copy and left it unsaid. But the idea that the Allies were holding themselves—ourselves—too to the standards by which they were judging Nazi defendants to be criminals was indeed the high and real universalism of Nuremberg.

The Nuremberg trial stayed, however, within the area of allied consensus. The U.S.-U.K.-U.S.S.R. postwar alliance was fragile. The Soviet show trial instinct versus the American-British-French due process instinct was just barely worked out and bridged over in London in summer 1945, in the agreement that created the IMT and got the Allies together to Nuremberg. They did not push it too far, to their fracture point. Of course they did not put themselves in the dock alongside the German defendants, and that is a fair criticism. But they did put people in the dock for the evils each had perpetrated.

The Allies also were in many respects cautious and skeptical, following Nuremberg, in embarking on projects to codify too much, too broadly, too permanently, words on paper that the world could not live up to. Yes, the United Nations General Assembly adopted in December 1946 the London Agreement of August 1945 and also the IMT Judgment of Fall 1946—in a summary, conclusory way. Yes, the UN General Assembly at that same time adopted the proposed Genocide Convention, Raphael Lemkin's great project and dream, and sent it forward for states to consider, ratify, and potentially make real as a new development in international law. But the idea of a code of crimes, and also the idea of a charter for a permanent international criminal court, were things that not only the Soviets, but also the Americans (including Jackson and his colleague and friend Charles Fahy, legal adviser in Berlin and at Nuremberg, and then at the United Nations and the Department of State) and the British, were hesitant to push after Nuremberg. And why? Not because they were soft on high ideals and universal justice. It was because they were

practical about making progress. They, as international colleagues, had gotten Nuremberg done. And they realized that it would be a risky, perhaps a backsliding, step to attempt in the real world following Nuremberg to be too utopian.

On the other hand, Nuremberg architects such as Jackson and Fahy were interested in moving the United Nations as far as it could really go. This explains how the IMT judgments on September 30 and October 1, 1946, gave birth to the UN General Assembly actions of two-plus months later. The process was push-pull and hydraulic—they toggled well between utopian, idealistic, visionary leadership and pragmatic, political judgments. I suspect that today’s international court officials and their national counterparts recognize that as more or less their own job description.

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Where does all of that leave us? It leaves the world, especially those of us who are in the heart of “Nuremberg” expertise as teachers and leaders, using this word as an inheritance of real meanings and duties. We each try in our ways to teach Nuremberg because really to get it requires careful study, not just casual invocation. To study Nuremberg means reading it, debating it, and critiquing it. When we do that, we are better positioned to live up to it, and to build upon it—to take “Nuremberg” and a world of law and, we hope, less war and more peace and humanity, to numbers that will be much bigger than seventy.

I close with an antique phrase from Robert H. Jackson: he said that the meaning of the Nuremberg trial would become clear in “the century run.” We are seventy years down from 1946. We have thirty more years to go before that century will have run. I am grateful to be involved and sharing that project of giving meaning to Nuremberg, continuing to do its work, with each of you.



## **Transcripts and Panels**



**Reflections by the Current Prosecutors:  
The Impact of the IMT on  
Modern International Criminal Law**

*This panel was convened at 11:45 a.m., Friday, September 30, 2016, by its moderator, Dean Michael Scharf, Dean and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law, who introduced the panelists: Fatou Bensouda, International Criminal Court; Serge Brammertz, International Criminal Tribunal for the former Yugoslavia; Brenda J. Hollis, Special Court for Sierra Leone; Hassan B. Jallow, International Criminal Tribunal for Rwanda; Nicholas Koumjian, Extraordinary Chambers in the Courts of Cambodia; Ekkehard Withopf (for) Norman Farrell, Special Tribunal for Lebanon. An edited version of their remarks follows.*

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**JAMES C. JOHNSON:** I would like to invite to the podium Michael Scharf, dean of the School of Law at Case Western Reserve University, a university that I am honored to be a part of in a small way. Case Western Reserve University has been part of the Dialogs as a sponsoring organization from the very start, and it is an honor to invite Michael to the podium. Thank you.

**MICHAEL SCHARF:** I just realized from John Barrett's speech that I am the same age as Robert Jackson was when he was here, and that blows my mind. But if you go back twenty-three years, before my hair turned gray, before I had a beard, and before I was a dean or a professor, I was working with Jane Stromseth, Todd Buchwald, and Paul Williams at the State Department Office of the Legal Advisor. It was handed to me to be part of a team to help create the Yugoslavia Tribunal. That launched me on my journey, which has gotten me to this point where I get to converse with my heroes, the international prosecutors.

As Jim Johnson said last night, this is a group that does not need a long introduction or really any introduction at all because you have their bios, and their experiences speak for themselves. But just to go down the stage, we have: Fatou Bensouda, the chief prosecutor of the International Criminal Court (ICC); Serge Brammertz, the chief prosecutor of the Yugoslavia Tribunal and also of the Rwanda Tribunal's Residual Mechanism; Hassan Jallow, the chief prosecutor of the Rwanda Tribunal; Brenda Hollis, the chief prosecutor of the Special Court for Sierra Leone; Nick Koumjian, chief prosecutor of the Cambodia Tribunal; and Ekkehard Withopf from the Special Tribunal of Lebanon.

We have a wonderful group today, and we have talked about how we want to present this information to you. In the past, I have asked an open-ended question, and we have received very long open-ended answers. Jim Johnson said, "Listen, this year you really need to link this to the Nuremberg experience, the Nuremberg legacy, and ask very pointed questions. Do what you do on your radio show." So what I am going to do is ask specific questions to each of them. Some will be questions for more than one, and we are going to zoom through those. Hopefully, at the end, there will also be time for Q&A from the audience.

Nuremberg is why all of these international tribunals are possible, and everybody in this room who believes in this field is a fan of Nuremberg, but we also remember that when the prosecutors returned from Nuremberg, they returned to a very critical reception. You had people like Senator Robert Taft writing a speech excoriating the due process norms at Nuremberg that John F. Kennedy then puts in his book, *Profiles of Courage*, which makes it a very popular conception.

It is true that Nuremberg was an experiment, and like any experiment, any first effort, it had its criticisms; it had its problems. I think what we have learned largely is that we have grown over the last seventy years and solved many of those problems. But what I am going to do

is ask questions related to some of the criticisms of Nuremberg and related to things that are happening at each of these tribunals in the last year, to bring that up to as current a time as possible.

So let us begin by talking about what Bill Schabas has labeled in his book, “the crime of crimes,” as genocide. Contrary to widespread belief—and I suppose everybody in this room knows this, but the general population would not so much—the Nuremberg Tribunal did not charge or convict the crime of genocide. I think it was actually Ben Ferencz at his trial that used the word for the first time from the prosecutor’s bench.

There have been some really interesting developments regarding the crime of genocide in the various tribunals that I thought we could start with. So, we will ask Hassan, Nick, and Fatou about these.

Hassan, first of all, since our gathering in Chautauqua a year ago, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) has issued its final decision affirming the conviction of Pauline Nyiramasuhuko. She was convicted of genocide and rape. What would you say is the significance of that final decision of your Tribunal?

**HASSAN JALLOW:** Well, the Rwanda Tribunal has been the premier genocide tribunal. It is the first to have dealt with the question of genocide in a judgment. It has tried more genocide cases than any other. *Nyiramasuhuko* was the last of the cases, what we call the “Butare case.” Nyiramasuhuko was a minister at the time of the genocide in the interim government, and ironically, she was the minister of Family Affairs and the Advancement of Women. She was the only woman indicted by the ICTR; she was convicted of ordering the killing of Tutsis, of genocide in respect of ordering the killing of Tutsis, and of genocide in respect of rapes committed by her subordinates, who were members of the ruling party Interahamwe. In a way, I think that being the last judgment also emphasized very much

the approach of the Rwanda Tribunal in dealing with this question of sexual violence as a tool for genocide.

If you recall, the first judgment of the ICTR was a case that was also a landmark in terms of the link between sexual violence, rape, on the one hand, and genocide on the other. It demonstrated how these acts of sexual violence constitute genocide.

The last judgment of the Tribunal also very much emphasized that point. It was the conviction of Nyiramasuhuko, and that is why I think *Nyiramasuhuko* is such a landmark case.

**MICHAEL SCHARF:** And, interestingly, she is the first women in history to be convicted of this crime.

**HASSAN JALLOW:** Yes, she is the first.

**MICHAEL SCHARF:** So, Nick, I have been following events out in Phnom Penh. As you know, I was a colleague, a subordinate, of Robert Petit during my sabbatical there, so it is one of my favorite tribunals to watch. And you had history lessons over the summer. You had historians talking about whether the Khmer Rouge actually had the requisite intent in targeting the Cham, the Muslims, and the ethnic Vietnamese to prove the crime of genocide. So, basically, the historians are up there on stage. Can you tell us a little bit about how that unfolded and what the outcome of that has been?

**NICHOLAS KOUMJIAN:** Well, the historians have been limited by the Court in what they are supposed to give opinions on. They are not supposed to give an opinion on the ultimate question of whether genocide occurred, for example. But there have been historians that have testified who interviewed many of the victims and some perpetrators of the crimes and talked about the facts regarding what happened during the regime.

Specifically at issue are two separate genocides charged in the Cambodian courts, and they are both of small minority groups. These groups were killed in the thousands or tens of thousands, while in the whole population there were about 1.9 million, as a rough estimate, people who were killed, most of those being Cambodian ethnicity, Khmers. But there were two groups that were particularly targeted. One was the Vietnamese, a traditional enemy that was particularly loathed by the Khmer Rouge. In the initial years of the regime, they were exported. They were sent back to Vietnam—and here we really relied more on witness testimony. There was one general of the Khmer Rouge who admitted that, yes, if they had not left in the first two years, the orders were to kill them. The policy was to kill them all. So maybe 10,000 or so Vietnamese were killed, but that was all that was left in the country. And throughout various statements of the accused, we argue and will argue that the intent to exterminate that group in whole or in part in Cambodia existed.

Another very interesting genocide in our case is of the Cham Muslims. This is an ethnic group and a religious group, so they were practicing Muslims. One historian testified that in his estimate, about 36–40 percent of Cham were killed, and this was higher than the rate of Khmers, Cambodians, which was about 20 or 25 percent. But the key point we have argued is that the genocide convention says destroy, in whole or in part, a group as such. The Cham were practicing Muslims, and when the regime took power, they abolished religion, particularly Islam and others. Muslims were not allowed to pray. They were not allowed to dress in their traditional dress. They were not allowed to speak their own language. They were not allowed to do any of the ceremonies of the religion, and they were very often forced to eat pork.

So, we will argue that the intent was to destroy the Cham, as such. All of those who asserted their identity as a Cham, who wanted to practice their religion, were killed. We noted the statistics that religious leaders in particular were almost all wiped out. If all those who practice a

religion are killed, the intent is to destroy the religion as such, so we will see how the Court will deal with that. But the historians were brought in more to talk about what they learned from their interviews with victims and perpetrators, supplementing the testimony that we have before the Court, both live and written statements of many victims.

**MICHAEL SCHARF:** Will the defense bring in their own historians to have a battle of history?

**HASSAN JALLOW:** Well, the defense has proposed various historians. It is a civil law system, so the judges pick the witnesses who testify, and we have not opposed any. I have never opposed any of the witnesses that the defense has proposed. Some have been reluctant to testify, unfortunately, but soon after I get back, I will be examining a defense expert witness.

**MICHAEL SCHARF:** Excellent. Now, Fatou, the United States has labeled the actions of ISIS in Syria as genocide, and I know you have announced that there is an investigation on ISIS. I am wondering if you could give us an update on the ICC's investigation on ISIS and whether the genocide allegation has had an effect on that.

**FATOU BENSOUDA:** The ISIS crimes—or “alleged crimes,” as we call them—undoubtedly are of concern to my Office and the international community writ large. They are very serious allegations of atrocity crimes that are being committed.

The Rome Statute, however, has jurisdiction, which is very specific and defined. Since 2014, my Office has been receiving information and requests for intervention by the ICC. But, as you know, given the fact that both Syria and Iraq are not states parties to the Rome Statute, we do not have territorial jurisdiction in these two countries.

I have, with my team, looked into personal jurisdiction very closely because what you see happening is that there are nationals of states parties who are found amongst the ranks of ISIS, and we have looked at that very closely. We also called for the states that have their nationals amongst the ranks of ISIS to provide my Office with any further relevant information that they may have.

I wanted to also point out that given the Office's longstanding policy regarding the person bearing the greatest responsibility for those crimes as well as the principle of complementarity, we are constrained to act under the existing circumstances. We have really looked at the matter closely. I issued a statement, I believe in 2015, to say that the jurisdiction the ICC could possibly have over the crimes that are being committed vis-à-vis those nationals of states parties who are found amongst the ranks of ISIS is very limited and very narrow.

We have also seen that those who are occupying the highest ranks amongst ISIS—with maybe one or two exceptions—are not necessarily those who come from the states parties of the ICC. It is mainly Syrians or people who come from Iraq. I am not saying that there are no others that are from states parties, but this is at least the trend that we have seen. Therefore, the jurisdiction that we have is still very narrow; but that does not mean that we do not continue to ask states parties to provide information to the office. It is important that we continue to look at it and also to work, if possible, very closely with those states parties with regards to their nationals alleged to have committed these crimes.

**MICHAEL SCHARF:** Has there been any discussion of a Security Council resolution on the leaders of ISIS, referring those to the ICC?

**FATOU BENSOUDA:** Well, I know that there have been some initiatives taken by certain states parties, but as you know, these decisions are taken independently of my office. I do know that there

are states parties who have taken up this issue and are trying to see whether there could possibly be a referral from the UN Security Council to the office for the crimes. That way, of course, the jurisdiction and the way we could intervene becomes much larger than what we have currently, which is very limited.

**ATTENDEE:** Mike, can you ask her about Libya?

**MICHAEL SCHARF:** Sure, Steve. Why not? Would you comment also on Libya and ISIS?

**FATOU BENSOUDA:** I am glad, Steve, that you asked that question because the office is actually looking at current crimes in Libya. In the last report I sent to the UN Security Council, I indicated that we will not only focus on the crimes that have been committed by the Gaddafi regime and during the first part of the conflict. Crimes continue to be committed in Libya. We see the atrocities that are committed, and we have received information that members of ISIS are allegedly involved in the commission of those crimes. This gives us a window in which we can look at the crimes that are committed by people who are alleged to be part of ISIS in Libya, because already we have jurisdiction through the referral that we have from the UN Security Council.

So, to that extent, we could also expand our focus. We could also look at other crimes that have been committed, including potentially the new crimes that are allegedly committed by members of ISIS and other groups.

**MICHAEL SCHARF:** One of the things that happens to international tribunals is they are criticized from all sides for every decision, and this was true of Nuremberg. It was criticized both with respect to who was indicted but also who was not indicted, and there has always been a political background to international justice. That is not to say that the prosecutor's office is politicized, but there is a background.

The Yugoslavia Tribunal, for example, was criticized for first delaying and then later rushing the indictment of Slobodan Milošević. The Special Court for Sierra Leone was criticized for indicting Charles Taylor, and then criticized for not also indicting Muammar Gaddafi. The ICC was criticized for indicting the now president of Kenya, a case that has been dismissed and has been a very challenging case politically. The Cambodia Tribunal has struggled bringing cases against individuals who may have some association with the current government, and there are press reports that the Special Tribunal for Lebanon (STL) may be closing in on an indictment of Syrian President Assad. Those might be wildly wrong, and Ekkehard told me he cannot talk about that issue at all.

But I wonder if Serge, Brenda, Fatou, and/or Nick would care to comment on the issue of courts and international politics. And try to keep it relatively brief. We will start with Brenda.

**BRENDA J. HOLLIS:** Thank you. I think this is an important topic, and I think it is one that we need to be very clear about. When we look at critiques of these international courts, no matter what you do, someone is going to be critical of it. So the question becomes what is the proper perception of an international criminal court, and I think it is much the same as what is the proper perception of a domestic criminal justice system. It cannot be tied to political whims or political desires because as soon as you base your decisions on politics, then where do the victims go for justice? Justice then becomes basically a slave to situational politics.

So, in my view, the perception that international courts should work to achieve is that you are doing your job professionally with an informed database according to your mandate, and I think the answer that Fatou gave to one of the earlier questions is exactly what a court should do. Is it within our mandate? Do we have the law and the facts to support our actions? And that is the only perception that we should be promoting.

There are ways to promote that. Outreach is a very good way to promote that. This includes informing people about what your mandate is, what it is not, and also having strategies for investigation, for prosecution, and then implementing those strategies through criteria and factors that guide you in carrying out those strategies. And I think when we look at the current leadership in the ICC Office of the Prosecutor, they are far in advance of the other courts because the other component of having these strategies, criteria, and factors is to be transparent about what they are to the greatest extent possible so that the public knows why you are acting and how you are acting. I think that is the perception that should be out there for the courts.

**MICHAEL SCHARF:** Does anybody else want to add to that?

**SERGE BRAMMERTZ:** All our tribunals have been criticized many times for many different issues, and you mentioned the *Milošević* case at the ICTY. I remember in the early days, one of the big criticisms was that the ICTY indicted and prosecuted a midlevel perpetrator, with the argument that the Tribunal should have really focused on those who bear the greatest responsibility.

If we are looking back today, twenty years later, we still see this criticism, but it is only thanks to the prosecution of a number of midlevel perpetrators that we got all the evidence we needed to go for the big guys. And that is why we have obtained a number of very successful convictions in relation to *Karadžić*, and hopefully *Mladić* next, and many others, because we had the possibility to build up the chain of command, which I think was very important. So, case selection—who you are prosecuting—is a very difficult decision, and one where we think that this rather mixed approach—top down, bottom up—is the right one.

We speak about Nuremberg, and I remember at one of our discussions I said to Ben Ferencz, “You know, we have among prosecutors all

these discussions about who to prosecute, how many to prosecute, what is the gravity threshold,” and I asked this question, as I am sure many of have asked him, “So how did you select your twenty-three indicted persons?” He said, “Well, we had space for twenty-three persons, so we went for twenty-three.”

So we are always thinking about very sophisticated arguments, and where there was space for twenty-three, then that was the criteria.

We always discuss the scope of the indictment: What are you putting in the indictment? We all agree that Milošević had a very large indictment in relation to crimes committed in Bosnia, denying Kosovo, Srebrenica, and the hostage taking of the blue helmets.

Later on, the judges passed rules to limit or to mandatorily force the prosecutor to reduce the indictment by 30 percent, and we did it on a voluntarily basis later on. We had this big debate when Karadžić and Mladić were arrested, where many were asking us to really cut the indictments. We cut them by 50 percent and had many meetings with victims’ organizations to explain why certain municipalities would not be in the indictment anymore. In terms of expectations, those who are financing the tribunals want smaller, shorter, and leaner trials. Victims, rightly so, are expecting the broadest trials possible. The challenge is to find a compromise between having a trial that is much more than at the domestic level—a trial that shows the magnitude, importance, and gravity of the crimes committed—but at the same time is manageable. For example, for *Karadžić* and *Mladić*, we reduced 200 incidents to 100.

And the last small element is timing. We all know justice delayed is justice denied. Well, in the international field, it is different. There are moments where you have zero chance of being successful and others in which it is the right moment to move forward with an indictment.

So, there are so many decisions to be made that it is very easy to criticize whatever decision we are making.

**MICHAEL SCHARF:** Let me ask as a follow-up whether there is diplomatic pressure to indict all sides of a conflict. I know that with the Yugoslavia Tribunal they started with a Serb indictment in the first trial, then a Croatian, and then a Bosnian Muslim. I know that diplomatically and publicly, people at the time said, “Well, that was really wise,” because that was good for reconciliation to have prosecutions of all sides.

Now, in other places like the Ivory Coast there is criticism because only the former regime and nobody in the current regime is being indicted. How does the idea of indicting different groups—the pro-government and anti-government, in terms of how it fits into diplomacy—unfold? Does anybody want to comment on that? Hassan.

**HASSAN JALLOW:** The selection of targets for investigation of prosecution is one of the most difficult areas for any prosecutor and none of our tribunals have escaped criticism about our final list on who was included and excluded. It is because of the nature of the system itself that international criminal justice is selective. It has to be selective because it cannot prosecute everybody. You have to make a choice as to whom to select.

I think the important thing is, as a prosecutor, you have objective criteria to guide the selection process. You have a procedure to do so, and you are transparent about it. You are transparent about the whole process.

At the ICTR, when we were faced with the completion strategy, we actually spent days debating the criteria for selection of cases, and we agreed on them. Steve Rapp was there, James Stewart was there, and they were all helpful. And once we agreed on this criteria, then it was the task of a small committee to comb through

the cases and see which cases met those criteria. I think that is the best protection a prosecutor has—objective criteria and a transparent process, which is made public as well.

There is no interference. I am speaking for the ad hoc. For instance, on this issue of prosecuting both sides, in our case we would like to refer to the fact that there was also the obvious side. The Security Council did make a reference to that issue in a resolution, Resolution 1503 I think, but it was very careful. It never asked the Tribunal to prosecute members of the Rwandan Patriotic Front (RPF). It asked the Tribunal to investigate and left it then to the discretion of the prosecutor to decide whether in light of the evidence and in light of the law, there were any cases to prosecute. So there was that guidance from the Security Council.

The Council did not overstep its boundaries by interfering with the judicial process. It left it to the Tribunal to decide whether there were cases to prosecute or not.

**MICHAEL SCHARF:** To change the subject for a second, in our wonderful keynote this morning, we heard a great background story about how the Court decided to indict for the first time the crime of forced marriage. As everybody knows, one of the criticisms of Nuremberg was that it was applying *ex post facto* crimes; in particular, the crime of aggression, which had never been prosecuted before. Your courts have all had to grapple with new innovative crimes and evolutionary crimes.

Let me ask Nick and Brenda this. Nick, you have charged a different type of forced marriage but used the same term. Brenda, your Tribunal convicted forced marriage with respect to the phenomenon of bush wives. How are those two crimes of forced marriage different and similar, and how did both tribunals deal—and yours, Nick, currently deal—with the issue of the *ex post facto* attack?

**NICHOLAS KOUMJIAN:** Thank you. Well, of course, the defense challenged that this crime of forced marriage was not part of customary international law in 1975, the period of the jurisdiction of the Extraordinary Chambers in the Courts of Cambodia. But the crime had already been confirmed in some litigation at the Court that falls into this residual category of other acts—other inhumane acts—for crimes against humanity. This has been upheld in a lot of jurisprudence that said that when the acts reach the level of severity of other inhumane acts, you should not leave it to the imagination of perpetrators to find a way of torturing or a way of persecuting a civilian population when there is no codified crime, no previous jurisprudence. So, the courts found that forced marriage does reach the level of another inhumane act in Sierra Leone.

I think the elements will be the same in Cambodia. Though, the phenomena were different. One of the big phenomena, the real difference, is that in Sierra Leone, the wives were often a reward to fighters; the men were given the reward of a wife to do the domestic chores and for sexual purposes.

In Cambodia, it was very different. The government had a policy, I would say, of controlling family life, limiting family ties, and so they decided that they would select spouses. Both the man and the woman were victims of the forced marriage. Men were given no choice about whom they had to marry any more than women were.

One of the witnesses that testified last month was a transgender person who was born as a man and identified herself as a woman, but was forced during the regime to marry a woman and then forced to consummate that marriage. Then they actually produced a child in that union. So, it is a very different phenomenon in Cambodia because it was a government policy about controlling society completely as opposed to rewarding fighters.

**MICHAEL SCHARF:** Do you want to add anything, Brenda?

**BRENDA J. HOLLIS:** Just that I think, initially, we have to look at whether this is a new crime or not, and I know this term is used even by the judges at the special court. But in my mind, it is not a new crime. It is a new characterization of certain conduct as another inhumane act, which is not a new crime.

But in the situation in Sierra Leone, it was actually a dissenting opinion in the Armed Forces Revolutionary Council (AFRC) case. The judge in the dissenting opinion said that in Sierra Leone they had vitiated the will of these women and girls and forced them to enter into and remain in a marital union, and by doing this, they subjected the victims to physical and mental suffering. She relied on the two substantive elements of other inhumane acts, which are basically that the perpetrator inflicted great suffering or serious injury to body or mental or physical health by means of this inhumane act, and that the gravity, as Nick said, was similar to the other articulated crimes. In this dissenting opinion, the judge said, “I understand that forced marriage has not been identified as a separate crime. But when we look at provisions of treaties, conventions, and domestic jurisdictions, we find that there is, in many of these treaties, conventions, and domestic jurisdiction, a requirement that ‘marriage’ be with the consent of both parties.” So, there is a basis for saying that where consent is absent with one party, there is potential criminal conduct.

The Appeals Chamber upheld the dissent and overruled the majority. In doing that, the Appeals Chamber basically said that forced marriage shares certain elements with sexual slavery, to include nonconsensual sex and deprivation of liberty. But they said, in addition, forced marriage describes a situation in which the perpetrator compels a person to serve as a conjugal partner, resulting in severe suffering or physical, mental, or psychological injury to the victim.

On the question of whether there was notice to the perpetrator that this conduct was criminal, the Appeals Chamber said that they were satisfied there was such notice because they said, “What we had in Sierra Leone were perpetrators who intended to force a conjugal partnership upon the victims, and they were aware that their conduct would cause serious suffering or physical, mental, or psychological injury.” In arriving at this conclusion, they looked at the underlying facts of the situation in Sierra Leone for women and girls and found that, basically, it was abduction, often with severe violence, and part of that abduction very often included rape or serial rapes, and it was only later that they were handed off. But it also included forcing these people to move from place to place to perform slave labor for their “husband” or the perpetrator who had them and also to bear and raise their children. So they said, “When you look at the underlying conduct, we are satisfied that these individuals intended this conduct, and they must have known that this was criminal in nature.”

Now, one final point is that in the *Taylor* case, we did not charge forced marriage, and there were two reasons for that. At the time we began to present our evidence and were preparing the last stages of our case, forced marriage was upheld in a dissent in a case, and the majority had said that was not the proper characterization. And it was only after we had begun to present our evidence that the Appeals Chamber upheld this dissenting opinion. And we felt at that time, it was too late to amend an indictment to include forced marriage.

But in my mind, there was a more important reason for not including forced marriage: the situation in Sierra Leone had nothing to do with marriage in any form. It was a form of enslavement, which was both sexual in nature and also forced labor in nature. So we did not charge it. That meant that the Trial Chamber had to deal with our case in the context of previously having the Appeals Chamber uphold forced marriage. And all three of the judges, including the judge who had dissented in the AFRC case, said, “We reflect that marriage

is not the proper characterization for what happened here and that forced marriage is not the proper characterization of this underlying conduct. Really, it is a form of sexual slavery that involves conjugal duties, which basically are domestic duties.” So they went back to this analysis and said, “We think that it was a misconception,” and of course, as Trial Chambers are wont to do, they said, “And it was forced upon us because prosecution charged forced marriage, so we had to deal with it.” But we think, more properly, it is not a situation of forced marriage. So they upheld the same conduct as sexual slavery with this added component of conjugal duties, and that was not an issue on appeal. That is how we dealt with that issue.

**MICHAEL SCHARF:** So, the other part of the efficacy of the tribunals is their ability to actually get custody over the accused, and Nuremberg did not have much of a problem with this. They did not need a constabulary because they had a bunch of armies occupying Germany that could go around and pluck people up and bring them to the tribunal.

But the ICC and the ad hoc tribunals depend on the cooperation of states, the Security Council, and the Assembly of States Parties. So, let me ask Serge, Hassan, and Brenda about how your three tribunals—the Yugoslavia Tribunal, the Rwanda Tribunal, and the Special Court for Sierra Leone—ended up gaining custody over nearly every indicted person—and I have to say I am pleasantly surprised about that. What was the secret to the tribunals’ successes in this regard, and what are the lessons for the ICC?

**BRENDA J. HOLLIS:** You know, earlier, we heard an excellent presentation about the political environment after the Second World War that allowed for the creation of an international justice mechanism and spoke about it as a shining moment. And it was decades later that we had other such shining moments. Because decades later, the political environment was such to allow the creation of new

international justice mechanisms, and that was the ad hoc tribunals and then the follow-on courts from that.

Another shining moment was when states came together to create the International Criminal Court, and the reason I preface my remarks with this is that our success depends upon the political will of the international community. Certainly, in Sierra Leone, we are talking about the government of Sierra Leone. And we would be remiss if we did not thank and acknowledge the tremendous cooperation that we received throughout the life of the Court from the government of Sierra Leone. Even when we indicted individuals who were viewed by many in Sierra Leone as saviors of the democracy and national heroes, the government of Sierra Leone assisted us in arresting these individuals and transferring them to the custody of our Court.

So, we had that political will in Sierra Leone. Where you do not have that political will, then you do not get the people you indict. There was an instance where we did not have the political will in the Sierra Leone Court, and we had to wait until the political will was there to get this indictee. I am talking about Charles Taylor.

Now, the political will of the international community is beyond the power of the courts to create, but there are things that courts can do to try to encourage and build this political will throughout the world. Certainly, in Sierra Leone, David Crane, the chief prosecutor, and the deputy prosecutor worked diligently to establish good working relationships with the inspector general of Sierra Leone. And it was in part because of this good working relationship that they were so cooperative with us in effecting the arrest and transfer of these people to us. So that is one way that we can try to build this international political will.

Also, at a lower level, having our people work with lower-level authorities in the appropriate agencies also assists in building

political will and, beyond that, as I think the other tribunals have noted, building an effective tracking unit so that you can locate where these individuals are in the world. Establishing good relationships with the authorities there is also another means that we can use to help to build this political will.

But one thing—and I think the Yugoslav Tribunal did this best—is that there comes a point where you simply have to name and shame, and you have to make very public what you have done and who it is that is blocking your ability to get custody of these people. In that regard, you also have to analyze what it is this non-cooperative state wants from the international community, and how we can energize the international community to make getting what they want conditional on handing over people.

So those are some of the ways I think that we can build political will, but ultimately, this is an issue and a failing of the international community, not the courts.

**MICHAEL SCHARF:** Serge, do you want to add something?

**SERGE BRAMMERTZ:** Yes. We are in this lucky situation to be probably the only tribunal with no fugitives at large, and as Brenda said, we had a very successful tracking team with Bob Reid, an Australian investigator, being really our best fugitive hunter. And I would like to say that the main reason is because we have done a fantastic job and we are excellent, but the real reason is that we had the European Union and the conditionality policy. And in the early years when Milošević was arrested but not surrendered, the United States was planning and organizing a big donors' conference for Serbia and insisted on the transfer of Milošević, and he was surrendered one day before the conference was to take place.

Over nine years ago, when Karadžić and Mladić were not arrested, I had not only to report to the Security Council every six months, but also to the Council of Ministers of Foreign Affairs of the European Union. Every time our report was negative, Croatia, Serbia, or Bosnia would not move forward in their EU progress. So, for me, it is crystal clear that this stick-carrot policy by the European Union towards the countries of the former Yugoslavia played a key role, because it was a very clear political agenda. You want to join the European Union? There are a number of criteria that have to be fulfilled.

And remember that in 2011, a few weeks before Mladić was arrested, there was a survey done in Serbia where 65 percent of the people interviewed were against the arrest of Mladić. There have been videos in the courtroom that show Mladić's men executing prisoners, but despite these very obviously documented crimes, a majority of the population still considered all our fugitives as heroes. That is not a problem. So, 65 percent were against these arrests, but 75 percent were in favor of joining the European Union. And politicians are, everywhere in the world, very similar. They very often do what they think will have the most important impact.

This is missing for the ICC and other places. Look at the ICC and the Security Council. Countries cannot agree on having one political line. In the majority of countries where the ICC is operating, you have one side and another. So my conclusion in this regard is that it is much more the failure of the international community that there are no arrests, because the ICTY has demonstrated that where there is a common political position with a very clear agenda, justice is successful, and where there is not, it is much more complicated.

**MICHAELSCHARF:** Hassan, did you want to add something, briefly?

**HASSAN JALLOW:** Yes. Well, these indictees have to be arrested because in all our cases, I think with the exception of maybe Lebanon,

you cannot have trials in absentia, so you must bring in the accused person. In the case of the Rwanda Tribunal, unlike in Germany at the time, none of them were present in Rwanda. All of them had fled the country. A couple of them were present enough to actually be engaged as part of the defense team in the ICTR, and we have a court on our premises in Arusha itself.

There were three things we found very useful. One was setting up a tracking team of very efficient, competent, and dedicated investigators, who carry out the difficult task of trying to track the movements of these fugitives. I think that is an important lesson.

The second is that the Tribunal engages in diplomatic outreach to secure the cooperation of states, because once we tracked the fugitive and found him in a particular location, we did not have any powers of arrest. You still have to fall back on the country concerned to effect the arrest of the accused. So diplomatic outreach was very important, and we did this at various levels on a bilateral basis with the country concerned.

At a regional level, working with countries in a region to put pressure on some of these defaulting countries, we worked with groups or states that constituted themselves into friends of the ICTR, and they spoke on our behalf with regard to some of the difficult countries.

In the final analysis, we went back to the Security Council. We went to the Security Council and secured its support in urging the states concerned to cooperate with us, particularly Kenya with respect to the case of *Kabuga*. These were some of the methods we resorted to.

And, finally, of course, a little bit of good luck always helped us. We had some very lucky arrests when you consider the circumstances under which these were effected.

At the end of the day, of course, we had indicted ninety-three people, all of whom were arrested, except the three we passed on through the mechanism. So it is the task of Serge now to look for them, find them, and bring them over to Arusha for trial, with the exception of six more we sent to Rwanda for trial there. It is the responsibility of the Rwandese to prosecute them.

**MICHAEL SCHARF:** Hassan mentioned the Lebanon Tribunal, which is the only tribunal since Nuremberg that has the ability to do trials in absentia. As you know, as students of Nuremberg, Martin Bormann was prosecuted in absentia, and it turned out after the trial and his conviction that he actually had been dead, which was a little bit of an embarrassment.

Now, Ekkehard, we did not forget about you down there. You are not a potted plant.

Can you tell us a little bit about how the trials in absentia are going? I understand that one of the defendants that you have indicted in absentia, Mustafa Badreddine, who is a leading Hezbollah commander, was actually killed in an airstrike this past May, and so your office is actually in the middle of a debate about whether he should be the modern-day Martin Bormann. Should you prosecute him, even though you know he is dead, or drop him from the prosecution? Tell us a little bit about that.

**EKKEHARD WITHOPF:** First, I want to repeat that I am talking on behalf of the Prosecutor, Norman Farrell, who sends his regards and apologizes for not being able to attend due to other work commitments.

In respect of the accused Badreddine, what has happened is the following: on May 13, we got a number of reports indicating that one of the accused, Badreddine was killed in Syria, close to Damascus.

Badreddine's role in the STL's indictment—concerning the assassination of former Lebanese Prime Minister Rafik Hariri—is characterized by saying that Badreddine coordinated the surveillance of Hariri in preparation of the attack and the purchase of the van that was used to prepare the attack. Furthermore, he monitored, and together with the accused Merhi, coordinated the false claim of responsibility.

What followed the reports of Badreddine's death was a rather peculiar aspect of litigation. Finally, after two months of litigation before the Trial Chamber and the Appeals Chamber, it was judicially determined that Badreddine is dead. Consequently, the proceedings against him were terminated.

The proceedings are terminated by now, so we are not prosecuting Badreddine anymore, and of course, we amended the indictment accordingly. We continue to name him in the indictment as an unindicted co-conspirator. While this has resulted in resistance by the defense, we are relying on ICTY jurisprudence and other international jurisprudence and are optimistic that we will be in a position to convince the Trial Chamber that this is the proper way to proceed.

What we are facing now makes it even more complicated, and we thought after the Trial Chamber had agreed to the amendment of the indictment, that particular aspect would finally be dealt with. However, what happened just recently is that the Trial Chamber ordered/invited the parties to make submissions on the question as to whether an *amicus curiae* should be appointed to assist the Trial Chamber on evidentiary matters in relation to the now former accused Badreddine. One really needs to understand what it means for an *amicus curiae* assisting to address the evidence that relates to a former accused. First of all, it is unnecessary, it is also unhelpful, and it is impractical. There is no precedent in international criminal law. To our knowledge, there is also no precedent in any domestic law, and we are hopeful that the Trial Chamber will follow our position.

The mere idea that there would be an *amicus curiae* appointed who, in essence and in practice, largely does nothing else but what an appointed defense counsel does, is a bit difficult for us to conceptualize, and we hope it is not going to happen.

**MICHAEL SCHARF:** So another innovation coming out of another tribunal.

This is called the IHL Dialogs, and you are hearing a dialog among the prosecutors, but I think what many people love about this panel is the ability to ask the prosecutors your questions. So, even though I have a lot of other questions—and I am sure some of you wanted me to address them—let us turn it over now to the audience so that you will have a full fifteen minutes to ask your questions.

**MICHAEL SCHARF:** If you have a question, just raise your hand. Jane Stromseth.

**JANE STROMSETH:** I know many of the tribunals engage in meaningful and systematic outreach with affected communities. Part of the international justice project is not only seeking justice through fair trials and holding the most responsible accountable, but also conveying and demonstrating to victim communities that this is being done and also honestly engaging with their criticisms. Maybe they think those most responsible are those who live down the street and were not prosecuted. So I am interested in your thinking on outreach and how that is being done and how it could be done better, the field presences and so forth—that aspect of dealing with the affected communities and their demands for justice. Thank you.

**MICHAEL SCHARF:** Will one or two of you address that? Fatou?

**FATOU BENSOUDA:** Outreach is critical to our work—I think to the work of any tribunal—but particularly to the work of the ICC. We just need to do outreach.

One of the problems we have encountered is the fact that the Court is not known. It is not understood. The jurisdiction is also not properly understood. Why we intervene in certain areas and why we do not intervene in others is also not known. Of course, this creates a perception of bias, for instance, that you are trying this person and you are not trying this person, or you are in this region and you are not in another region. We have reflected a lot on this not only in my Office but also at court-wide level.

As you know, the way we are set up is that the Registry is primarily responsible for outreach, But it is important that, where we can, as Office of the Prosecutor, we also get involved in conveying those messages, because there are certain things that the Office of the Prosecutor can do or can say for themselves, which unfortunately the Registry cannot do on the Office's behalf.

The recent changes that the Registry have made include increasing field presence and also having staff at the very senior level in the field and able to answer to those questions.

Another thing that the Registry was doing, and that I think paid off very well in both the *Lubanga* and the *Katanga* trials, is having in the field a video or a screen in which they can follow the trials directly. We also have people from the Registry who are also able to be out there and to answer questions directly with the affected community.

One of the things that I also did was to try to be closer, engage more and interact more, with civil society. I think it is important. Civil society being the first responders, they will be able to convey helpful messages and accurate information about the Court.

We also try to engage as much as possible with states that are able to organize some of these events on the ground where we are able to be present and all the organs of the Court can be represented. We call them the cooperation events or the cooperation seminars. We have so far had quite a few on the African continent, but also outside of the African continent. In fact, in this coming month, we hope to have one in Chad. We are working on it. These are some of the efforts that we are making to get closer to the people and to be able to explain to them what the Court is doing, why the Court's jurisdiction is the way it is, and also why we cannot intervene in all areas. We do this because the expectations for the Court are very high, and it is felt that whenever there is conflict anywhere, the ICC should be there.

As I said earlier, we have a lot of requests about why we are not intervening in this or that place. Of course it is not by choice, but our jurisdiction is limited to that effect.

**MICHAEL SCHARF:** Nick, there is a recent Open Society Justice Initiative report that indicates that the Cambodian people are receiving very little news about the Cambodian Tribunal from the media. Is this undermining your outreach and the educative function of your trials?

**NICHOLAS KOUMJIAN:** I think that was Laura McGrew's report that recently came out.

Of course it is difficult. It is a rural society, and some of the rural communities are quite isolated with limited media. In Cambodia, for example, radio is probably more important than television, although that is changing. But one of the great advantages of having a court in the country is that to date over 200,000 Cambodians have come through and witnessed proceedings in the courtroom. We have a very large courtroom that seats about 500 people, and pretty much every day, there is a group of at least a hundred, sometimes several such

groups, that come in and watch a bit of the proceedings and get a briefing from the outreach people on what the Court is doing.

But, clearly, more could be done. There were more television and radio programs, but then the money ran out. Still, every day in the press in Cambodia, in both the English and Khmer press, there are articles about what has happened in the Court and in the trial.

**MICHAEL SCHARF:** We are running out of time, so maybe if two or three people would each say their question, and then we will just hear those questions. And then we will allow the bench to decide which ones to address.

**ATTENDEE:** What could prosecution indictments look like in the future if we do not deal with states anymore, but with ideologies? For example, extremists do not rely on states but follow an ideology, which is unifying them. You see terrorist groups in Syria, Iraq, and Afghanistan, but they belong to all kinds of nationalities. So how might this look in the future and what impact could the ICC have on that?

**MICHAEL SCHARF:** Okay. So that is one question, and your hand is up.

**ATTENDEE:** I have a question for Prosecutor Bensouda and Serge Brammertz. What would you say to an idea of an ICTY-modeled tribunal for Syria? Would that be something that you would agree to or oppose? I am curious because people say that arguing for that undermines the ICC. Prosecutor Brammertz, given that you are from the ICTY, I am wondering what your thoughts are. And as a former Yugoslav, thank you for your work, Prosecutor Brammertz.

**MICHAEL SCHARF:** And another question there.

**ATTENDEE:** My question is about the notion of political will and the opportunity to execute the judgments you make to bring

through the sentences and possible incarceration. How important this is and how do you accomplish it?

**MICHAEL SCHARF:** Okay. And then the last question. You have been patient.

**PATRYK LABUDA:** What role does academic scholarship play in your decision making? Do you have time to engage with some of these academic criticisms, or how do you deal with this? Thank you.

**MICHAEL SCHARF:** Hopefully, if your question is not answered now, you can have it answered after the panel, but we do have four questions. And if any of the panelists want to try to answer any or all of those very briefly, that would be great. Serge, do you want to start?

**SERGE BRAMMERTZ:** I can start with the question on the ICTY-modeled tribunal for Syria. Again, this is a big political debate. I spent two years in Lebanon when I was in charge of the Hariri investigation and had the opportunity to interview President Assad and many others in the context of this investigation. Believe me, former Yugoslavia is a complex area, but the Middle East is not very different in many regards.

We all know that four times the Security Council resolutions failed to send the case to the ICC, but I think that independent of a referral, the ICC alone will never be the solution for Syria. You have already twice as many victims as you had in the conflict in the former Yugoslavia. The conflict is already twice as long. We have indicted 161 persons at our Tribunal. There are 5,000 people still under investigations in Bosnia. So, I do not think that the ICC alone would ever be the solution for accountability in Syria. What would be the best model? I think it is the closer you are to the people affected—victims’ communities and perpetrators’ communities. Proximity to the victims is one thing, but outreach to perpetrators’ communities, I think is a big challenge.

I am in favor of an ad hoc solution—not necessarily an ad hoc tribunal—if possible with local ownership, because once you have Syria’s local ownership, you have already less room for criticism because people cannot distance themselves. But it will be extremely difficult to find people who would be willing to engage in a mixed solution.

I remember that when I started in Lebanon, I had five investigators. I had twenty posts. I invited ten ambassadors from Middle East countries from the region to ask them to make lawyers and investigators and prosecutors available. Five of them said, “Well, you know, we are so honored that you are asking us, but we don’t have any people who are qualified to join your investigation commission.” The other five were saying, “Well, let’s be honest. We do not want to touch this Hariri investigation commission.”

So, as much as I am in favor of a mixed solution for Syria, it will be extremely difficult to find people who are willing to do it and who are perceived as independent and impartial enough by others to have the necessary credibility.

**MICHAEL SCHARF:** Now, Fatou, you mentioned academic scholarship last night in your speech. I will let you have the final word, and maybe you can answer that question about being busy and the role of academics.

**FATOU BENSOUDA:** I continue to say that it is really very important for the work of the ICC to have the discourse and discussion that takes place at the academic level. Of course, it does not make us decide on our cases. I thought I heard you ask how it helps in decision making. With respect to the cases themselves, of course, we have to follow what the Rome Statute says, what the law says, and how we can charge in respect of these crimes, which are already laid out and defined. But the importance of academics and the discussions they have about the work that we do or the various provisions of the Rome

Statute is critical. It is very important for us, and I have acknowledged it several times. I have said that this is something that we hold as very critical to the work that we do.

There was a question about ideologies and some of these perpetrators who now commit crimes based on ideologies or states, but I want to remind everyone that with respect to what we do, it is about the individual criminal responsibility of the individuals who commit these crimes. There are various means through which people reason why they need to commit these crimes. It can be ideologies that they have. It can be based on policies that they have. But, at the end of the day, what is crucial for prosecutors to look for is the elements that are required, to see whether the individuals who perpetrate these crimes fall within what we are actually looking for.

Currently, if you look at the case docket of the ICC, you see that we have charged people who are state actors at the highest level, but we have also charged people who are in the militia. If you look at both, you can see it is perhaps state policies that have made them commit these crimes, but also with respect to the militia, they go forward to commit these crimes because it was what they believed in.

I do not see it being different in the future as long as you stick with the principles of what your statute tells you, what the law tells you in respect of the crimes, and whether these elements have been satisfied or not. I hope I have understood your question.

Then there was the question with respect to whether the ICC will be undermined if there are other courts that are set up with respect to Syria. I do not think so. Firstly, you should also remember that the ICC is a court of last resort, in the first instance. It is not here to replace national jurisdictions. It comes in where national jurisdictions are unable or unwilling.

In the current case, I can only say that I do not know whether I can comment that far, given the fact that neither Syria nor Iraq is a state party to the Rome Statute. But, as I said earlier on, I know that there are various attempts. There are various initiatives that states take to involve the ICC, but until that happens, we do not have personal jurisdiction here.

I have said before that it is important that justice is done. At the moment, it is almost impossible or very difficult for the ICC to come in, but that should not stop other efforts that are being made to ensure that justice comes to both Syria and Iraq.

**MICHAEL SCHARF:** Please join me in a very warm thank-you and applause for our panel.



## Roundtable: German Perspectives on the Prosecution of Nazi Crimes

*This panel was convened at 2:30 p.m. on Friday, September 30, 2017, by its moderator, Serge Brammertz, International Criminal Tribunal for the Former Yugoslavia, who introduced the panelists: Hans-Joachim Lutz, Higher Regional Court in Munich; Christoph Safferling, International Nuremberg Principles Academy; and Annette Weinke, Friedrich Schiller University. An edited version of their remarks follows.*

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**SERGE BRAMMERTZ:** We are here for a very interesting discussion with three very distinguished speakers. I will not go into details about their CVs. You have them in your dossiers. Dr. Annette Weinke, who is a historian, will be speaking from a historical perspective; Dr. Hans-Joachim Lutz, who has been a prosecutor for many years and is now a judge, will speak about a concrete case he worked on recently; and Professor Christoph Safferling will speak about the other aspects that have not been addressed by the two colleagues.

We will have short presentations from three very different angles—a historical perspective, a concrete case, and a broader aspect. But perhaps before giving you the floor, Annette, I will note that I was really struck this morning when you were speaking about historical events that are important today. Yesterday, when we were flying in, I was boarding the plane and reading an article in a newspaper on Hitler's birth house in Braunau. I was not aware that there was a big ongoing discussion on what to do with this house where he spent a few months as a baby, before his parents moved. He was born in 1889, so we are speaking about events that happened 127 years ago, and the debate is now ongoing.

I will not go into details about this article, which is really interesting, but there was a government decision to expropriate the property, and now there is a thirteen-member commission that is discussing what should be done with the house. One decision now has been made not to demolish it due to the argument that you cannot destroy history. There are now a number of proposals regarding what to do with the house, and apparently there is an agreement to change, at least, the front of the house, which is today the place where a lot of new Nazi groups come every year. So they want to at least change the façade of the house, and then there are a number of proposals to make it a police station or to locate an NGO on the premises, but to demystify the house by changing its appearance.

If we speak about the Second World War, the Nazi regime, we speak about the historical perspective, so I am very much looking forward to Annette's talk.

**ANNETTE WEINKE:** Good afternoon, everybody. Thank you, Serge, for the kind introduction. I want to express my deep gratitude to Jim and the organizers of this event for giving me the opportunity to present some of my ideas to this very distinguished audience. Basically, I am grappling with a rather difficult task because, as you can imagine, it is quite tricky to give you a summary or an outline of what happened during the last seventy years, with respect to the German reactions on Nuremberg. First of all, there was obviously not *one* German reaction. There were different groups within the German population who reacted quite differently to this event. Also, there were conjunctures. There were different phases during these seventy years, and generally we can say that it was not an uplifting history or a "success story." I will try to give you a brief outline, and you have to forgive me if I have to simplify a little bit to make a long and complicated trajectory more comprehensible.

In 1949, shortly after the American follow-up trials, the German émigré jurist, Franz Neumann, published an article summarizing his view of the trial program's legacy. Neumann was convinced that its didactic purpose and its historical lessons had been totally lost on the majority of Germans. He assigned the main responsibility for the overall negative response not to the Western powers, but to the traditional West German elites, who had kept their nationalist and cultural bias against "the West": "Those powerful groups tend to use the trials as political instruments either to attack the West or to offer themselves as allies against the East, or to attack all victorious powers . . . It is conceivable (and even likely) that the trials will play a role similar to the famous 'War Guilt Lie' after 1918," when the Versailles Peace Treaty had aroused strong nationalistic sentiments. Neumann's pessimistic assessment that the Nuremberg Trials tended to backfire was more or less realistic. While opinion polls in Germany during the International Military Tribunal (IMT) reflected a fairly positive reception for the trial, four years later the Americans were confronted with the perplexing result that many more Germans now saw the IMT as an unfair proceeding. Historians who have examined the formation of a West German "collective guilt" syndrome have argued that the fixation on a presumed allied allegation of collective guilt was partly a reaction to the over-ambitious reeducation program conducted by the Americans in their zone.

However, it was surely no coincidence that the protests against the trials turned vociferous just at the moment when the American prosecutorial office in the Western zones issued indictments against 200 arbiters of Germany's military, legal, medical, and diplomatic elites. This became, then, the rallying point for conservative West German opposition to Western occupation politics.

Further encouragement came from voices from the United States and Great Britain who wished to discredit the war crimes trials as a New Deal experiment in social engineering. German critics

were led by renowned legal scholars—among them a couple of former IMT defense attorneys—and church officials who in 1949 had constituted the so-called “Heidelberg jurist circle.” This was a reference to the German sociologist, Max Weber, who was one of the liberal dignitaries who had launched a campaign against the Versailles punishment program in 1919.

With a self-image as the only unblemished institutions in Germany, the Catholic and Protestant churches were central in the public campaign for amnesty. In their forceful critique of Nuremberg, church leaders conflated lamentations of a supposed general trend to secularization with condemnations of the trials as cultural Bolshevism and instruments of “Jewish revenge.”

In the pointed words of the American sociologist Jeffrey Olick, the clerical discourse on Nuremberg established a “grammar of exculpation” that shaped how West Germans would perceive the Allied occupation and how they remembered the war and the Holocaust. As it can be shown in various contexts, the Christian notion of “reconciliation” was strategically exploited to assist political mobilization. As used by churchmen like Bishop Theophil Wurm and the Tübingen theologian, Helmut Thielecke, reconciliation evoked a metaphysical tale of German suffering and connected it to highly specific political goals. So the highest priority on the church’s agenda was to end Allied denazification and reeducation politics.

According to Wurm and others, forced measures of expiation were simply counterproductive to a spiritual renewal of the German people. In this vein, he even went as far as to equate denazification with the Jewish catastrophe: “To squeeze the German people together in an even more crowded space and to reduce its possibilities for life as much

as possible cannot, in fundamental terms, be evaluated any differently than the extermination plans of Hitler against the Jewish race.”

In the early 1950s, the Heidelberg jurist circle had accomplished its most important goals. In the context of the looming Korea crisis, the Western allies either overturned or ameliorated previous war crimes verdicts and released many of their German prisoners. Legal scholar Eduard Wahl, a former member of the National Socialist German Workers' Party (NSDAP) and the SA, and co-editor of the Nazi legal journal *Zeitschrift für Völkerrecht*, who had acted as a go-between between the Adenauer government and the lobby group, had joined the West German Bundestag as a member of the Christian Democrats. In May 1953, Wahl was approached by Raphael Lemkin, a Polish law professor who had emigrated to the United States. In 1944, Lemkin had coined the term “genocide,” which later became the conceptual framework for the United Nations Genocide Convention in 1948. Frustrated by the marginalization of his scheme in the wake of the Nuremberg trials, the purpose of his letter to Wahl was to reaffirm West German conservatives in their well-known resentments against “Nuremberg law,” while convincing them of the advantages of his own innovation. The latter one was praised as a powerful weapon suitable to punish Communist crimes committed against ethnic Germans in Eastern Europe in the Cold War. It was due to Lemkin's relentless lobbying that the Federal Republic paradoxically became one of the first states worldwide that ratified the Genocide Convention in 1954 and integrated it into her domestic penal code. Until 2002, this remained the only legislative adaption of international criminal law in West German national penal law. Although it never gained any practical implications for the jurisdiction against perpetrators with a National Socialist and/or Socialist background, it symbolized the Federal Republic's “anti-totalitarian” commitment and her resolve to defend liberal rights against dictatorial oppression. Contrary to the contention of lauded German experts of international law like Bruno

Simma, neither “crimes against humanity” nor “genocide” were ever applied by West German courts between 1949 and 2002.

The fact that the Federal Republic’s political establishment, from right to left, almost unanimously rejected the Nuremberg trials and persuaded Western allies to unwind the project, prematurely, has led some historians to the general conclusion that Nuremberg actually blocked West German critical self-introspection. In a refreshingly provocative new look at the possible history of human rights, American historian Samuel Moyn states bluntly, “The main response[s] to Nuremberg and postwar Germany were anger and boredom. In spite of trying, recent historians have not been able to discover any reasons that Germans, even German lawyers, were re-educated by it. . . . As for the so-called ‘successor’ trials . . . they may have made things worse by stimulating revanchism.”

To my mind, this argument shows how a legitimate attempt to deconstruct optimistic mythologies about Nuremberg runs the danger of creating new legends, and this time mostly pessimistic ones. So I would argue that the postwar German history of Nuremberg and international law is much more complex and multifaceted.

In the long run, the West German discourse on Nuremberg did not trigger just cultural opposition, but also appropriation and reinvention within the broad expanse of West German *Vergangenheitsbewältigung*, overcoming the past. The project of German-Israeli *Wiedergutmachung*, for example, was, in fact, both a West German reaction to the Holocaust, as represented at Nuremberg, and an attempt to overcome the limitations of justice and truth telling via court proceedings.

The vivid discussion among West German jurists about whether the Nuremberg principles should be integrated into a national penal law can be interpreted as a fundamental critique against Allied intrusion in sovereign national rights and indigenous legal culture. But it can also

be interpreted as an attempt to engage in international human rights discourses so as to harmonize them with national legal traditions. In the same vein, one could claim the resumption of national war crimes prosecutions in the late 1950s was motivated by the insight that Nuremberg had only scratched the surface of the actual crimes, as it was particularly true with respect to the Holocaust and Eastern Europe.

Thus, from the insider's perspective, the Auschwitz trial and other big Holocaust trials of the 1960s and 1970s served to correct the biases and limitations of Nuremberg, even while observers abroad saw these as proof that West Germans had finally learned their "lessons."

Interestingly enough, this constructive perspective on West German Holocaust trials especially took hold in Communist Poland. By the early 1960s, the Polish *nomenklatura* had become relatively disillusioned by the self-apologetic tendencies of East German antifascism and were positively surprised by the West German trials, which they actively supported. So the West Germans themselves, at some point, started to interpret the national war crimes program as a step to mutual understanding and reconciliation for the Polish and Israeli people, simply because this was how Poland and Israel saw it. When we tackle the issue of self-transformation from within and transformation from without, we are always dealing with complicated entanglement and transfer processes.

While it is certainly true that, over several decades, the Nuremberg discourse of the West German elites was almost entirely skeptical, the tendencies for positive self-transformation cannot be overlooked. Franz Neumann, who became a guest professor at Free University in West Berlin died relatively young, at 54, in a car crash, so, therefore, we can only speculate how he would have assessed the eventual course of the West German *Vergangenheitsbewältigung* in light of his earlier views. Contrary to his earlier pessimism, however, we can say that Nuremberg

did not become a second “Leipzig,” so despite the resentments, the trials did not become a focal point for another “war guilt lie.”

Despite the obvious limitations of early West German Holocaust memory, proponents of denial always remained a sectarian minority within the Federal Republic. Subsequent generations of human rights activists, church members, journalists, and intellectuals revived the idea of Nuremberg in promoting historical self-reflection and reconciliation with the formal victims of the Nazi terror.

So, I come to the end here. Should we, therefore, speak of postwar West Germany as an international relations morality tale? At this point my answer is yes and no. By the way, this is typical for historians—always yes and no. At the beginning of the twenty-first century, the Federal Republic has certainly begun to embrace the Nuremberg legacy and international human rights with substantial official support for the ICC at The Hague and global anti-impunity campaigns. But the self-congratulatory tone on human rights issues among the political and academic elites of the Berlin republic also has its disturbing side. West Germans often appear to believe that they are not just global champions of mastering the past but even think of it as their potentate invention. So as I have tried to outline here, this perception is based on a distorted image of their own national history.\*

**SERGE BRAMMERTZ:** Thank you very much, Annette, for this very general overview. I am sure there will be follow-up questions afterwards. From the broader picture of how the view of Nuremberg developed over the years, we are now going to a very concrete

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\* Portions of this presentation were excerpted from: Annette Weinke, *Reconciling through International (Criminal) Law? The Nuremberg Trials and their Impact on Concepts and Practices of Reconciliation in Postwar Germany*, in *ASIA-PACIFIC BETWEEN CONFLICT AND RECONCILIATION* 205-218 (Phillip Holliday, Maria Palme, & Dong-Choon Kim eds., 2016).

case, one of the last Nazi trials, which has been conducted by our colleague, the *Demjanjuk* case.

**HANS-JOACHIM LUTZ:** Dear colleagues, the case of John Demjanjuk was one of the latest large trials regarding Nazi crime. I was the prosecutor of this case and made the investigations, wrote the indictment, and represented the prosecutor's office at the trial.

First, I want to give you some background remarks. During World War II, John Demjanjuk was a soldier of the Red Army. He was captured by the Germans in May 1942. A few weeks after his capture, Demjanjuk was elected by SS officers for the so-called *fremdvölkische Wachmannschaften*, which means foreign nationalist guards. Then he received military training for several months at Trawniki training camp, from which he was discharged with the lowest grade, *Wachmann*, which means security guard. Presumably, Demjanjuk was detailed on March 27, 1943, to the extermination camp, Sobibor, in Poland, where he was involved, presumably, in the killing of about 28,000 Jews by the end of September, 1943. After the war, he emigrated to the United States of America, where he then lived in the state of Ohio.

From about 1977 onwards, authorities have dealt with Demjanjuk's history. In Israel, he was charged to have murdered Jews in the extermination camp of Treblinka. In 1988, the Jerusalem District Court, in the first instance, imposed the death penalty on him, and in 1993, the second instance, the Court acquitted him. Then he was set free. He returned to the United States.

In 2008, the *Zentrale Stelle der Landesjustizverwaltungen* in Ludwigsburg—the Central Office of the State's Justice Administration—decided to make pre-investigations against Demjanjuk with regard to probable offenses committed in Sobibor. After one year of investigations, they sent their files to me, and after an

additional six months of further investigations, I filed the indictment against Demjanjuk in July of 2009.

There were some special problems with the case, which I want to tell you about. First, one difficulty lay in the huge amount of evidence material to be collected from the world—the United States, Israel, Poland, Ukraine, Russia, and, of course, Germany. The case, after all, was an extraordinary one with lots of references to countries abroad. I went to the United States, Israel, and Poland to collect this evidence.

Second, gathering the evidence itself was, of course, difficult. The criminal act was committed almost seventy years ago, and there were not any eyewitnesses alive who could report on Demjanjuk's activities in Sobibor. This forced us to rely on historical documents and especially on experts. In this respect, the case makes a big difference to the antecedent trials. Legally, we could not apply today's construction of criminal enterprise. That construction was not possible in this case. Our conclusion was to say it might not be exactly clear what Demjanjuk did in Sobibor, but any of his acts in Sobibor were part of the extermination happening there, guarding the extermination camp compound inside or outside the camp.

It is necessary to point out the difference between guarding an extermination camp and concentration camp. In an extermination camp, the only purpose is murder, so you can say that any action performed there is associated with murder. Therefore, it is legally irrelevant that the concrete act of Demjanjuk to a concrete murder could not be proved. But we had to prove the guards' activities in reference to the murder process, and this was possible because of our experts.

We also had legal problems, of course, and the main legal problem lay in the defense of exculpation. The German Supreme Court has pointed out this problem in general. Grounds of exculpation may only be invoked if the person has tried to avoid criminal offense

conscientiously. The person may not choose the easiest and most convenient way in dissolving the conflict. Of course, there must be a possible way out of the conflict. However, a certain risk is reasonable. This was our German Supreme Court. In this context, it had to be noted that Demjanjuk could escape the German service.

This was, for me, the most difficult point of the proceeding. In German postwar jurisprudence, some former German guards were acquitted by reason of *putativbefehlsnotstand*. This is a German word. Perhaps you could translate it as an imaginary reason, imaginary necessity, or a situation erroneously regarded as an emergency. This is given when the offender thought there was an emergency because he could not refuse the order; otherwise, he, himself, would be killed. Therefore, it required great proof and justification by a former prisoner of war.

In conducting the investigation I tried to use all possible evidence to clarify the question of whether Demjanjuk could escape from service. As nothing was known about the personal situation of Demjanjuk in Sobibor—we had no eyewitness—we had to deduce from the general situation of his colleagues in Sobibor as to the possibilities of an escape of Demjanjuk. This was also the hour of our experts.

My closing argument, which the Court accepted, was that Demjanjuk would have had the chance to escape if he had made appropriate efforts. In spite of the risks, there would have been chances of success. Other people had successfully realized their escapes. We have to imagine there were 150 Trawniki men in a ratio of 20 to 30 German guards in Sobibor. Also, Demjanjuk had a gun and could go around the compound.

On May 12, 2011, the Court finally found Demjanjuk guilty of assisting murder in 28,060 cases. The Court imposed a term of imprisonment of five years and lifted the arrest warrant as there was no more danger that he would escape. He was in jail for two years. The verdict did

not become finally valid because Demjanjuk died on March 17, 2012, before the completion of the legal review upon his appeal.

Conclusion: What are the differences between past and now that we can see in this case? First, in the past, there were a lot of eyewitnesses that had identified the perpetrator and described his activities. Now, experts describe the activities of persons because eyewitnesses are no longer alive, but the experts describe the activities of person who had the same rank as the defendant. The Court deduces the activities of the defendant from those facts. But there is no difference in one point. Many often say that since the *Demjanjuk* verdict, it is sufficient to prove the presence of the perpetrator in an extermination camp. Only the presence of the perpetrator is enough. However, former verdicts also convicted persons by reason of murder on hundreds of thousands of people due to their functions in an extermination camp. This is not new. What is new is only that nobody identified the perpetrator, Demjanjuk, at a certain moment in Sobibor, so the Court had to establish the fact of his presence there through documents that showed Demjanjuk was in Sobibor during a certain period. That he was actively part of the extermination in 28,000 cases was found due to the experts' statements concerning the activities of the guards.

My second point regarding the differences between past and present is that in the past, only German people in power with a higher rank were charged. Now lower-rank officials can be indicted, even a person from abroad. Demjanjuk was a so-called small fish. He was only a guard. And another difference, the courts often gave the defendants a greater ability to invoke imaginary necessity. Now the courts say even a lower-ranking official had the chance of choice, whether he takes part in the murder or refuses to do so.

So let me close with some humanitarian remarks on the trial against Demjanjuk. It was, of course, a case of political sensitivity. It was a crime of the state, and Demjanjuk assisted in this crime of the state,

although the crime was, of course, common law murder. So, in my opinion, it is especially necessary to take care of the defendant in political cases. Demjanjuk got two defense counsels assigned even before he was brought to Germany, and even the obstructing lawyer—we had a very difficult lawyer—was paid from the budget.

Second, the courts took special care of Demjanjuk. He was ninety years old. A physician was present in the courtroom and Demjanjuk lay in a convenient bed. I have a picture here from the courtroom. It was Demjanjuk in the wheelchair and beside it is his bed, and behind him you see his physician. The hearings did not last longer than three hours per day, so we took special care of his health. The evidence was thoroughly collected and the elements of guilt were carefully established by the Court. Last, the trial was only about finding the individual guilt of Demjanjuk. We tried to avoid a show trial with educational and technical aims. We wanted to stay close to the case and not to work off Nazi crimes in their entirety.

**SERGE BRAMMERTZ:** Thank you very much, Hans-Joachim. Those of us who have worked on international tribunals are familiar with many of the problems you have described—finding witnesses, locating survivors, relying on experts, and being inventive and hoping the judges are showing some intellectual flexibility as well. Thank you very much for your presentation. The rest will be covered by Christoph.

**CHRISTOPH SAFFERLING:** Hello. Good afternoon. Thank you very much for being still awake and being interested in our story and German perspectives, as it says in the program. Now you are hearing a third perspective on “*Vergangenheitsbewältigung*.” I think you can only grasp the real sense of this term if you are actually German and understand the notion of German suffering in this word. *Vergangenheitsbewältigung* refers to dealing with the past or coming to terms with the past. Of course, it is insinuated that you never really come to terms with this past. Six million slaughtered Jews,

not mentioning all the other victim groups. What can you say? What can you do? What have we done?

First I want to mention that I think Germans, as a society and as individuals, feel a very strong ambiguity in themselves. They are torn between perpetratorship and being a victim. When I look at my family, for example, my mother's father was a member of the SS and he was killed in 1943 by bohemian partisans. My father's father was a German judge, and he was suspended from office in 1943 because he was too Catholic for the Nazi party. So there you are. In my family, both sides—perpetrator of the worst kind, an SS member, and on the other hand, part of the German elite as a judge, and he survived the war. He was not persecuted in that sense, but he was driven out of office because of his conviction of his religion.

This ambiguity shows in each family in German society, and, I would say, it also shows in society and in politics as such. It is absurd when you look at the different institutions that developed in the aftermath of the Second World War. There was an agency called the Central Agency for Legal Aid that was first situated within the German Federal Department of Justice, and later on was part of the Foreign Office. Its primary aim was to help prisoners of war who were still in France, the United States, and Russia. But it also warned German alleged war criminals if there was going to be prosecution against them in France or in some other country, so that they did not travel to these countries where they would be arrested. It actively warned criminals about how to avoid being prosecuted.

Then, in 1958, an agency was founded in Ludwigsburg for the investigation of former Nazi crimes. So you have two agencies at the end of the day working on Nazi crimes; one in favor of prosecution and the other against prosecution. This is totally irrational, and you can see in the files, in many instances, that these agencies indeed conflicted in many cases with each other.

So there you are, dealing with a past coming to terms with the past.

Ralph Giordano, a Holocaust survivor who died in 2014, always spoke of the German second guilt in that Germany did not manage to deal properly with its past. One of the big failures, indeed, was the continuation of the German elite. We have already heard in the presentations of Annette and Hans about the inability to prosecute Nazi crimes properly. So the former elite took over, again, after the foundation of the former Republic of Germany.

There was one thing that brought together the former West German elite, and that was anticommunism. Obviously, the United States is familiar with that phenomenon, and, as in the United States, this worked almost as super glue in West Germany. Never mind what you did in the past; as long as you are now a decent anticommunist, we can use you for our federal government. And be aware that the Cold War was right within Germany, separating West from East, so this part of dealing with the past was very much also a German/German history.

At the end, around 70 to 80 percent of former lawyers who had infiltrated in the Nazi regime were taken on to serve the new government in the states or on the federal level. I, myself, have done a study on the Federal Department of Justice, and at the end of the 1950s we found that 77 percent of former Nazi party members were then working for the Federal Department of Justice in Bonn. Indeed, no judge, and only one prosecutor, was actually convicted for his former infiltration into the Nazi system by a federal German court.

So this was obviously a stern discontinuation of what was started by the jurists' trial here in Nuremberg, by the U.S. military tribunal, where the Court clearly said that the terrible judgments that were passed were crimes against humanity. This, indeed, was discontinued by the German jurisprudence as soon as the Federal Republic of Germany was founded. German Control Council Law Number 10, "Punishment

of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,” was not applied, and it was then abolished in 1956.

What developed instead were exculpatory myths. I would identify four explanations, in particular, that helped these jurists to stabilize themselves and minimize their own responsibility. First, they would say, “We only applied the laws.” They would give a very positivist argument, saying, “It was not my responsibility. It was some lawmaker, whoever that was. Maybe it was Adolf Hitler, but I only applied what was said and what was published in the gazettes.” Then a second string of arguments were jurists saying, “I only followed orders,”—so, again, “It is not my responsibility. It is the responsibility of my superior.” The third round, which was jurists working for the government in particular, said, constantly, “I stayed in office in order to prevent a real Nazi from taking my place.” Then—and this is the fourth point—by doing this, “I have prevented worse from happening.”

Now I wonder, again, looking at six million slaughtered Jews, what on earth could have been worse than what actually did happen?

So these are the four myths that developed in the immediate aftermath of the jurists’ trial here in Nuremberg.

In looking at the many biographies of lawyers of that time, and being a lawyer myself, I always ask how would I have acted? How would I have reacted under these circumstances? And what I found most intriguing, when I look at the stories of these people was the problem of excessive compromising—you can see and sense that in a great movie, *Judgment at Nuremberg*. You are in office, you find a new Nazi law to be applied, or you have been given an order, and yet you think to yourself, that is a stern reaction, that is illegitimate, but I will do it this one time. So you compromise, and after you compromise once, you compromise a second time, and before you turn around you have blood on your hands.

What I think we learn from the jurists' trial and from Nuremberg is that we have to be aware, and we have to shape our consciousness for human dignity and for human rights. This is why we remember what happened, and this is why I do this research; to make us, myself, aware of this fine line and of human dignity and respect for human rights as being the overall aim of every law and of every governmental power there is.

Thank you very much.

**SERGE BRAMMERTZ:** Thank you so much, Christoph. We heard three very different speeches, from very different angles, but they were all extremely interesting—Germans speaking about German perspectives. Who wants to start asking questions?

**ATTENDEE:** That was really interesting. Sometimes it takes a generation for things to change, and this is probably a cursory view. I have been impressed by the evolution of German thinking, and it seems that, at this point—and you will correct me if I am wrong—that you, in your educational system, and in other ways, have looked at the past, and seem to be dealing with it and making what happened progress in a very positive way. I think of the Nuremberg Academy and I applaud you for that. Would you just expand on that a little bit? As I said, I may be wrong or I may not be. Thank you.

**ATTENDEE:** I am interested in the German reaction, or range of reactions, to the post-*Demjanjuk* trials and efforts, how many more may be in the pipeline, and what they are accomplishing.

**ATTENDEE:** Monica from New Mexico. When I was studying to get my LLM in England I had some classmates from Germany, and I remember that we were in a deep discussion regarding how we Mexicans and Creoles, who were descended from Spanish people, were very racist with our indigenous people. We were discussing this

with these Germans. I remember a comment from one of the girls, a German, who said, “You can say whatever you want if you bring into the discussion the Nazi atrocities.”

And all the discussion stopped, and all of us were shocked. We said, “But why? Why should we bring this issue up if we weren’t even alive? We weren’t born in those times.” And they said, “This is the only issue you can destroy us with, and you are racist with your own people.” I have been questioning why she said that for twenty years. It is because there is, as you said, perhaps hidden guilt, or this ambivalence you described, that has shaped the minds of the youth and of this girl. We could talk about everything and she could be very competitive, but in that particular point, we could destroy her. Thank you.

**JUDGE MARGARET MCKEOWN:** Thank you. My question is whether, in the current-day German judicial ethics code, or in the Judicial Training Academy, there is any focus on this issue and on looking back and then looking forward so as to prevent a recurrence of these events.

**ATTENDEE:** I just have a brief question to Professor Safferling. I was wondering how much of what was done in Germany, in terms of trials post-Second World War, was couched in real institutional will and how much of it was just individuals pioneering. For example, I recently saw a film about Fritz Bauer, and I get the sense that, in particular, his drive was something that was pushing him forward. So I am wondering about institutions as opposed to real individuals that are driving it forward. Thank you.

**SERGE BRAMMERTZ:** Let us make a first round of answers and then we will hand it back to you. Christoph, the majority of questions were addressed to you, so you start, and then our two colleagues will complete your answer, or we will correct your answers.

**CHRISTOPH SAFFERLING:** That is fine with me. You should correct my answers, indeed.

Thank you. I thank you for your interest in all these questions. You know, coming to the first question, if it had not been for this place I probably would not be here today. I would probably be doing something else. I would be a corporate lawyer or whatever. The reason why I am interested in human rights and international criminal law, I think has very much to do with me being German and with my past, because I think that is something that we have to learn. My answer to this ambiguity that we feel within ourselves is to address this and try to give it a more positive approach, looking to the future as much as learning from the past.

I have not spoken very much about the last seventy years in Germany. Annette has done a great deal of that. But it has always been very difficult for Germany to deal on a political level. The city of Nuremberg's Documentation Center and the Memorium at the Courthouse are very recent developments. The former was opened in 2000, and the latter was opened only five years ago. I do not know if you were there last night when the Lord Mayor said that the Memorium has a funny history because there were visitors before there was a museum, so they had to build a museum for all the visitors who wanted to see this room. Usually it goes the other way around.

Nuremberg sees its history as being one of the places related to the Nazi party. You can see it over there. You can see it here in this hall. The race laws are called "Nuremberg laws," and then, in contrast, the Nuremberg trials served as a postmortem to National Socialism. Nuremberg identifies itself with this, and in that respect, it calls itself the city of human rights. It wants to give the world this memory, to make this world better by having an International Nuremberg Principles Academy, and to be a place where you can think and reflect about international criminal law.

Also, the research I have been honored to do over the last five years has been an official program by the Federal Ministry of Justice. There are other ministries and federal agencies that look into their history and fund this kind of research. But this is a very recent development. It changed with the fall of the Berlin Wall. The approach of Germany then was different, tending towards its past.

Also, when Germany needed to cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY), because Tadić was arrested here, the same problems came up and concerns were raised that the ICTY was like the IMT. Isn't that retroactive criminality? Is it based on a legitimate legal ground? Didn't the ICTY's Appeals Chamber act *ultra vires*? Germany cooperated nevertheless. It answered in a positive way and changed its policy compared to what it said before about the IMT at Nuremberg. You might know that with regard to this non-retroactivity principle in Article 7, Paragraph 2, of the European Convention on Human Rights, Germany had a reservation. Then Germany took it back, but nevertheless, we are clear on the book now. We are fully in favor of all the norms of the European Convention on Human Rights. But that was not always the case, and it was not the case because of the Nuremberg trials.

Before that change it was very much an individual approach, and it started early on. In 1959 there was an exhibition in Karlsruhe and then in Berlin called "*Ungesühnte Nazijustiz*" (unatoned Nazi justice), which identified people who were former Nazis that were now in the federal government. The person who initiated this exhibition, Reinhard Strecker, was not welcomed at all; indeed he was persecuted and fled to London. And Fritz Bauer, the former General Prosecutor of Hesse, was obviously a person strongly in favor of prosecution, but sometimes he felt very lonesome, as you can see by his personal utterings: "When I leave my office, I'm entering enemy territory."

So, yes, there have been individuals, and also some colleagues of mine, who had severe difficulties in their careers because they said things about former professors, who took advantage of the Jewish professors being driven out of office. Too much truth was not welcomed at that time, and the careers of those who were not silent suffered. So, yes, brave individuals started this, but after the German unification I think it turned and German policy changed.

There was a question by Monica. You know, I also studied in London. I stayed there for one and a half years, and it was always the same. Every weekend we would meet in some student residence, a group of mixed nationalities, and at one o'clock at night, after a few pints, we would always start to discuss National Socialism, and then all the others would leave and the four or five Germans would stay on.

What I want to say is that it is just in us. And it is not like other situations in countries with indigenous people because this was a systematic and industrialized slaughter of innocent humans. This had never happened before and I hope it will never happen again. That is the difference, and we always have to confront ourselves with that and do everything that we can to ensure this does not happen again.

**SERGE BRAMMERTZ:** Yes, and also in relation to the question on whether there is, within the training for lawyers and prosecutors and judges, special emphasis on this issue?

**HANS-JOACHIM LUTZ:** The question was in regard to how many cases there will be after the *Demjanjuk* case. There was a search for other cases, especially in Auschwitz, and they made a list of around fifty people to give to the prosecutors. There are probably more cases left, which are still at trial, and we will see. But the people involved are very old and it is very difficult to sentence them.

**CHRISTOPH SAFFERLING:** To try them, even.

**DR. HANS-JOACHIM LUTZ:** Yes. And there is not much education on these cases for lawyers, judges, and prosecutors.

**CHRISTOPH SAFFERLING:** The research that I did over the last four or five years certainly changed my way of teaching, so it has had an impact, also, on my students. But it is difficult for the time being to say that there is a proper place for this kind of training in legal education. It might be that what we are trying to do is to address this via the Federal Department of Justice now. Some federal states had programs that were addressing concentration camps and studying Fritz Bauer and so forth, but due to budgetary reasons, these programs were cut. Though now we are thinking about reintroducing them.

I think the former Federal Public Prosecutor of Germany wants to say something about that.

**ATTENDEE:** Since last year, I have been the Federal Prosecutor of Germany in Karlsruhe, and prior to that I was a prosecutor for thirty years, so I also came across these questions regarding the investigation and prosecution of Nazis. And just to answer the last questions about education, I think there has been a permanent course on this in the German Law Academy for the last fifteen or twenty years. This is a one-week course where professors who were witnesses of the time—Jews—tell their story and make judges and prosecutors aware of what has happened.

If I may add just a few words about the question that was raised, I will note that for me, the turning point was the year 1975. I was a young prosecutor then and there was a discussion about whether the investigation of murder cases and the prosecution of murder could expire after thirty years, and if you recount it was forty-five plus thirty, and it was very urgent to get a decision. We young prosecutors and judges were working against the politicians that wanted to keep the law as it was. The consequence would have been that after 1975,

no one from the old Nazis could have been prosecuted. The law changed and I think that was a starting point for the turning of the discussion in the public as well.

**ANNETTE WEINKE:** Just a very brief remark on this. I have been dealing with this topic now, I think, for twenty years, and I must say even after twenty years, I find it astonishing and remarkable that these German national trials started in the late 1950s, because the situation was so difficult. There were no victims, because all the victims, more or less, were killed. There were no victims who were asking for justice. The penal law was basically too rigid to set up these trials. The German penal law is not made for these kinds of trials, and this is why the sentences all remained very lenient.

There was also no political will. Among large parts of the political elites, there was a lack of political will and the majority of the German population—I think this is the most important thing—were against these trials. There were certain exceptions when there was a very slim majority in favor of these trials, but in general they were rejecting these trials. If you take all these factors together, you can only ask yourself how and why this happened in the end.

For me it is still a riddle after twenty years. Thank you.

**JAMES C. JOHNSON:** I remember this date specifically, mainly because I remember every day that I talk to Serge. But on November 25 of last year, I believe Serge was in The Hague, Hennie was here in Nuremberg, David was in North Carolina, and I was actually driving in the car across Kansas and stopped, and we had a conference call about this panel, and how this panel should look, and what form this panel should take. And thanks to some incredible work by Hennie and Serge, we were able to have this panel today.

Thank you to our panelists for your incredible perspectives on recent times, recent attitudes, and where you see things going.

## Reflections on Nuremberg

*This discussion was introduced at 4:00 p.m., Friday, September 30, 2016, by the Honorable Bernice B. Donald, Chair of the American Bar Association Center for Human Rights, judge for the U.S. Court of Appeals for the Sixth Circuit, who introduced the participants: Amb. David Scheffer, Mayer Brown/Robert A. Helman Professor of Law and Director, Center for International Human Rights at Northwestern University Pritzker School of Law; and William Schabas, Chair of International Law at Middlesex University London and Chair of International Criminal Law and Human Rights at Leiden University. An edited version of their remarks follows.*

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**JAMES C. JOHNSON:** Over the last few years the American Bar Association (ABA) has been increasing their sponsorship, and we could not be more grateful for that. We are very pleased that the ABA continues to sponsor, and continues to become more involved, in the International Humanitarian Law Dialogs as we move forward.

With that, I would like to introduce the first of our ABA representatives, the Honorable Bernice B. Donald, chair for the Center for Human Rights.

**BERNICE B. DONALD:** Thank you, Jim. I am Judge Bernice Donald, a judge of the United States Court of Appeals for the Sixth Circuit. Ohio is in our circuit, the state where the *Demjanjuk* trial, referenced earlier, was, and I bring you greetings from the American Bar Association's Center for Human Rights, which I currently chair, and the section of Criminal Justice, which I previously chaired.

This is my first trip to Nuremberg and my first Dialog meeting, and, Jim, I commend you and the Jackson Center and all of those who have made these Dialogs possible. They serve an extraordinarily valuable purpose.

It is my pleasure to introduce two renowned luminaries in the field of human rights—really they need no introduction, and for that reason, I will give them little introduction. But before I do that, I want to just say a couple of words on behalf of my entity, the Center for Human Rights, about the activities that we are embarked on.

Many of you know Kip Hale, who worked in this area and who has been here with you before. He has now moved on but asked me to please give each of you his greetings and tell you how much he misses being here.

The Center for Human Rights is home to the ABA International Criminal Court (ICC) project. We are involved also in an international criminal justice project, we have a Working Group on Crimes Against Humanity, and there is a long list of other exciting projects. We can only do those projects because we have the commitment of scholars and leaders like many of you here in the room. In fact, many of our advisors are in the room today, and one of them is even on the stage with us.

Our phenomenal work depends on the commitment and guidance of people who are really busy but who are leaders in their respected fields, and I thank you for that. I have traveled to jurisdictions all around the world for the cause of human rights and the rule of law, and as I have traveled to those various jurisdictions, it has become clear to me that people of the world generally have and share some core values—that people have more things in common than they have that divide them. People basically want their humanity recognized, protected, and respected. They want to have the opportunity to provide for themselves and their family. They want to be able to achieve their full God-given potential, and they want to have, even though they may not express it this way, equal dignity, equal opportunity, and equal justice.

David Crane said this morning when we started this session that when you walk into Courtroom 600, you can smell justice. I think people around the world yearn for justice. They may not be able to define it

with any degree of precision, but they know it when they experience it, and they know it when it is withheld from them. I believe that the absence of justice is hopelessness, and we are hearing conversations today that really extol the virtues of justice delivered, not justice denied.

I want to share with you one quick passage from a speech that I gave in 2013 at the Holocaust Museum in Washington, D.C., and if you have not been there, please do so immediately. The speech was entitled, “Can It Ever Happen Again?” In that talk, I observed that there was an absence, that there was a weakness, in the ethos of the German judiciary, and this goes to one of the points that my colleague, Judge McKeown, addressed earlier.

The prevailing motto of the German jurists during this time, during Nazi Germany, was the law is the law. Dr. William Meinecke, who has often lectured at the museum, said that extreme justice often leads to extreme injustice. When there is a lack of recognition of basic human rights and purpose behind the law, a blind adherence to that law can lead to injustice. The judges were reluctant to deviate from an application of the law that did not support the government’s goals, and as a result, very few judges spoke their conscience, especially at the height of Hitler’s power. Traditionally, they did not view themselves as a counterweight to the legislature and the executive. They were bound to apply and uphold whatever law the executive pronounced, and that situation clearly demonstrated an absence of judicial independence and led to a situation that we are here talking about today.

My task is to briefly introduce these two luminaries. First, I would introduce, to my far left, Professor William Schabas. He is a professor of international law at Middlesex University in London. He is the editor-in-chief of the *Criminal Law Forum*, a quarterly journal of the International Society for the Reform of Criminal Law. He is the president of the Irish Branch of Criminal Investigators, and from 2002 to 2004, he served as one of three international members of the

Sierra Leone Truth and Reconciliation Commission. He served as a consultant on capital punishment for the United Nations, and he has written more than twenty books and authored more than 300 articles.

And next, we have Professor David Scheffer, also known as Ambassador David Scheffer. He is the Mayer Brown/Robert A. Helman Professor of Law and director of the Center for International Human Rights at Northwestern University, the Pritzker School of Law. He was ambassador-at-large for war crimes issues from 1997 to 2001 and authored *All the Missing Souls: A Personal History of the War Crimes Tribunals*. Since 2012, he has been the UN Secretary-General Special Expert on United Nations assistance to the Khmer Rouge trials, and he is also an advisor to the American Bar Association's Center for Human Rights ICC project.

They will now give you reflections on Nuremberg.

**DAVID SCHEFFER:** It is a very distinct honor to be here, not only with Bill, whom I admire, but also with all of my colleagues and friends in the audience, so many of whom I know so well. It is great to be back, frankly, at Chautauqua here in Nuremberg.

I am going to start with just a general comment, and then we are going to get into it because Bill and I have the task of absorbing everything that has been said and striving not to say anything similar again in our conversation. I do not want to go down that path, with one exception. When John Barrett spoke today, he said three things of considerably positive character about the Nuremberg trials that I want to repeat, and then we want to go into a more critical view of Nuremberg.

First, Professor John Barrett said that the necessity of Nuremberg has resonated in that at Nuremberg, Robert Jackson and others felt that they could not walk away from the judicial challenge that

confronted them after World War II. It simply was not plausible, he said, to walk away from it.

I think that has resonated throughout the last twenty-five years for those who have worked on the modern war crimes tribunals; that all of us have had the frame of mind that it simply is not plausible to walk away from any of these challenges. And I salute those who have sustained that attitude.

Secondly, John said that there was a long-term view to absorb and understand the value of Nuremberg, and I think that is true. The panel that we just had on the German perspective demonstrates very clearly that it is a long-term arc of justice, and I view it the same way with respect to the modern war crimes tribunals. While we go through every day with all of the problems that are associated with each tribunal that have to be resolved every single day—and we sometimes get lost in the details of resolving those problems—there is still the long arc of justice. I think twenty, thirty, forty, fifty years from now we will look back and see the value of the work that has transpired with respect to these tribunals.

And, finally, John said the great value of Nuremberg—or the takeaway lesson—was how efficient, selective, and brief was the trial of the first twenty-two defendants. Well, that is sort of our departure point because we certainly recognize those values in Nuremberg, but we also recognize that there were many aspects of Nuremberg that have required critical evaluation ever since then. Bill Schabas has been at the forefront of a lot of that critical thinking, and I certainly have tried to apply the lessons of Nuremberg—whether they be positive or negative—in the work that we have all shared with the modern war crimes tribunals over the last twenty-five years.

So, I want to start this discussion, if I may. Bill, there are four things that we might want to discuss today. They are victor's justice, double

standards, retroactivity, and inadequate procedures. On victor's justice, could you give us your perspective on to what extent the Nuremberg tribunal was victor's justice, and should we care whether it was or not?

**WILLIAM SCHABAS:** Well, thanks, David. Now it is my turn to say what a pleasure it is to be sitting next to you here on the platform.

Before I address the question, it occurred to me, listening to that wonderful panel we had just before the break on German perspectives, that there was a great German friend of ours who is not here and would have loved to be here, and that is Hans-Peter Kaul. He was a regular at the Chautauqua events. We have heard him talk about Nuremberg and about the Second World War, and I just thought about him and how much we loved him and admired him.

**DAVID SCHEFFER:** Bill, I am going to interrupt you because you raised Hans-Peter Kaul's name, and I just want to recognize for the record that during the negotiations for the Rome Statute, it was Hans-Peter Kaul of Germany who stood repeatedly for the German people. In the negotiating rooms at the UN he would stand up and he would start with Nuremberg and say, "We are here today because of Nuremberg. We the German people are here today because of Nuremberg, and we are going to get this right for perpetuity."

**WILLIAM SCHABAS:** Of course, Nuremberg has its detractors. Someone could have listened to us today and thought that this is all just the Nuremberg fan club, and it is. But it is useful, I think, for us to address some of the critics. We use the term "Nuremberg," which can actually refer to a bunch of different things. John suggested that in his remarks as well this morning. The successor trials, as well as the big trials of the International Military Tribunal, the Nuremberg Principles, and the Nuremberg judgment have been used recently in legislation to deal with genocide denial. The European legislation on genocide denial uses the Nuremberg judgment as the marker, as

the departure point, for assessing whether someone who contests the genocide can be prosecuted for denial as a crime.

The leading case on this is a French case that went to the UN Human Rights Committee, the case of *Faurisson v. France*, which is now twenty years old. Faurisson contested what is called the *Loi Gayssot*, the French legislation that references the Nuremberg judgment. He was prosecuted for denying it. He challenged it under freedom of expression before the Human Rights Committee and lost.

But on the front page of that decision by the Human Rights Committee, they referred to Faurisson saying, “Well, how can you have Nuremberg as the gold standard for the truth of the Second World War and the truth of the Holocaust when they did such preposterous things as prosecute the Germans for the Katyn massacre.” And the decision of the Human Rights Committee does not go on to actually address that. They repeat that without getting to the bottom of what exactly the Nuremberg judgment said about the Katyn massacre. It actually did not say anything. It was utterly silent on the question. One of the great pleasures of being an academic is you can pick up the trail somewhere and just follow it. You do not have to have a grant to get to do the research. You can just say, “I’m interested in that, and I want to learn more about it.”

And so I have spent a lot of time in the last few years trying to learn more about how Nuremberg dealt with the Katyn massacre. This was at the beginning of the Second World War. Germany went about halfway into Poland, pursuant to the agreement with the Soviets. About three weeks later, the Soviets took the other half of Poland. The Soviets were essentially annexing that part of Poland. The Germans, too, were planning to annex the part of Poland that they took, and the Soviets arrested about 20,000 Polish military officers. They were taken to camps, and they wrote letters to their families and

so on. And then it all went silent in about April of 1940, and nothing ever was heard from them again.

In 1943, the Germans discovered a mass grave in a place called Katyn, which is near the modern border between Belarus and Russia today, and they made a report. Apparently, Goebbels, the minister of propaganda, was thrilled at the time. This was a propaganda coup. They were going to show how it was the Soviets who were the authors of terrible atrocities. The Soviets, of course, answered, saying this was just Nazi propaganda. A few months later, the Soviet armies retook the territory. They had a commission of inquiry. Both the Nazis and the Soviets had pseudo commissions of inquiry that did superficial forensic examinations, and, of course, the German inquiry reported that the Russians had done it, and the Russian inquiry said the Germans had done it.

At the Nuremberg trials, as they were preparing the indictment in October, the Soviet prosecutor says, “We’ve got to add a charge against the Germans for the killings in Katyn.” It is a tiny part of the indictment. The indictment itself is sixty-five pages long, and this represents about fifteen words. It is just buried in the indictment in the section about mass murder committed by Nazis in occupied territory. But it becomes an issue because the Soviet prosecutor submits the Soviet report, and then the Germans say, “We want to challenge it.”

So this little line in the indictment actually consumes two full days of hearing, the two final days of the trial, and they have the trial, and then we wait for the judgment. And the judgment is silent on this. So people sort of wonder what is going on there; what was the tribunal doing.

Out of the things I have learned, there are a few little points that are curious. One thing that is fascinating about this is that it gives us insights into the decisions that the prosecutors were taking about what to charge and whom to charge. We have some of those insights

now because we get the archival records. I have been to the British archives and looked at the archival records of the British government. Government officials instructed the prosecutors—not like our modern-day prosecutors who are independent. They were getting instructions.

And as for Robert Jackson, he is called to testify before a congressional committee in 1952, and he gives lengthy testimony about how they made this decision. Can you imagine this—a justice of the Supreme Court being compelled to testify before a congressional committee about confidential discussions among prosecutors? He does this and he speaks about the decision. So, it provides some insight into all of that.

One of the things I found in the British archives, which was utterly amazing, was that they had a little quarrel about this. The British said, “You know, some people think the Russians did this. Do we really want to prosecute this?” There is an official in the British foreign ministry who wrote—and I found the memo there in the archives—“Yeah, it’s probably the Russians that did it, but it would be better just to leave it alone. Let’s convict the Nazis, and we’ll get it over. We’ll just close that part of it.” It is a fascinating example of politicians—or rather bureaucrats—attempting to manipulate international justice.

Finally, of course, the judgment is silent, as I said. The question is, could they have done anything else with it? It is one of those crimes that we do not encounter very often in criminal justice, where there are only two suspects. There are only two possibilities as to who could have committed the crime, and so to rule on it to say, “Well, no, the Germans did not do it,” is, in effect, saying the Russians did it. And they were not charged. You could not do any of that.

What is fascinating about it is that the Soviet judge is also utterly silent on it. He writes a separate opinion, and he dissents on some things. That is the part that I still cannot quite figure out. He did the honorable thing, too, and if he was getting instructions, presumably

he was getting them from Moscow saying, “Convict them. This is the place to do it. This is our line. You better put that in the dissent.” And he does not do it.

I was in Ukraine a few years ago and I asked people what they knew about it. They said, “He came back. He did not go to the Gulag. He lived kind of an uneventful life and continued as a judge.” But when all of this is added up, I actually come to the opposite conclusion of someone like Faurisson. I think that it shows they handled it in the right way. They did not convict the Nazi defendants for the Katyn massacre. They dealt with it properly. You can read the transcript of the hearing, of course. It is two full days in the forty-two volumes. Modern-day historians write about it, and they say, “Well, it’s clear that the German defense lawyers whipped the Soviet prosecutor in the two-day evidentiary hearing. The German evidence was overwhelming.” When I read it, I found it quite underwhelming, actually. It was defense evidence along the lines of “Well, we didn’t see anything.” Today, I am talking to a group of prosecutors who know how to make fun of a defense where they say, “Well, we were there. We didn’t see any massacre taking place.” Of course, it is true that they did not, but nevertheless, when it is coming from the Nazis saying, “Well, we didn’t see any massacre,” it is not the most compelling evidence.

The Soviets, on the other hand, produced a plausible defense. In the end, when I read it, it was not as decisive as the historians make it out to be. I think for the historians it is actually self-fulfilling, since they want the evidence to be demolished because we know the truth today—that the Russians did it, and they admitted it. So they say, “Oh, the evidence was overwhelming,” but it really was not.

I went back and looked at the reports at the time by some of the diplomats and journalists who were there, and they also say the Soviets carry the day in terms of the prosecution, in terms of the evidence. It was not dishonest evidence, in a way. They just brought witnesses

who told what they saw. And what did they say? It was a mass grave, and they said, “Well, it looks like it could have been that people were not killed in 1940. They were killed in 1942 or ‘41,” because if they were killed in 1941, the Germans were responsible, and if it was 1940, it was the Russians. So, in the end, I think the Tribunal gets a clean bill of health on that one.

There is another criticism made of Nuremberg where they say, “Well, they acquitted the Germans of illegal naval warfare because the allies had done the same thing.” There is a famous affidavit from the American Admiral Chester Nimitz, which was produced in the record of the court. They received this affidavit saying the Americans had done the same thing, so they said, “Well, it must be okay, so we are not going to convict them,” which is a very cynical conclusion.

But I do not think that is what happened. I think you have to go back and read the judgment because they have a very interesting phrase after they describe the illegal submarine warfare. They refer to Nimitz’s affidavit, and they say—and I have the words here exactly just to quote—“As a result, the sentence of Doenitz is not assessed on the grounds of his breaches of the international law of submarine warfare.” They do not say he is acquitted. So they do not sentence him for it, but in an indirect way they are saying, “Yeah, this was against international law.”

And to confirm that, if you go to the report that Telford Taylor wrote about the successor trials, he describes this briefly. He says the Tribunal sanctioned Doenitz for the submarine warfare, and he refers to the quote I just read. So, he understood it the same way.

The fact is they were not acquitted of the crime. They were not sentenced additionally for it. The Tribunal was not there to condemn the allies for illegal submarine warfare, but it was not declaring that this was innocent behavior either. These are two examples that when

you take a close look at them, you say those judges got it right. The criticisms of Nuremberg on these two points are distortions and misrepresentations by people who are trying to chip away at the Nuremberg judgment, and they are unfair.

**DAVID SCHEFFER:** Let me just leap forward, if I may, to the International Criminal Court (ICC) on the issue of victor's justice. The Court seeks universal membership and at this point has 124 member states. That still means that there are a large number of countries that are not part of the Court. Thus, the work of the Court might be viewed as an inversion of victor's justice in the sense that many of the major powers are not part of the process and have immunized themselves from that legal process.

Let me provide an alternative view of that perception of the International Criminal Court. One can easily accept the aim of seeking a universal embrace of the International Criminal Court through more ratifications, particularly by major powers like the United States, Russia, China, Pakistan, Indonesia, and Saudi Arabia. There are many countries out there that would be likely candidates for that argument. But there is a tool within the Rome Statute—complementarity—which has an interesting impact on the argument.

Over the years, if one employs complementarity, with nonmember states as well as with member states, you begin to achieve an international legal system whereby within domestic criminal codes, even of nonmember states, the International Criminal Court is having an impact. This is also reflected in the pressure that the International Criminal Court can exert on certain nonmember states to undertake their own investigations and even their own prosecutions in the absence of being a member state while also demonstrating that they are, in fact, taking up the responsibility of international criminal justice within their own national systems. I think that is a feature of complementarity

that we should not overlook and, frankly, that we should pay some more attention to with respect to the work of nonmember states.

I wanted to first of all thank Judge Donald for her kind introduction and also say that I have the opportunity to chair the ABA Working Group on Crimes Against Humanity. What we are attempting to accomplish is an incorporation of crimes against humanity into the U.S. federal criminal code. When these issues arise, we do not want the United States to be a safe haven for those who have committed crimes against humanity elsewhere in the world. We also want to be able to have the capacity within our own courts to investigate and prosecute crimes against humanity, which so many member states of the Rome Statute already have done with their own implementation exercise of the Rome Statute.

When I visit members of Congress, whether they be congresspersons or senators, the conversation usually begins with Nuremberg because it is an easy touchstone. Everyone recognizes the importance of it. So in that one small example, the impact of Nuremberg continues to resonate because it activates people to think about the value of replicating some of what Nuremberg achieved in their own national systems.

**WILLIAM SCHABAS:** We are getting far away—seventy years away from Nuremberg, in a way. I think one of the features of Nuremberg, which is true also of all the ad hoc temporary tribunals, is that it was not up to the prosecutor of the Tribunal to figure out what situation to prosecute. That was defined in the Charter of the International Military Tribunal. It is in the statutes of all the ad hoc tribunals within the narrow situation. Of course, our prosecutors have to choose the targets, and within that, as we have seen, sometimes the victor's justice critique arises—the selectivity issues and everything.

But, of course, now we have a tribunal where the choice of the situation as well as the choice of the case belongs to the prosecutor. Fatou

Bensouda is sitting over here. And I think one of the most marvelous and exciting things that has happened at the ICC in the last couple of years is the list of situations, which I would say covers not just those under proper investigation, but those at the preliminary phase. There is a technical legal distinction between the two in terms of the power of the prosecutors. I think in reality, it is significant in terms of the operation of the Office of the Prosecutor, but it is not significant in terms of the choices of where to go and what to look at.

We have more than twenty countries now on that list, which includes four of the most powerful armies in the world and the conduct of these armies in territories that do not belong to them—the United States in Afghanistan; the United Kingdom in Iraq; Russia in Georgia and Ukraine; and Israel in Palestine. We have never had this before, never in the history of international justice. It is a huge turning point. Where it will go remains to be seen, and there are huge difficulties and obstacles, but the fact that it exists, I think is marvelous. And we have seen some of the consequences of it.

I live in the United Kingdom now, and the issue of prosecuting violations by British forces in Iraq has been hugely energized in the last year and a half, and it is all because in April/May a year and a half ago, Fatou Bensouda announced we are going to have a preliminary examination. It is in the papers every day, and everyone is aware of it. It is that declaration that has unleashed a huge amount of complementary activity, and I think you have examples in the United States, David.

**DAVID SCHEFFER:** Well, not only that, I was actually going to jump to Israel. I think the preliminary examination underway, with respect to Palestine and the Gaza situation, probably has activated more work in Tel Aviv on issues of examining every strike being questioned and pursued within that preliminary examination than would be the case in the absence of it. We do not know the outcome

of that yet, obviously, but I would imagine that it has imposed a far greater discipline of review than there would be in the absence of it.

I was actually going to just jump, if I might, Bill, to the issue of non-retroactivity. For those of us who teach Nuremberg, this is one of the most exciting episodes with students because they totally get into the argument of whether or not in the judgment on September 30, 1946, the judges got it right on the application of customary international law to the charges in the indictment. And we have had that debate for many, many decades, of course.

I wanted to point out—and Nick Koumjian would know this far better than I at this moment—that last June, the international co-investigating judge at the Extraordinary Chambers in the Courts of Cambodia issued a decision on forced pregnancy. The question was raised whether or not the charge of forced pregnancy could, in fact, be advanced in the cases under investigation at this time as a matter that was illegal under international law in the late 1970s. It is an interesting decision because the international co-investigating judge actually ruled that he could not find a basis in customary international law for forced pregnancy charges in the late 1970s, not even as an inhumane act.

So, to me, it rather reflects a tightening on the rule of non-retroactivity. I think judges are far more inclined today not to take the leaps that the judges took at the Nuremberg trial to establish the illegality of those particular charges, particularly on the crime of aggression and some of the crimes against humanity. Not that one necessarily objects to it today, but nonetheless judges' research is far more extensive in their judgments than was even available to the judges in 1946 to make what is essentially a historical scrutiny of developments in the law in order to arrive at a decision as to whether or not the non-retroactivity rule would be invoked.

**WILLIAM SCHABAS:** You know, I think it is a mixed picture, actually, because we have examples of judges—the Special Court for Sierra Leone, the child soldier decision; the Yugoslavia Tribunal, the *Tadić* case; and the rulings about enlarging the concept of war crimes to cover non-international armed conflict—enlarging crimes against humanity so that they apply to atrocities committed in peacetime.

Sometimes the judges have been very bold on this. Maybe they have hit an obstacle in Cambodia with a technical crime. They could have, theoretically, if they were really strict, said, “Well, we cannot convict for crimes against humanity in Cambodia because of the nexus with armed conflict, which only disappeared in the 1990s.” They did not do that.

Some people have said very nice things about academics today, but people have been a little dismissive of us too, and I just want to say that although I am fundamentally an academic, I do a little bit of litigation.

In recent years, I have been to the European Court of Human Rights, to the Grand Chamber in some cases, where I was not a prosecutor, but I was defending prosecutors. The prosecutors get in trouble sometimes and they need lawyers to come and get them out of hot water. So, these cases arise at the European Court of Human Rights because of prosecutions of old crimes. One of them, *Kononov v. Latvia*, involved war crimes that were committed on occupied Nazi territory in Latvia in 1944, and I was counsel to Latvia in that case, explaining that this was not a violation of the principle of retroactivity. And there we argued about Nuremberg because the Russians came in. They intervened because Kononov was a Russian citizen, and they said, “Listen, Nuremberg only applies to Nazis. It doesn’t apply to partisans.”

Well, Robert Jackson, in the introduction to his report to the president, says that was the quarrel he had with the Soviets. The Soviets thought that this was a body of law tailored to prosecuting the Nazis, but that it

would not apply generally. And, of course, Jackson's point was always if it is good enough for them, it has to be good enough for us as well.

The second case, though, was not quite as successful. This was trying to use an enlarged definition of genocide that Lithuania adopted so that they could prosecute people for political genocide. Now, there is nothing wrong with doing that today if you are going to prosecute the crime in the future, but the problem was using an enlarged definition of genocide in the past. That was in the case of *Vasiliauskas v. Lithuania*, and I was counsel to Lithuania arguing that this was acceptable, that the law was accessible, and that it was foreseeable by the man who was involved. He was a Soviet police officer in Lithuania in the early 1950s. A seventeen-judge panel—who gets to argue before seventeen judges?—decided nine to eight in favor of the applicant. I lost by one vote among judges who are drawn by luck. At the European Court of Human Rights, they pull them out of a hat—one judge, a lottery.

All that to say it is a bit of a mixed picture, and if I had to advise a client who asked, “What are our chances at the European Court of Human Rights on an Article 7 case?” dealing with sixty-, seventy-year-old crimes, I would say, “I am not sure.” And it depends also on the luck of the draw, whom you draw as your judges in the case. So there is a mixed message on retroactivity, I think.

**DAVID SCHEFFER:** Hans Corell in his fine address, noted that at the end of the day, the trial should operate with precision and pragmatism, and this is an issue that confronts us every day with respect to the modern war crimes tribunals.

At Nuremberg, it was certainly achieved, so it provides a legacy that we always look back at. I have had endless discussions with diplomats who constantly bring up the example of Nuremberg and ask me why the tribunal we have under discussion has not

actually achieved its mandate with the same speed and efficiency that the Nuremberg trial achieved.

So I ask this question: Should modern war crimes tribunals try to establish and relate the historical event—to create the historical record of these atrocity crimes through the precision of a criminal trial—for the purpose of their legacies in regard to the impact on that society? I am going to answer it first myself and then turn to Bill.

It cuts both ways, of course. If you try to go down that path, the result can be a very extrapolated and time-consuming trial because you are bringing in lots of experts, including academics, into the courtroom as expert witnesses, and bringing a lot of victims into the courtroom under victim participation. We certainly experienced that in Cambodia. That is part of the ICC process, but all of this extends the trial and might breach the two words that Hans advised us, which are precision and pragmatism.

The whole dilemma has an enormous impact, of course, on whether or not governments are prepared to support extremely lengthy trials. Atrocity crimes invite a tremendous amount of investigation, a tremendous amount of crime scenes that have to be investigated, a tremendous amount of documents and witnesses if they are available, into the courtroom. But at the same time, there is an enormous amount of pressure out there to speed up these trials and bring justice far more quickly than we are seeing transpire today.

So I want to turn to Bill and ask whether or not—given that you have demonstrated your historical research skills here today—these trials should actually also try to relate a historical narrative to the greatest extent possible. Or should there be pragmatic restrictions on achieving that goal?

**WILLIAM SCHABAS:** I think the answer is yes to both hypotheses. I think they inevitably do it, but that they probably should be careful about doing it.

If you think of the Nuremberg judgment, the core truth of the Nuremberg judgment is, as was pointed out earlier today, that this was a war of aggression started by one side. Not all wars are entirely clear on who started them and who is responsible for them. That is something that the judgment says and it is pretty hard to deny. We can still talk about the First World War, who started it, who sent the telegram to whom, who mobilized the army first. But we are not going to argue about the Second World War, and that profound truth really goes back to Nuremberg.

I am aware of all the arguments. I know the prosecutors all say, “No, do not burden us with trying to prove the whole history of the country.” The defense lawyers hate it. The judges are uncomfortable with doing it. And yet what they produce is a historical concept. The *Akayesu* judgment we refer to today, the first judgment of the International Criminal Tribunal for Rwanda, has a lengthy section about the genocide in Rwanda, and it starts with that. After a little while, the judges were just simply referencing that and saying those are established facts that could not be contested anymore.

We talk about the critics of Nuremberg. The first great critic of the judgment was here in Nuremberg, exactly seventy years ago. Michael Scharf will remember our old friend, Henry King from Cleveland. Henry was on the prosecution team, and Henry used to talk about meeting Raphael Lemkin in the Grand Hotel on the 1st of October after the judgment came out. Raphael Lemkin did not like the judgment at all—he was angry about the judgment because he said it recognized wartime genocide but not peacetime genocide. Now, of course, it did not recognize “genocide” at all, using that term. It used “crimes against humanity,” but what he referred to was the fact that

the Nuremberg judgment—although it spoke about pre-September 1939 atrocities like the *Kristallnacht* and the Nuremberg laws—did not convict anybody for those crimes. And so, Lemkin goes rushing back to New York to the first session of the UN General Assembly and proposes this resolution on genocide, recognizing it as an international crime. He gets the Cuban ambassador to propose it to the General Assembly, and the Cuban ambassador stands up and says, “We are here to fix a problem with the Nuremberg judgment.” So, the promotion of the codification of genocide within the UN was sparked by Lemkin’s unhappiness here at Nuremberg, exactly seventy years ago, and the notion that the shortcoming in the Nuremberg judgment was the failure to recognize prewar, that is, peacetime atrocities. So he presents the resolution, and that is, of course, where the convention comes from, and from the convention comes the ICC. So, it is a little line that started here in the Grand Hotel on the 1st of October.

And just one last thing about it; Lemkin’s draft resolution does not call for a convention. That is not his idea. There is an amendment that is proposed by one of the founding members, one of the initial members. One of them proposes an amendment. If you know, you know, but if you do not know who proposes it, you will never guess. So, I will spare you all the trouble of attempting to guess.

It is in the Middle East. It is not Iran. It is not Syria. It is not Lebanon, not Egypt. Saudi Arabia. The only good thing Saudi Arabia has ever done to promote international law and human rights. They said, “We should have a genocide convention.”

**DAVID SCHEFFER:** But let me also comment on the historical role of these trials because one witnesses it every day in Cambodia. Nick mentioned how 200,000 people have entered the courtroom. But we get a lot of criticism for the length of the trials in Cambodia. There are so many reasons why they are long and why they could be more efficient. We deal with those problems every day.

But at the end of the process, there is a historical record being written in Cambodia through the Extraordinary Chambers, which simply would never exist without that Court. It is a massive record. It will take decades for historians to parse through it and continue to retell and understand the complexity of what occurred in Cambodia in the late 1970s, and I think there is great value in that, tremendous value. Even though it is enormously frustrating to get there, it has enormous long-term historical value for that society.

You know, it was only about four or five years ago that Cambodian high school students received their first text that said anything about the atrocities of the Pol Pot regime. It simply was not taught. But the Court has inspired a lot of that now, a lot of outreach. There are going to be decades of it ahead of us, but it is a historical record. The Nuremberg judgment also launched as early as September 30, 1946, a process of history in the making that we are still undertaking seventy years later. It was a touchstone, and I think that is true for all of the modern war crimes tribunals. There will be decades of study in Rwanda, in the former Yugoslavia, and in Sierra Leone that we cannot imagine at this time. But all of these judgments, trial records, transcripts, and witness testimonies will be part of the historical record and what historians will be poring through and then relating to their societies, just as we are doing today here in Germany.

**WILLIAM SCHABAS:** You know, David, the tribunals and their judgments can be vehicles for recording history, but there is also the history of the institutions themselves. You would think we would know everything there is to know about the Nuremberg trial, but there is still a lot that we do not know about what was going on. Some of it, I think is just going to be lost in the mist of time.

For example, people now are poring through the Soviet archives, which are largely open, and learning more about them. There is all the preliminary work that went on in London. Now there is a group of

scholars who are working on the UN War Crimes Commission, which paved the way for it. Prior to that, we had the London International Assembly. Philippe Sands has just written a book about Lauterpacht's involvement, and there are still big chunks of this that we could learn more about that we still need to know more about. It enriches our understanding today about what is going on, as we wrestle with some of the crimes that we inherited from Nuremberg, and that may not have been prosecuted very much.

We were speaking earlier about how Nuremberg does deal with occupation a lot. But it does not deal with a lot with things like targeting in the conduct of hostilities. It is not really in the nature of a trial of leaders to do this, but we do not have much since then about occupation. Although it occurs to me that the decision that was issued a few days ago by the International Criminal Court, *Al Mahdi*, is in a way, an occupation decision, because, in fact, they use the term. They talk about how Ansar Dine, the al-Qaeda affiliate, had occupied Timbuktu, and so it is about how they treat people who have fallen into the hands of one of the combatant parties. And, of course, they are applying a provision that is derived from the laws and customs of war, but that actually has never been applied.

And so we are still going back. As our experience grows in international criminal justice, every six months, every year, we learn more about it, and we encounter more difficulties. We have to keep going back and looking at this stuff because we find answers to our modern-day problems. We get clues to them in the old stuff.

## **Closing**



## **Tenth International Humanitarian Law Dialogs Closing**

**Margaret McKeown\***

It is my privilege to preside over the closing ceremony. I am Judge Margaret McKeown from the United States Court of Appeals for the Ninth Circuit. With two international land borders and a very long maritime border, we are home to many international law cases. But, I am here for this year's Dialogs because of my passion for the rule of law.

I chair the American Bar Association Rule of Law Initiative, which we affectionately call "ABA ROLI." With this project, the American Bar Association (ABA) works in over fifty countries to promote the rule of law. We do this through partnerships with local and national entities in these countries. We work with justice sector actors—lawyers, judges, prosecutors, government officials, and activists—to build local capacity, to strengthen laws and legal institutions, and to deliver accountability on the national level

I am also here on behalf of all the entities of the American Bar Association that are co-sponsors of these amazing Dialogs, including not only the ABA Rule of Law and Initiative, but also the ABA Center for Human Rights, the ABA Criminal Justice Section, and the ABA Section of International Law.

The theme of this year's gathering, "A Lasting Legacy for the Future," encourages us to go back to mine the post-World War II history and the Nuremberg legacy for lessons and inspiration for today's very significant justice challenges.

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\* Judge, United States Court of Appeals for the Ninth Circuit.

We are gathered here to honor the seventieth anniversary of the Nuremberg judgments and to celebrate remarkable progress—to remember that just a lifetime ago, there was no international criminal law, no Genocide Convention, no Geneva Conventions, and no international tribunals. And then, here in Nuremberg, the wisdom, courage, foresight, and creativity of a few took hold and changed the world. Nuremberg has come to represent a high watermark of international justice, both as a legal landmark and as a legal standard.

Justice Jackson, the chief prosecutor, looms large in our discussions about his legacy and Nuremberg. But, I would like to remind you that it was quite remarkable to have a justice of the United States Supreme Court take a leave of absence from Court. There was no precedent for this and, unlike some countries, there was no statutory of authorization for him to do so. Justice Jackson's departure left the nine-member Court with only eight justices, a circumstance that presents itself today as well. One justice selfishly complained that it caused him extra work. I suggest that justice was more than a little shortsighted. It was a time in history when extraordinary circumstances demanded extraordinary measures. So today, as we see seemingly intractable violent conflicts, as we see attacks on civilians, and as we see atrocities of unspeakable barbarity, we know that justice looms large for all. The law reaches far and it reaches high. Heads of state can be and have been held accountable; time and again, we have seen that, eventually, accountability prevails. As it did here in Germany, justice permits us to move forward, from conflict towards lasting peace. And, as we were reminded today, justice also provides a legacy for the greater good. That is the legacy that we honor and that these modern-day prosecutors commit themselves to carry forward.

You may have heard a little laughter and frivolity from the back room where the prosecutors are meeting. I suggest to you that this lightheartedness does not detract from the seriousness of today's declaration. Instead, I suggest that it represents the joy they feel in

being participants in the system of justice underlying this declaration. This declaration is a tangible representation of their commitment and for our hope for an even brighter future.

Please join me in thanking these prosecutors for this declaration. We also thank them for their day-in and day-out efforts to secure justice and accountability. I now declare the Tenth International Humanitarian Law Dialogs at Nuremberg closed.



## **Conclusion**



## Conclusion

David M. Crane<sup>\*</sup>

I stared out at the audience. It was the opening ceremony of the International Humanitarian Law Dialogs. Distinguished guests, friends, colleagues, and the press were in attendance. There we all were in the famous courtroom; THE courtroom, where modern international criminal law began at Nuremberg. We were assembled to commemorate the seventieth anniversary of the judgments there at this historic place and to celebrate the tenth anniversary of the International Humanitarian Law Dialogs, a convocation of the world's current and former international chief prosecutors. Normally held at the Chautauqua Institution in upstate New York, near Jamestown, the Dialogs, as they are known, left the pristine banks of Lake Chautauqua and met at Nuremberg. In some ways it was a "perfect storm" of history, symbolism, and meaning as we celebrated mankind's march forward to tame the beast of impunity and use the rule of law to hold dictators, thugs, and others accountable for what they do to their own citizens.

It was an awesome two days in Nuremberg. As you have read in this momentous volume of the *Proceedings*, the perspectives and reflections of the various speakers, panelists, and discussants there make this particular book important. As I perused the book, I mused at how far we truly have come over the past decades in accountability for international crimes. From the international community doing nothing, for whatever right or wrong reason, to a transition to the modern international criminal law system, these developments are nothing short of amazing.

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<sup>\*</sup> Professor of Practice, Syracuse University College of Law and Founding Chief Prosecutor, Special Court for Sierra Leone, 2002–2005.

We now have the jurisprudence, the rules of evidence and procedure, and the experience to seek justice for the oppressed when called upon to do so by the international community. It is an infrequent call but we are ready and able to restore the rule of law in devastated parts of the world. No more can we say we do not have the legal or practical ability to hold thugs accountable. The only decision in the process is the political one of doing something. It is always a political decision, no more seen than in the challenges of setting up justice mechanism in Syria and in other parts of the world.

As we move deeper into the twenty-first century, an age of extremes challenged by kaleidoscopic events and dirty little wars, this darkened age will test our mettle in accountability for atrocity crimes. Regardless of the strides we have made in all areas of international criminal law, the turning inward of nations seeking their own paths on the world stage, ignoring of the rule of law internationally, challenges the spirit of Nuremberg started seven decades ago. Time and again the United Nations is hampered by a splintered Security Council, rendering it almost helpless. This circumstance harkens back to the days of the Cold War and does not auger well for future justice initiatives. It is a call to those who seek justice every day for victims of atrocity crimes to work harder and be more creative and agile in our work to ensure that atrocities are not ignored as they were in the past century. We have come too long to return to that condition.

It is important to thank all of our sponsors who work hard annually to support the International Humanitarian Dialogs. Each of them has been a long-term backer, some for the entire decade that the Dialogs have been in existence. A particular shout out to the City of Nuremberg as our official hosts. To all of them, thank you for what you have done and are doing for mankind in helping the Dialogs to take place, and in what you are doing as organizations to bring justice for victims of atrocities. Of note are the dedication of James Johnson, his wife Pam, his assistant Molly White, and Henrike Clausen from

Nuremberg who made this important event happen. To them, job well done; you made us all proud.

I encourage you to go back and review the commentary once again. Consider the deep reflections of these remarkable people about justice, the importance of the rule of law, and the legacy of the Nuremberg trials. Use this volume as a way to renew our pledges that no one is above the law. I will close with the words I opened the ceremony with, using the stirring words of Justice Robert H. Jackson, the Chief American Prosecutor at the International Military Tribunal at Nuremberg:

That four great nations flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that power has ever paid to reason.



## **Appendices**



## Appendix I

### Agenda of the Tenth International Humanitarian Law Dialogs

Thursday, September 29, through  
Friday, September 30, 2016

#### Thursday, 29 September – Memorium Nuremberg Trials

- 5:45 p.m.      **Opening Ceremony**  
**Introduction** by Professor David M. Crane.  
**Welcome** by Dr. Ulrich Maly, Lord Mayor,  
Joachim Herrmann and Donald Ferencz.  
**Keynote addresses** by Prosecutor Fatou Bensouda,  
and Attorney General Loretta E. Lynch  
Presentation of the Joshua Heintz Award for  
Humanitarian Achievement  
**Poetry Reading** by Marjory Wentworth.
- 5:45 p.m.      **Movement to Altes Rathaus Nuremberg**
- 5:45 p.m.      **Welcome Reception**  
Hosted by the City of Nuremberg

#### Friday, 30 September – Documentation Centre and Nazi Party Rally Grounds

- 8:15 a.m.      **Meet in Hotel Lobby - walk to the Documentation  
Centre Nazi Party Rally Grounds**
- 9:00 a.m.      **Welcome and Introduction of the Prosecutors**  
Florian Dierl  
James C. Johnson

- 9:15 a.m.     **Keynote Address**  
Delivered by the Honorable Joseph F. Kamara  
Introduced by Professor David M. Crane
- 10:00 a.m.     **Break**
- 10:30 a.m.     **The Legacy of Nuremberg**  
Delivered by Professor John Q. Barrett  
Introduced by Mark Agrast
- 11:30 a.m.     **Break**
- 11:45 a.m.     **Prosecutor Roundtable:** The Impact of the IMT on  
Modern International Criminal Law  
Moderated by Dean Michael Scharf
- 1:00 p.m.      **Luncheon**
- 1:30 p.m.      **Luncheon Keynote Address**  
Delivered by Ambassador Hans Corell  
Introduced by Professor Leila Sadat
- 2:15 p.m.      **Break** (*Prosecutors convene separately to draft the  
Nuremberg Declaration*)
- 2:30 p.m.      **Roundtable** - German Perspectives on the prosecu-  
tion of Nazi crimes  
Moderated by Prosecutor Serge Brammertz
- 3:45 p.m.      **Break**
- 4:00 p.m.      **Reflections on Nuremberg**  
Ambassador David Scheffer and Professor William  
Schabas  
Introduced by The Honorable Bernice B. Donald
- 5:00 p.m.      **Break in Place**

- 5:05 p.m.     **Issuance of the Nuremberg Declaration**  
Moderated by The Honorable Margaret McKeown
- 5:30 p.m.     **Closure of the 10<sup>th</sup> IHL Dialogs**



## Appendix II

### Declaration of the Tenth IHL Dialogs at Nuremberg September 29, 2016

*In the spirit of humanity and peace the assembled current and former international prosecutors and their representatives here at Nuremberg, Germany...*

*Recognizing the continuing need for justice and the rule of law as the foundation to international peace and security and cognizant of the legacy of all those who preceded us at Nuremberg and elsewhere:*

Considering that the commemoration of the 70<sup>th</sup> anniversary of the judgments of the International Military Tribunal at Nuremberg is an appropriate occasion for renewal of the international commitment to justice for all victims of atrocity crime;

Acknowledging those judgements and the work of those at that tribunal that set the cornerstone for the modern system of international criminal law;

Inspired by the commitment of the Nuremberg Tribunal to stay the hand of vengeance and subordinate power to reason;

Noting with grave concern the ongoing attacks against civilian populations including humanitarian actors in violation of the norms applied at Nuremberg and modern international criminal law;

Commending Ambassador Christian Wenaweser as the eighth recipient of the Joshua Heintz Humanitarian Award for his important and impressive service to humanity;

Celebrating the tenth anniversary of the International Humanitarian Law Dialogs;

***Now do solemnly declare and call upon the international community and international organizations to keep the spirit of the Nuremberg Principles alive by:***

Promoting the independence of international and national judicial institutions including shielding them from political interference;

Ensuring full accountability for all perpetrators of international crimes such as enforcing warrants and judicial orders;

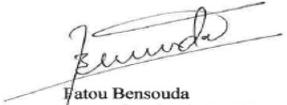
Protecting the integrity of judicial proceedings by guaranteeing witnesses and victims are free from threats and undue influence;

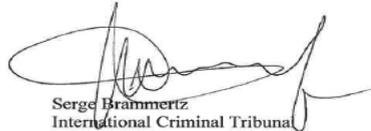
Ensuring effective accountability for all international crimes including sexual and gender based crimes, crimes victimizing children, and crimes against cultural heritage;

Providing full support to all international courts and tribunals in the exercise of their judicial and residual functions;

Committing to capacity building based on best practices and their own experience in assisting jurisdictions to fulfill their complementarity obligations.

Signed in Mutual Witness:

  
Jatou Bensouda  
International Criminal Court

  
Serge Brammertz  
International Criminal Tribunal  
for the Former Yugoslavia

  
David M. Crane  
Special Court for Sierra Leone

  
Norman Farrell  
Special Tribunal for Lebanon

  
Brenda J. Hollis  
Residual Special Court for Sierra Leone

  
Hassan B. Jallow  
International Criminal Tribunal for Rwanda  
Mechanism for International Criminal Tribunals

  
Nicholas Koumjian  
Extraordinary Chambers in the  
Courts of Cambodia

  
Robert Petit  
Extraordinary Chambers in the  
Courts of Cambodia

  
Stephen J. Rapp  
Special Court for Sierra Leone



## Appendix III

### Biographies of the Prosecutors and Participants

#### *Prosecutors*

##### **Fatou Bensouda**

Prosecutor Bensouda of The Gambia, elected by the Assembly of States Parties, became Prosecutor of the International Criminal Court on 12 December 2011. Ms. Bensouda swore in on 15 June 2012. Previously, Ms. Bensouda held the position of ICC Deputy Prosecutor, having been elected with an overwhelming majority by the Assembly of States Parties on 8 August 2004 and serving as such until May 2012. Prior to her work at the International Criminal Court, Ms. Bensouda worked as Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, rising to the position of Senior Legal Advisor and Head of The Legal Advisory Unit. Before joining the ICTR, she was General Manager of a leading commercial bank in The Gambia. Between 1987 and 2000, she was successively Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, and Attorney General and Minister of Justice, in which capacity she served as Chief Legal Advisor to the President and Cabinet of The Republic of The Gambia. Ms. Bensouda also took part in negotiations on the treaty of the Economic Community of West African States (ECOWAS), the West African Parliament, and the ECOWAS Tribunal. She has served as delegate to United Nations conferences on crime prevention, the Organization of African Unity's Ministerial Meetings on Human Rights, and as delegate of The Gambia to the meetings of the Preparatory Commission for the International Criminal Court. Ms. Bensouda holds a masters degree in International Maritime Law and Law of The Sea and as such is the first international maritime law expert of The Gambia.

**Serge Brammertz**

Prosecutor Brammertz assumed his duties as the Prosecutor of the International Criminal Tribunal for the former Yugoslavia in 2008. Prior to his current appointment; he served as Commissioner of the United Nations International Independent Investigation Commission into the assassination of former Lebanese Prime Minister Rafik Hariri, as the first Deputy Prosecutor of the International Criminal Court where he was in charge of establishing the Investigations Division of the Office of the Prosecutor, and initiated the first ICC investigations in Uganda, the Democratic Republic of Congo and Darfur.

**David M. Crane**

Prosecutor Crane is a professor of practice at Syracuse University College of Law. From 2002 to 2005 he served as the Prosecutor for the Special Court for Sierra Leone and indicted former Liberian President Charles Taylor for his role in the atrocities committed during the Civil War in Sierra Leone. Professor Crane was the first American since Justice Robert H. Jackson and Telford Taylor at the Nuremberg trials in 1945, to serve as the Chief Prosecutor of an international war crimes tribunal. He founded and advises Impunity Watch ([www.impunitywatch.com](http://www.impunitywatch.com)), a law review and public service blog.

**Brenda J. Hollis**

Prosecutor Hollis was appointed Prosecutor of the Residual Special Court for Sierra Leone in February 2014 by the Secretary-General of the United Nations, having served as Prosecutor of the Special Court for Sierra Leone from February 2010 until its closure in December 2013. She had been extensively involved in the training of judges, prosecutors, and investigators for work with the International Criminal Tribunals. She served as Senior Trial Attorney from 1994 until 2001 at the International Criminal Tribunal for the former Yugoslavia, and assisted the Office of the Prosecutor at the International Criminal Tribunal for Rwanda. Prosecutor Hollis served for more than 20 years in the United States Air Force, retiring in 1998 with the rank

of Colonel. Prior to her Air Force service, she served as a Peace Corps volunteer in West Africa.

### **Hassan Jallow**

Prosecutor Hassan Bubacar Jallow was the Prosecutor of the UNICTR from 2003 until its closure on 31 December 2015. He was concurrently the first Prosecutor of the UNMICT from 2012 to 2016. Prosecutor Jallow previously worked in the Gambia as the State Attorney from 1976 until 1982, when he was appointed Solicitor General. In 1984, Mr. Jallow served as Attorney General and Minister of Justice for the Gambia, then, in 1994, he was appointed as a justice of the Supreme Court of the Gambia. From 2002 until 2003, Prosecutor Jallow served as a Judge in the Appeals Chamber of the Special Court for Sierra Leone.

### **Nicholas Koumjian**

Prosecutor Koumjian has served as the international Co-Prosecutor of the Extraordinary Chambers for the Courts of Cambodia since October 2013. He worked as a prosecutor for twenty years in Los Angeles and since 2000 he has served in various international criminal tribunals. He was a prosecutor at the International Criminal Tribunal for the former Yugoslavia and later at the State Court of Bosnia and Herzegovina. He headed the UN-staffed Serious Crimes Unit in East Timor and was Principal Trial Attorney at the Special Court for Sierra Leone in the trial of Liberian President Charles Taylor. He was also director of a US-funded human rights programme in Colombia, working on anti-corruption initiatives in Central and Eastern Europe. Additionally, he has represented both defendants and victims before the International Criminal Court.

### **Robert Petit**

Robert Petit was called to the Bar in 1988 and started his legal career as a Crown Prosecutor in Montreal for eight years eventually focusing on organised criminality and complex cases. In 1996 he

embarked on an international career first as a Legal Officer in the Office of the Prosecutor of the International Criminal Tribunal for Rwanda. Subsequently between 1999 and 2004, he was a Regional Legal Advisor for the United Nations Interim Administration Mission in Kosovo, a Prosecutor for the Serious Crimes Unit of the United Nations Missions of Support to East Timor, and a Senior Trial Attorney with the Office of the Prosecutor of the Special Court for Sierra Leone. In 2006, he was named by the United Nations as International Co Prosecutor of the Extraordinary Chambers in the Courts of Cambodia, a position he held until September 2009 when he returned to Canada and to his long-term position as Counsel and Team Leader with the War Crimes Section of Canada's Federal Department of Justice.

### **Ambassador Stephen J. Rapp**

Stephen J. Rapp is a distinguished fellow at the U.S. Holocaust Memorial Museum and The Hague Institute for Global Justice working on strengthening the capacity of human rights inquiries to document ongoing mass atrocities. He served as US ambassador-at-large for global criminal justice from 2009 to 2015. In that role, he coordinated US government support to international criminal tribunals, including the International Criminal Court, as well as to hybrid and national courts responsible for prosecuting persons charged with genocide, war crimes, and crimes against humanity. He was credited with arranging for the United Nations Commission of Inquiry and other prosecutorial authorities to gain access to a cache of 55,000 photos documenting torture by the Assad regime. From 2007 to 2009, Ambassador Rapp served as prosecutor of the Special Court for Sierra Leone, where he led the prosecution of former Liberian President Charles Taylor. His office achieved the first convictions in history on crimes against humanity charges for sexual slavery and forced marriage and for attacks on peacekeepers and recruitment and use of child soldiers as violations of international humanitarian law. From 2001 to 2007, he served as senior trial attorney and chief of prosecutions at the International Criminal Tribunal for Rwanda,

where he led the trial team that achieved the first convictions in history against leaders of the mass media for the crime of direct and public incitement to commit genocide. He was the United States Attorney for the N. District of Iowa from 1993 to 2001. He received a BA from Harvard College and a JD from Drake University Law School.

### **James Stewart**

Prosecutor Stewart serves as the Deputy Prosecutor of the International Criminal Court. In 1979 Mr. Stewart joined the Downtown Toronto Crown Attorney's Office as an Assistant Crown Attorney, where he handled criminal trials. In 1985, Mr. Stewart served in the Crown Law Office Criminal division. Prior to his 2012 election to the ICC, Mr. Stewart worked as General Counsel in the Crown Law Office within the Ministry of the Attorney General, in Toronto. On leaves of absence from the Crown Office, Stewart worked at the UN international Criminal tribunals. Mr. Stewart served as Senior Trial Attorney in the OTP at the International Criminal Tribunal for Rwanda, as Chief of prosecutions in the OTP at the International Criminal Tribunal for the Former Yugoslavia, and as Senior Appeals counsel and then Chief of the Appeals and Legal Advisory Division in the OTP at the International Criminal Tribunal for Rwanda.

### **Ekkehard Withopf**

Ekkehard Withopf is a Senior Trial Counsel within the Office of the Prosecutor (OTP) of the Special Tribunal for Lebanon (STL). He currently serves the OTP as its acting Chief of Prosecutions. Prior to joining the STL in October 2009, he was a Senior Trial Lawyer within the OTP of the International Criminal Court (ICC) from July 2004 to September 2009, and from May 1999 to May 2004, he was a Senior Trial Attorney within the OTP of the International Criminal Tribunal for the former Yugoslavia (ICTY). He was the lead counsel in a number of cases, including inter alia the ICTY case against Hadžihasanović and Kubura, which concerned crimes committed by units of the 3rd Corps of the Army of Bosnia and Herzegovina and

the Mujahedin in Central Bosnia in 1993, and the ICC case against Thomas Lubanga Dyilo, who was charged with the war crimes of enlisting, conscripting and using child soldiers in Ituri, a district in the Orientale Province of the Democratic Republic of the Congo. Prior to joining the ICTY, Mr. Withopf was a prosecutor at the office of the German Attorney General, where he was involved in investigating and prosecuting terrorist crimes committed in Germany by the Algerian Front Islamique du Salut (FIS) and the Provisional Irish Republican Army (PIRA). He had commenced his professional career within the German judiciary as a prosecutor and judge in Bavaria, followed by his assignments as a prosecutor within the working group “Government Criminality” in Berlin, dealing with crimes committed by prosecutors and judges of the former German Democratic Republic. Prior to these appointments, Mr. Withopf worked as an Assistant Professor for Administrative Law and Philosophy at the University of Würzburg in Bavaria and as a lawyer in private practice.

### *Panelists and Speakers*

#### **Mark David Agrast**

Mr. Agrast is the Executive Director of The American Society of International Law (ASIL). Since 2009 he has served as a Deputy Assistant Attorney General in the U. S. Department of Justice’s Office of Legislative Affairs. From 2003 to 2009 Mr. Agrast served as a Senior Vice President and Senior Fellow at the Center for American Progress. Previously he held a senior staff position with two members of the U.S. House of Representatives. He has also served as the Chair for the Section of Individuals Rights and Responsibilities and the Commission on Immigration. Since its inception and has played a central role in designing and implementing its Rule of Law Index. After graduating from Case Western Reserve University, Mr. Agrast pursued his post-graduate studies as a Rhodes Scholar at the

University of Oxford and received his J.D. from Yale Law School where he was editor in chief of the Yale Journal of International Law.

### **John Q. Barrett**

Mr. Barrett is a Professor of Law at St. John's University in New York City, where he teaches constitutional law and legal history. He also is the Elizabeth S. Lenna Fellow and a Board member at the Robert H. Jackson Center in Jamestown, New York. Professor Barrett is writing the biography of Robert H. Jackson (1892-1954), United States Supreme Court Justice and Nuremberg chief prosecutor of the principal Nazi war criminals following World War II. Professor Barrett is an internationally renowned teacher, writer, public commentator and lecturer. Last November, he spoke in Nuremberg, in historic Courtroom 600, at the city's program commemorating the 70<sup>th</sup> anniversary of the start of the Nuremberg trial. Professor Barrett discovered, edited and introduced Justice Jackson's now acclaimed memoir *That Man: An Insider's Portrait of Franklin D. Roosevelt*, which is both F.D.R. biography and Jackson autobiography. Professor Barrett also is author of numerous articles and chapters, including on Justice Jackson and Nuremberg, and his "Jackson List" periodic emails—thejacksonlist.com—reach well over 100,000 readers around the world. He is a graduate of Georgetown University and Harvard Law School and served as a law clerk to U.S. Circuit Judge A. Leon Higginbotham, Jr.; as Associate Counsel in the Office of Independent Counsel Lawrence E. Walsh (Iran/Contra); and as a U.S. Department of Justice attorney.

### **Henrike Claussen**

Henrike Claussen received her Master's degree in Modern History, History of Arts and Archaeology from the University of Cologne, Germany. She worked as an academic staff member for the Documentation Centre Nazi Party Rally Grounds (Nuremberg, Germany) and the White Rose Foundation (Munich, Germany). In 2007 she became the project coordinator for the establishing of

the new permanent exhibition “Memorium Nuremberg Trials” in the Nuremberg courthouse. Since its opening in November 2010 she has been serving as the exhibition’s curator and was recently appointed as the new director of the Memorium Nuremberg Trials. She has written articles and given lectures on various topics ranging from national trials against nazi criminals, German culture of remembrance since 1945 and questions of jurisprudence. Currently she is working on a book “The Nuremberg Trials: Origins – History – Legacy” to be published in 2016.

### **Hans Corell**

Ambassador (ret.) Hans Corell, a current board member at the Robert H. Jackson Center, served as Under-Secretary-General for Legal Affairs and Legal Counsel of the UN from 1994-2004. In this capacity, he was head of the Office of Legal Affairs in the UN Secretariat. He served as Ambassador and Under-Secretary for Legal and Consular Affairs in the Swedish Ministry of Foreign Affairs from 1984 to 1994. Ambassador Corell served as a member of Sweden’s delegation to the United Nations General Assembly 1985-1993 and has had assignments related to the Council of Europe, OECD and the CSCE (now OSCE). He co-authored the CSCE proposal for the establishment of the International Tribunal for the former Yugoslavia transmitted to the UN in February 1993. He was the Secretary-General’s representative at the 1998 UN Conference that adopted the Rome Statute of the International Criminal Court, and involved in the establishment of the International Tribunal for Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. In 2015, the International Bar Association’s Human Rights Institute announced Ambassador Corell as its new Co-Chair previously he was Vice-Chair.

### **Florian Dierl**

Florian Dierl has been the since 2014 director of Dokumentationszentrum Reichsparteitagsgelände Nürnberg since 2014. In 2011, he curated

the exhibition “Police in the NS State” at Deutsches Historisches Museum Berlin. Previous to these accomplishments, Mr. Dierl was a research associate at Hamburger Institut für Sozialforschung, Haus der Wannseekonferenz Berlin, Freie Universität Berlin. His publications include, (with Zoran Janjetović / Karsten Linne) *Arbeitspflicht und Menschenjagden: Arbeitsverwaltungen und Zwangsarbeit in den polnischen und jugoslawischen Besatzungsgebieten 1939-1944*; Essen: Klartext, 2013; (with Karsten Linne) *Arbeitskräfte als Kriegsbeute. Der Fall Ost- und Südosteuropa 1939–1945*, Berlin: Metropol, 2011; (with Marianna Hausleitner / Martin Hölzl / Andreas Mix) *Ordnung und Vernichtung. Die Polizei im NS-Staat. Eine Ausstellung der Deutschen Hochschule der Polizei, Münster, und des Deutschen Historischen Museums, Berlin, 1. April bis 31. Juli 2011*, Dresden: Sandstein, 2011. In addition, Mr. Dierl also has various papers and essays on the history of German police, national socialist perpetrators, and German rule in occupied Europe during Second World War.

### **Hon. Bernice B. Donald**

The Honorable Bernice B. Donald began serving on the bench for the United States Court of Appeals for the Sixth Circuit in 2011. Prior to joining the Court of Appeals, Judge Donald served on the U.S. District Court for the Western District of Tennessee. Judge Donald served as Judge of U.S. Bankruptcy Court for the Western District of Tennessee from June 1988 to January 1996. She was the first African American woman in the history of the United States to serve as a bankruptcy judge. When she was elected to the General Sessions Criminal Court in 1982, she became the first African American woman to serve as a judge in the history of the State of Tennessee. An internationally recognized legal scholar, Judge Donald has lectured and trained judges around the world and served as faculty for numerous international programs, including Romania, Mexico, Turkey, Brazil, Bosnia, Botswana, South Africa, Namibia, Senegal, Rwanda, Tanzania, Russia, Egypt, Morocco, Thailand, Armenia, Jamaica, and Manila. In 2003, Judge Donald led a People to People delegation to Johannesburg and

Capetown, South Africa and traveled to Zimbabwe to monitor the trial of a judge accused of judicial misconduct. Judge Donald has served as President of the American Bar Foundation, the National Association of Women Judges, and the Association of Women Attorneys.

### **Donald Ferencz**

Don was born in Nuremberg, where his father had been a Prosecutor at one of the trials held subsequent to the International Military Tribunal. He earned a BA in Peace Studies at Colgate University in New York and undertook coursework at the Canadian Peace Research Institute in Ontario, Canada. He holds degrees in education, law, business, and taxation, leading to an eclectic career as school teacher, adjunct professor of law, and two decades as a consultant and senior tax executive. In 1996, he and his father established The Planethood Foundation, to assist in replacing the law of force with the force of law. Don was a non-governmental advisor to the International Criminal Court's Assembly of States Parties' working group on the crime of aggression through the ICC Review Conference in Kampala, Uganda, in 2010 (<http://crimeofaggression.info/the-campaign/the-global-institute-for-the-prevention-of-aggression/>). Don is a Visiting Professor at Middlesex University School of Law and a Research Associate at the Oxford University Faculty of Law's Centre for Criminology.

### **Joachim Herrmann**

Since 2013 Joachim Herrmann is Bavarian Minister of Inner Affairs, Building and Transport. Joachim Herrmann started his political career during his Legal Studies at Erlangen and Munich, where he became Chairman of the Association of Christian-Democratic Students (RCDS). From 1992 to 2003 he was a Lawyer and General Counsel of Siemens AG. In 1997 and 1998 he became the Bavarian Deputy Secretary-General of the CSU and in 1998 and in 1999 he was the State Secretary in the Bavarian Ministry of Labour and Social Welfare, Family Affairs, Women and Public Health. From to 2003

to 2007 he was the Chairman of the CSU State Parliamentary Group and in 2007 he started as Bavarian State Minister of the Interior and became Deputy Prime Minister of Bavaria in 2008.

**Cameron Hudson**

Cameron Hudson is director of the Museum's Simon-Skjodt Center for the Prevention of Genocide and previously served as the Center's policy director. From 2009 to 2011, he served at the State Department as the chief of staff to the President's Special Envoy for Sudan during the period of South Sudan's independence. He also served from 2004-2009 as the director for African affairs on the staff of the National Security Council at the White House, where he was responsible for organizing the government response to the Darfur genocide. Previously, he served as an intelligence analyst in the Central Intelligence Agency as well as for the United Nations and the Organization for Security and Co-operation in Europe in the former Yugoslavia.

**James C. Johnson**

James C. Johnson serves as Co-Director of the Henry T. King Jr. War Crimes Research Office and Adjunct Professor of Law at Case Western Reserve University School of Law. Mr. Johnson is also the Senior International Fellow for the Robert H. Jackson Center, having served as the President and CEO of the Jackson Center from 2012 until 2015. From 2003 until 2012, Mr. Johnson served as Senior Trial Attorney and as the Chief of Prosecutions for the Special Court for Sierra Leone. As such, Mr. Johnson supervised trial and investigative teams, which prosecuted ten accused, including the former President of Liberia, Charles Taylor, for war crimes, crimes against humanity and other serious violations of international law. Prior to joining the Special Court for Sierra Leone, Mr. Johnson served for 20 years as a Judge Advocate in the United States Army.

### **Joseph Kamara**

Joseph Fitzgerald Kamara is Sierra Leone's Attorney General and Minister of Justice. Prior to his appointment in January 2016, Mr. Kamara headed his country's Anti-corruption Commission (ACC) where he succeeded in establishing a robust anti-corruption regime. During his time as Commissioner of Anti-Corruption, Mr. Kamara secured the conviction of several high profile government officials including three Ministers, Mayor of the Capital City, Head of the National Revenue Authority, and Head of the National Maritime Agency. A Member of the African Union Board on Anti-Corruption, Mr. Kamara has over 25 years experience at the Bar. After graduating from Fourah Bay College, University of Sierra Leone in 1989, he worked for the Government of Sierra Leone as State Prosecutor. Following the end of the civil war in Sierra Leone, Mr. Joseph Fitzgerald Kamara, worked as Deputy Prosecutor for the Special Court for Sierra Leone, and successfully prosecuted leaders of various factions including Charles Taylor. He was one of the pioneers pushing for the recognition of forced marriage and sexual violence in international criminal law jurisprudence. Mr. Kamara is passionate about expanding human rights protections and improving access to justice in his country. He has worked tirelessly providing legal assistance to many indigent Sierra Leoneans. Mr. Kamara is currently working to repeal and modernize outdated laws in his country that undermine fundamental freedoms.

### **Hans-Joachim Lutz**

Dr. Hans-Joachim Lutz received his law degree, with additional economic education, from the University of Bayreuth in 1993. In 1998, Dr. Lutz received his Doctorate in Law at the Humboldt University in Berlin. Thereafter, he worked for the Chief Federal Prosecutor at the German Supreme Court in Karlsruhe as a research assistant. From 2002 to 2006, Dr. Lutz served as a Judge at the District court in Wurzburg. Between 2006 and 2012, he served as the Prosecutor in Munich, where he was responsible for the prosecution of Nazi crimes

committed between 1933 and 1945 in the Munich area. Dr. Lutz is currently serving as a Judge at the Higher Regional Court in Munich and has been serving in this position since April 2014.

**Loretta E. Lynch**

Loretta E. Lynch took her post as the 83rd Attorney General of the United States on April 27, 2015. Ms. Lynch received her J.D. from Harvard Law School in 1984. In 1990, Ms. Lynch joined the United States Attorney's Office for the Eastern District of New York, located in Brooklyn, New York. There, she forged an impressive career prosecuting cases involving narcotics, violent crimes, public corruption, and civil rights. In one notable instance, she served on the prosecution team in the high-profile civil rights case of Abner Louima, the Haitian immigrant who was sexually assaulted by uniformed police officers in a Brooklyn police precinct in 1997. In 2002, Ms. Lynch performed extensive *pro bono* work for the International Criminal Tribunal for Rwanda. As Special Counsel to the Tribunal, she was responsible for investigating allegations of witness tampering and false testimony. In 2010, President Obama asked Ms. Lynch to resume her leadership of the United States Attorney's Office in Brooklyn. Under her direction, the office successfully prosecuted numerous corrupt public officials, terrorists, cybercriminals, and human traffickers, among other important cases.

**Dr. Ulrich Maly**

Since May 1, 2002, he has been Lord Mayor of his home town. Dr. Ulrich Maly graduated in Economic Science and did a PhD in politics on the topic of "Economy and the Environment in Urban Development Politics." Since January 1984, Dr. Ulrich Maly has been a member of the SPD. After graduation, he was executive secretary of the SPD party group in the City Council, and between 1996 and 2002 Treasurer of the City of Nuremberg. This includes being the chairman of the board of the Bavarian Association of Municipalities and Vice president of

the board of the German Association of Municipalities, Chairman of the jury for the “Nuremberg International Human Rights Award”, Chairman of various foundations, including the “Future Foundation of the Sparkasse (Savings Bank)”, Chairman of the Convention and Tourist Centre Nuremberg and the German-American Institute (DAI) and other associations.

**Hon. Margaret McKeown**

Judge McKeown was appointed to the United States Court of Appeals for the Ninth Circuit by President Clinton and was confirmed by the United States Senate in 1998. She received her J.D. from Georgetown University Law Center in 1975. Judge McKeown was a White House Fellow in 1980-1981, serving as Special Assistant to the Secretary of the Interior and Special Assistant at the White House and is currently Chair of the ABA Rule of Law Initiative Board. She serves on the Council of the American Law Institute, the Executive Council for the American Society of International Law, the managerial board of the International Association of Women Judges, and the Editorial Board of *Litigation Journal*. She is vice-chair of the Georgetown Law Board of Visitors and Jurist-in-Residence at the University of San Diego Law School. Judge McKeown has been an advisor on several international projects of the American Law Institute including International Commercial Arbitration (ongoing); and Foreign Relations Law (ongoing). She is also an advisor on the Restatement of the Law for Copyright.

**Leila N. Sadat**

Professor Sadat is the Henry H. Oberschelp Professor of Law and Israel Treiman Faculty Fellow at Washington University School of Law and has been the Director of the Whitney R. Harris World Law Institute since 2007. In 2008, she launched the Crimes Against Humanity Initiative and, since then, has served as Chair of its Steering Committee. In December 2012, she was appointed Special Adviser on Crimes Against Humanity by International Criminal Court Chief Prosecutor

Fatou Bensouda, and earlier that year was elected to membership in the U.S. Council on Foreign Relations. In 2011, she was awarded the Alexis de Tocqueville Distinguished Fulbright Chair in Paris, France. Sadat is an internationally recognized human rights expert specializing in international criminal law and justice and has published more than 75 books and articles. From 2001-2003 Sadat served on the United States Commission for International Religious Freedom.

**Christoph J. M. Safferling**

Mr. Safferling, 1971, (Dr. iur., LL.M.) studied Law in Munich and London. He received his doctoral degree at the University of Munich in 1999, and passed the bar exam in 2000. Afterwards he held the position of assistant professor of law at the University of Erlangen-Nuremberg. From 2006 to 2015 he was professor for criminal law, criminal procedure, international criminal law and public international law at the Philipps-University of Marburg, and the Director of the International Research and Documentation Center for War Crimes Trials. He is the Whitney R. Harris International Law Fellow of the Jackson Center, Jamestown, N.Y. Since 2012 he is a member of the International Academic Commission at the Federal Ministry of Justice for Critical Study of the National Socialist Past. Today he holds the chair for criminal law, criminal procedure, and international law at the Friedrich-Alexander-University Erlangen-Nuremberg and is one of the vice-presidents of the International Nuremberg Principles Academy. His main fields of research are: international criminal procedural law, the mental elements of the crime, and the history of international criminal law. He is co-editor of the German Law Journal and the *Revista Internazionale di Dritto Penale*. He edited the German translation of Whitney Harris' *Tyranny on Trial* into German ("Tyranen vor Gericht, Berlin: BWV 2009).

**William Schabas**

Professor Schabas is professor of international law at Middlesex University in London. He is the editor-in-chief of *Criminal Law*

*Forum*, a quarterly journal of the International Society for the Reform of Criminal Law, and President of the Irish Branch of Criminal Investigation. From 2002-2004 he served as one of three international members of the Sierra Leone Truth and Reconciliation Commission. Professor Schabas served as a consultant on capital punishment for the United Nations Office of Drugs and Crime, and drafted the 2010 report of the Secretary-General on the status of the death penalty. He was named an Officer of the Order of Canada in 2006, and elected a member of the Royal Irish Academy in 2007. He was awarded the Vespasian V. Pella Medal for International Criminal Justice of the Association Internationale de Droit Pénal, and the Gold Medal in the Social Sciences of the Royal Irish Academy. Professor Schabas has authored more than 20 books dealing with international human rights law and has published more than 300 articles in academic journals.

**Michael P. Scharf**

Professor Scharf is the Dean and Joseph C. Baker – Baker & Hostetler Professor of Law at Case Western Reserve University School of Law. In 2005, Scharf and the Public International Law and Policy Group, a NGO he co-founded and directs, were nominated for the Nobel Peace Prize for their work. Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for UN Affairs, and delegate to the UN Human Rights Commission. In 2008, Scharf served as Special Assistant to the Prosecutor of the Cambodia Genocide Tribunal. He is the author of sixteen books, and won the American Society of International Law's Certificate of Merit for outstanding book in 1999, and the International Association of Penal Law's book of the year award for 2009. Scharf produces and hosts the radio program "Talking Foreign Policy," broadcast on WCPN 90.3 FM.

**David Scheffer**

David Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director, Center for International Human Rights at Northwestern University Pritzker School of Law. He was U.S. Ambassador at Large for War Crimes Issues (1997-2001) and authored *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012). Since 2012, he also has been the U.N. Secretary-General's Special Expert on United Nations Assistance to the Khmer Rouge Trials.

**Jennifer Trahan**

Associate Clinical Professor of Global Affairs at New York University. She served as counsel and of counsel to the International Justice Program of Human Rights Watch; Iraq Prosecutions Consultant to the International Center of Transitional Justice; and worked on cases before the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda. She served as an observer for the Association of the Bar of the City of New York to the International Criminal Court's Special Working Group on the Crime of Aggression, as Chairperson of the American Branch of the International Law Association's International Criminal Court Committee, a member of the ABA 2010 ICC Task Force, and as a member of the New York City Bar Association's Task Force on National Security and the Rule of Law. She was a NGO observer at the ICC Review Conference in Kampala, and lectured at Salzburg Law School's Institute on International Criminal Law.

**Annette Weinke**

Annette Weinke is Assistant professor at the History Department of Friedrich Schiller University in Jena, Germany, and Co-Director of the Jena Center of 20th Century History. She is the author and editor of six books, among them *Die Nürnberger Prozesse* (2015, 2nd ed.) and a comprehensive history of the Ludwigsburg agency for Nazi crimes investigations (2009, 2nd ed.), and co-author of the study *Das*

Amt und die Vergangenheit (The German Foreign Office and the Nazi Past). She has published extensively on themes like the history of war crimes tribunals, human rights and international criminal law. In her latest book, she takes a fresh look at the latter topic by examining the transnational debate on German state criminality in a *longue durée* perspective, starting from WWI to the end of the Cold War. She was a visiting professor at University of Massachusetts and taught courses in Modern European History at several US universities. In 2015/16, she was a fellow at the History Department of Princeton University where she was working on a collective biography of emigrated human rights lawyers and activists in the 20th century.

### **Marjory Wentworth**

Marjory Wentworth's poems have been nominated for The Pushcart Prize five times. Her books of poetry include *Noticing Eden*, *Despite Gravity*, and *The Endless Repetition of an Ordinary Miracle and New and Selected Poems*. She is the co-writer with Juan Mendez of *Taking a Stand*, *The Evolution of Human Rights*, co-editor with Kwame Dawes of *Seeking, Poetry and Prose inspired by the Art of Jonathan Green*, and the author of the prizewinning children's story *Shackles*. Her most recent collaborations include *We Are Charleston, Tragedy and Triumph at Mother Emanuel*, with Herb Frazier and Dr. Bernard Powers and *Out of Wonder, Poems Celebrating Poets* with Kwame Alexander and Chris Colderly (2017). Marjory Wentworth is on the faculty at The Art Institute of Charleston and is the co-founder and former president of the Lowcountry Initiative for the Literary Arts. She serves on the Editorial Board of the University of South Carolina's Palmetto Poetry Series, and is the poetry editor for *Charleston Currents*. She is the 2016 Leo Twiggs Fellowship recipient at the Riley Institute at Furman's Diversity Leaders Initiative. Marjory Wentworth is the Poet Laureate of South Carolina. [www.marjorywentworth.net](http://www.marjorywentworth.net)

### **Christian Wenaweser**

Since 2002, Christian Wenaweser has been the Permanent Representative of Liechtenstein to the United Nations. In 2008, Ambassador Wenaweser was elected to a three-year term as the President of the Assembly of States Parties of the International Criminal Court. From 2003 until his election as President, he chaired the Special Working Group on the Crime of Aggression for the Assembly of States Parties. At the United Nations, Ambassador Wenaweser served as Chairman of the Third Committee (dealing chiefly with human rights issues) during the 57th session of the General Assembly and as Vice Chair of the Open-Ended Working Group on Security Council Reform and Adviser on Security Council Reform during the 59th session. Between 2003 and 2005, he served as Chairman of the ad hoc Committee on the Scope of Legal Protection under the 1994 Convention on the Safety of United Nations and Associated Personnel. Ambassador Wenaweser was educated at the University of Zurich, the Graduate Institute of International and Development Studies in Geneva, and the Bavarian Academy of Sciences and Humanities in Munich, Germany.

### **Paul Williams**

Paul Williams is the Grazier Professor of Law and International Relations at American University and the President/co-founder of the Public International Law & Policy Group. In 2005, Dr. Williams, as Executive Director of PILPG, was nominated for the Nobel Peace Prize by half a dozen of his pro bono government clients. Dr. Williams has assisted over a dozen clients in major international peace negotiations, including serving as a delegation member in the Dayton, Lake Ohrid, and Doha negotiations. He also advised parties to the Key West, Oslo/Geneva and Georgia/Abkhaz negotiations, and the Somalia peace talks. Previously, Dr. Williams served in the Department of State's Office of the Legal Advisor for European and Canadian Affairs, as a Senior Associate with the Carnegie Endowment for International Peace, and as a Fulbright Research Scholar at the University of Cambridge.