Verein
zur Förderung der Rechtswissenschaft (Hrsg.)

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Wintersemester 2011/2012

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Vorwort

Das Wintersemester 2011/12 zeigte der Fakultät erstmals die für uns sehr positiven Auswirkungen der Abschaffung der ZVS. Die Direktbewerbung bei den Universitäten hat Köln einen deutlichen Zuwachs an herausragenden Studenten beschert, was das Studienklima spürbar positiv verändert hat.

Neben der großen Absolventenfeier und der Promotionsfeier standen im vergangenen Semester die internationalen Beziehungen im Zentrum der Fakultätsveranstaltungen. Der neue deutsch-türkische Studiengang konnte bereits die ersten Absolventen feiern. Der Besuch einer Delegation der East China University of Political Science and Law (ECUPL) verbreiterte die Basis für einen bereits laufenden gegenseitigen Studentenaustausch zwischen Köln und Schanghai. Eine erneute Vertiefung der traditionell engen Beziehungen zwischen Köln und den japanischen Universitäten brachte ein deutsch-japanisches Kolloquium zum Verbrechen des Angriffskrieges hervor.

Eine große Freude war es, dass es uns bei Claus Kreß erneut gelang, die MPG daran zu hindern, einen Kölner Kollegen zu einem Direktor eines Max-Planck-Institutes zu machen. Gleiches gilt für Martin Hensslers Absage des ehrenvolles Angebotes, Präsident der Bucerius Law School zu werden. Köln bleibt ein attraktiver Standort für Rechtswissenschaftler. Dies wird von außen wahrgenommen. Mit Freude nahm die Fakultät zur Kenntnis, dass sie im Ranking der Wirtschaftswoche, das auf einer Befragung von 500 Personalverantwortlichen deutscher Unternehmen beruht, zur drittbesten deutschen Fakultät gewählt worden ist. 2009 und 2010 war es noch der fünfte Rang.

Köln, den 23. 04. 2012 *Prof. Dr. Hans-Peter Haferkamp*

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Nachrichten

Personalia

Herr Prof. Dr. *Christian von Coelln* hat den Ruf an die EBS Universität für Wirtschaft und Recht zur großen Freude der Fakultät abgelehnt.

Herr Prof. *Thomas von Danwitz* ist erneut zum Richter am Europäischen Gerichtshof ernannt worden.

Am 09.09.2011 ist Prof. Dr. *Hans Joachim Hirsch*, ehemaliger Direktor des Kriminalwissenschaftlichen Instituts, verstorben. Die Fakultät wird seine eindrucksvolle Persönlichkeit in ehrenvoller Erinnerung behalten.

Frau Prof. Dr. *Caroline von Gall* ist zum 01.02.2012 zur Juniorprofessorin für Ostrecht und öffentliches Recht ernannt worden. Die Fakultät gratuliert ganz herzlich.

Herr Prof. Dr. *Martin Henssler* hat die Berufung auf das Amt des Präsidenten der Bucerius Law School zur großen Freude der Fakultät abgelehnt.

Herr Prof. Dr. *Claus Kreß* hat einen Ruf auf eine Direktorenstelle am Max-Planck-Institute Luxemburg for International, European and Regulatory Procedural Law erhalten und zur großen Freude der Fakultät abgelehnt.

Frau Prof. Dr. *Susanne Walther* ist aus der Fakultät ausgeschieden.

Herr Dr. *Steffen Augsberg* ist auf eine W 3-Stiftungsprofessur für Öffentliches Recht und Gesundheitsrecht an der Universität des Saarlandes berufen worden.

Gremien und Mitgliedschaften

Herr Prof. Dr. *Claus Kreß* ist in folgende Gremien aufgenommen worden:

- Council of Advisors of Global Institute for Prevention of Aggression

- Advisory Board of the Forum for International Criminal and Humanitarian Law
- Auswärtiger wissenschaftlicher Berater der israelischen Public Commission to Examine the Maritime Incident of 31 May 2010
- Internationaler wissenschaftlicher Beirat des Internationalen Forschungs- und Dokumentationszentrums Kriegsverbrecherprozesse der Philipps-Universtität Marburg
- Advisory Council of the Crimes Against Humanity Initiative.

Auszeichnungen

Der Lehrpreis wurde von der Fachschaft unserer Fakultät in diesem Jahr im Rahmen der Absolventenfeier Herrn Prof. Dr. *Claus Kreß* verliehen.

Herr Prof. Dr. *Dieter Strauch* wurde mit dem Preis des Torsten Janckes Gedächtnisfonds der Königlichen Gustav Adolf Akademie in Uppsala ausgezeichnet.

Berichte von Veranstaltungen der Fakultät

Absolventenfeier des Ernst E. Hirsch – Jahrgangs 2010/11 des Masterstudiengangs Deutsches und Türkisches Wirtschaftsrecht (LL.M. Köln/İstanbul Bilgi) sowie zur Eröffnung der Ausstellung "Haymatloz – Exil in der Türkei 1933 – 1945" am 18. November 2011

Am 18. November 2011 fand an der Universität zu Köln eine akademische Feier des Masterstudiengangs Deutsches und Türkisches Wirtschaftsrecht (LL.M. Köln/İstanbul Bilgi) zu Ehren der Absolventinnen und Absolventen des ersten Studienjahrgangs (Ernst E. Hirsch – Jahrgang 2010/11) statt, zu der die Dekanin, Frau Professor Barbara Grunewald, und der Programmbeauftragte, Herr Professor Heinz-Peter Mansel, sowie die Gesellschaft für Auslandsrecht eingeladen hatten.

Nach der musikalischen Eröffnung durch das Türkische Musikensemble NRW eröffneten der Prorektor für Lehre und Studium, Herr Professor Stefan Herzig, und der Generalkonsul der Türkischen Republik Köln, Herr Mustafa Kemal Basa, die Veranstaltung. Der Generalkonsul betonte die besondere Verbundenheit zwischen der Türkei und Deutschland und hob hervor, dass die Türkei den deutschen Wissenschaftlern, die während des Nationalsozialismus Zuflucht in der Türkei fanden, aufgrund deren nachhaltigen Beitrags an der Entwicklung der jungen türkischen Republik zu großem Dank verpflichtet sei. Er würdigte das gemeinsame Projekt der Rechtswissenschaftlichen Fakultäten der Universität zu Köln und der İstanbul Bilgi Üniversitesi, die zu den renommiertesten Universitäten der Türkei gehört: „Ich bin überzeugt davon, dass die Absolventinnen und Absolventen, die sich in beiden Ländern bestens auskennen, zukünftig unsere Wirtschaftsbeziehungen stärken werden."

Als Festredner sprach Herr Dr. Rainhardt Freiherr von Leoprechting, Präsident der Türkisch-Deutschen Industrie- und Handelskammer, Senior Executive Advisor to the Management Board of METRO AG, zu dem Thema „Die Türkei in der Europäischen Union: besser für beide". Die Vollmitgliedschaft der Türkei sei „eine Chance für die EU, mehr politisches und wirtschaftliches Gewicht zu bekommen, neue Märkte zu gewinnen und Verbündete zu behalten, neue Impulse zu geben und zu bekommen". Für die Türkei bilde die Perspektive der Mitgliedschaft eine Grundlage für den enormen wirtschaftlichen Aufschwung der letzten Jahre und ihre wachsende Rolle als bedeutsame Regionalmacht.

Freiherr von Leoprechting brachte seine Wertschätzung für den ersten deutsch-türkischen Masterstudiengang im Wirtschaftsrecht zum Ausdruck und versicherte die weitere Unterstützung der Türkisch-Deutschen Industrie- und Handelskammer bei der Vermittlung von Praktikumsstellen für die weiteren Jahrgänge. Die Berufsperspektiven der Absolventinnen und Absolventen schätzte er als sehr positiv ein: „Mit Ihrem Fachwissen, doch insbesondere auch mit Ihren Sprachkennt-

nissen und als Mittler zwischen der deutschen und türkischen Kultur, sind Sie sehr interessante Kandidaten für die zahlreichen Unternehmen, die sowohl in Deutschland als auch in der Türkei tätig sind.“ Abschließend gratulierte er den Absolventinnen und Absolventen des Ernst E. Hirsch – Jahrgangs 2010/11 und überreichte ihnen jeweils ein Exemplar des von ihm mit dem Verleger Dr. Florian Langenscheidt herausgegebenen Buches „In bester Gesellschaft – 100 türkische Erfolgsgeschichten aus Wirtschaft und Wissenschaft“.

Im Anschluss berichteten die beiden Absolventinnen Ayşegül Altınbaş, LL.M. Köln/İstanbul Bilgi und Fatma Bilim, LL.M. Köln/İstanbul Bilgi über ihr Masterjahr in Köln und İstanbul. Die Programmbeauftragten, Herr Professor Heinz-Peter Mansel (Universität zu Köln) und Herr Associate Professor Yeşim M. Atamer (İstanbul Bilgi Üniversitesi), erläuterten den Mehrwert eines bilingualen Masterstudiums innerhalb eines Jahres an zwei führenden rechtswissenschaftlichen Fakultäten in zwei europäischen Metropolen und motivierten die Absolventinnen und Absolventen ihre Qualifikationen in die Arbeit im internationalen Rechtsverkehr, auch über die Türkei und Deutschland hinaus, einzubringen. Als Ehrengast sprach Frau Professor Nermin Abadan-Unat (Jahrgang 1921), eine international renommierte türkische Soziologin, in einem beeindruckenden Vortrag über die Geschichte und Perspektiven der deutsch-türkischen Wissenschaftsbeziehungen. Mit ihren Studienerinnerungen brachte sie den Gästen das außerordentliche Engagement von Professor Ernst E. Hirsch, dem „Vater des türkischen Handelsrechts" und Namensgeber des ersten Jahrgangs, während seiner akademischen Tätigkeit in der Türkei näher. Frau Professor Nermin Abadan-Unat schätze sich glücklich dafür, dass sie selbst zu den Hörern seiner Vorlesungen gehört. In ihrem Beitrag stellte sie persönliche Bezüge zu der die Veranstaltung begleitenden Ausstellung „Haymatloz – Exil in der Türkei 1933 – 1945" her.

Die Berichte und Eindrücke zum Ernst E. Hirsch – Jahrgang wurden mit einem Film zum Masterstudiengang Deutsches und Türkisches Wirtschaftsrecht (LL.M.

Köln/İstanbul Bilgi) veranschaulicht, der im Rahmen der Absolventenfeier erstmals präsentiert wurde.

Nachdem die Dekanin in ihren Schlussworten berichtete, wie sie sich selbst durch die Betreuung der Masterarbeit einer Teilnehmerin des ersten Jahrgangs von der besonderen Leistungskraft der Teilnehmerinnen und Teilnehmer des Masterstudiengangs überzeugen konnte, erhielten die Absolventinnen und Absolventen ihr Masterdiplom, durch das ihnen der gemeinsame Abschluss „LL.M. Köln/İstanbul Bilgi“ verliehen wurde. Der Stiftung Mercator wurde für die notwendige Unterstützung mit Verwaltungsmitteln gedankt. Die Dekanin dankte ferner insbesondere dem Deutschen Akademischen Austauschdienst für die Gewährung von İstanbul-Stipendien an die Teilnehmerinnen und Teilnehmer des 2. Jahrgangs sowie der Bilgi Universität für den Verzicht auf die Erhebung von Studiengebühren.

Die Veranstaltung, die größere Aufmerksamkeit in der Presse fand, wurde durch das Türkische Musikensemble NRW beschlossen. Dank der großzügigen Unterstützung durch die Gesellschaft für Auslandsrecht, die Stiftung Mercator und durch Herrn Rechtsanwalt Dr. Hartmut Nitschke (Freshfields Bruckhaus Deringer Köln) konnten die Absolventinnen und Absolventen sowie die Gäste bei einem Buffet den Abend feierlich ausklingen lassen.

Anlässlich der ersten Absolventenfeier des Masterstudienganges Deutsches und Türkisches Wirtschaftsrecht (LL.M. Köln/Istanbul Bilgi) wurde auch unmittelbar vor Beginn des Festprogramms die Ausstellung "Haymatloz – Exil in der Türkei 1933 – 1945" durch die Kuratorin Frau Christiane Hoss, M.A. und Herrn Enver Hirsch, dem Sohn des Namensgebers des ersten Jahrgangs, am 18. November 2011 im Neuen Senatssaal eröffnet.

Die Ausstellung stellt die Lebenswege deutschsprachiger Emigranten, die in der Türkei Zuflucht gefunden hatten, vor und erinnert an die aus dem nationalsozialistischen Deutschland Vertriebenen. Sie ruft dabei auch die politische und gesell-

schaftliche Reformepoche der Türkei unter Mustafa Kemal Atatürk und İsmet İnönü in Erinnerung. Die Ausstellung "Haymatloz – Exil in der Türkei 1933 – 1945" wurde vom 22. November bis zum 16. Dezember 2011 im Foyer des Rechtshauses der Universität zu Köln, gezeigt. Sie kam an die Universität zu Köln als Kooperationsprojekt des AKTIVEN MUSEUMS Faschismus und Widerstand in Berlin e.V. und des Instituts für internationales und ausländisches Privatrecht. Informationen zur Ausstellung finden Sie unter www.aktives-museum.de.

Wiss. Mit. Elvan Er

Akademische Feier zu Ehren der Absolventen der Ersten Juristischen Staatsprüfung am 25. November 2011

Am 25. November 2011 wiederholte sich eine bereits liebgewonnene Tradition: Die Absolventen des vergangenen Studienjahres wurden mit einem großen Festakt in der Aula des Hauptgebäudes geehrt. Auf den feierlichen Einzug der Absolventen folgte eine kurze Begrüßung durch die Dekanin der Rechtswissenschaftlichen Fakultät, Frau Professor Barbara Grunewald, und den Prorektor für Lehre und Studium, Herrn Professor Stefan Herzig.

Als diesjährigen Festredner hatte die Fakultät den Justizminister des Landes NRW, Herrn Thomas Kutschaty, gewinnen können. Sein Vortrag trug den Titel „Zukunft der Juristenausbildung – Kontinuität im Wandel“.

Für die musikalische Umrahmung sorgte das „triologische Quartett“, das, wie schon im vergangenen Jahr, durch seine Jazz-Einlagen begeisterte.

Nach der akademischen Feier zog die Festgesellschaft ins Hörsaalgebäude um. Dank der großzügigen Spende der Kanzlei Freshfields Bruckhaus Deringer warten dort ein großes Buffet und Getränke auf die Gäste.

Wiss. Mit. Saskia Jessen

Jahrestagung der Deutsch-Lusitanischen Juristenvereinigung am 25. und 26. November 2011 in Köln : „Entwicklungen in den lusophonen Rechten: Methoden- und Rezeptionsdiskussionen“

Die Deutsch-Lusitanische Juristenvereinigung veranstaltete ihre Jahrestagung am 25. und 26. November 2011 auf Einladung der Gesellschaft für Auslandsrecht und des Instituts für internationales und ausländisches Privatrecht (Direktor: Herr Professor Heinz-Peter Mansel) an der Universität zu Köln. Nach Begrüßungsworten des Gastgebers und des Vorsitzenden der Vereinigung, Herr Professor Stefan Grundmann aus Berlin, betonte die portugiesische Generalkonsulin Frau Quintela Baptista Durão aus Düsseldorf die große Bedeutung grenzüberschreitender Rechtsfragen mit Bezug zu Portugal.

Am ersten Tagungstag sprach Herr Professor Erik Jayme aus Heidelberg über die „Anwendung mosambikanischen Ehescheidungsrechts durch deutsche Gerichte“. Besondere Scheidungsvoraussetzungen des mosambikanischen Rechts, etwa eine Vereinbarung über den Unterhalt, können aus Sicht eines deutschen Gerichts einem anderen als dem mosambikanischen Recht unterliegen. Solche Vereinbarungen über die Scheidungsfolgen ließen sich in die jeweils anwendbaren Rechte integrieren. In der Entwicklung des europäischen Kollisionsrechts sei eine bedauerliche Zersplitterung des Scheidungsfolgenrechts zu verzeichnen. Sodann referierte Herr Dr. Carl Friedrich Nordmeier aus Köln über das Thema „Rechtsvergleichende Betrachtungen zum Recht der Internationalen Zuständigkeit in Kap Verde, Portugal und Timor-Leste“. Der Einfluss portugiesischen Rechts werde unter Berücksichtigung der unterschiedlichen historischen Gesetzesfassungen besonders deutlich. Auch in der Gerichtspraxis zeige sich die enge

Verflechtung der Rechte portugiesischsprachiger Länder. Es folgte ein Referat von Herrn Dr. Rui Dias aus Coimbra über „Jurisdiktionskonflikte bei gesellschaftsrechtlichen Streitigkeiten“, in dem der Referent Techniken der Kooperation der Gerichte verschiedener Staaten thematisierte. Es sei eine wachsende Bereitschaft zur Kooperation zu verzeichnen, die insbesondere auf die Vermeidung von Parallelprozessen ziele.

Am zweiten Tagungstag sprach Herr Professor Augusto Jaeger Junior aus Porto Alegre über die „Methodologie in Europa und im Mercosul: Grundsätzliche Erwägungen“. Er untersuchte, inwiefern die Entwicklung einer Methodenlehre im europäischen Rechtsraum auch im lateinamerikanischen Integrationsprozess des Mercosul von Bedeutung sei und erarbeitete eine Methodenlehre für regionale Integrationsprozesse. Dann ging Herr Professor Dário Moura Vicente aus Lissabon der Frage nach einem „gemeinsamen Recht für die Gemeinschaft portugiesischer Länder“ nach. Die Rechtssysteme der Länder portugiesischer Sprache seien insbesondere durch gemeinsame Tradition verbunden. Es ließen sich aber eigenständige Entwicklungen im Hinblick auf die Integration der jeweiligen Länder in Staatenverbände nicht übersehen. Zum Schluss sprach Herr Dr. Jan Peter Schmidt aus Hamburg über „Die Rezeption deutschen Rechtsdenkens in Brasilien am Beispiel des Grundsatzes von Treu und Glauben“. Eine Flucht in Generalklauseln sei auch in Brasilien zu beobachten. Deutlich wurde zudem der große Einfluss, den das deutsche Recht auf die Rechtsentwicklung in Brasilien ausgeübt hat und weiterhin ausübt.

Die Tagung endete mit einem Besuch des Wallraf-Richartz-Museums, wo Herr Professor Erik Jayme ein Referat über „Das fin de siècle als das Arkadien der Moderne“ hielt.

Dr. Carl Friedrich Nordmeier

Fakultätskarrieretag der Rechtswissenschaftlichen Fakultät am 19. Januar 2012

Am 19. Januar 2012 fand zwischen 10.00 und 15.00 Uhr im Hauptgebäude der Universität der zweite vom Studien- und Karriereberatungszentrum und der myjobfair GmbH organisierte Fakultätskarrieretag der Rechtswissenschaftlichen Fakultät statt. Dieser erfreute sich sowohl bei Ausstellern als auch Besuchern großer Beliebtheit.

Die bis auf den letzten Platz vergebenen Ausstellerplätze wurden von insgesamt 33 externen Wirtschaftskanzleien und –unternehmen genutzt, um sich den Besuchern vorzustellen, darunter u.a. die Kanzleien Freshfields Bruckhaus Deringer, Linklaters, Oppenhoff & Partner, GÖRG Partnerschaft. Aber auch Siemens als eines der größten Wirtschaftsunternehmen Deutschlands war als Aussteller vertreten.

Flankiert wurde dieses Angebot zum einen durch begleitende Firmenvorträge, bei denen u.a. die Europäische Kommission sich und ihre Arbeit näher vorstellte und zum anderen durch universitätseigene Angebote wie beispielsweise der kostenlose Bewerbungsmappencheck.

Von diesem Angebot ließen sich ca. 600 Interessierte anlocken, was eine deutliche Steigerung der Besucherzahlen gegenüber dem Vorjahr darstellt und zeigt, wie groß das Interesse der Studierenden an einer frühzeitigen Kontaktaufnahme mit potentiellen Arbeitgebern ist. Besonders stark vertreten waren Studierende der unteren Fachsemester, die sich über Praktikumsangebote informieren wollten und somit von der Möglichkeit Gebrauch machten, zu einem möglichst frühen Zeitpunkt erste Kontakte mit potentiellen Arbeitgebern zu knüpfen. Daneben wurde

der Fakultätskarrieretag von den Besuchern aber insbesondere auch zur Suche nach Referendarstellen genutzt.

Erstmals angeboten und sehr erfolgreich eingesetzt wurde in diesem Jahr das „Vorab-Bewerbungs-Tool“. Mit diesem hatten Besucher die Möglichkeit, den Ausstellern ihre Bewerbung bereits im Vorfeld des Fakultätskarrieretages zukommen zu lassen und auf diesem Weg eine Einladung zu einem persönlichen Gespräch zu erhalten. Knapp 90 % der Besucher, die hiervon Gebrauch gemacht haben, erhielten daraufhin mindestens eine Einladung zu einem persönlichen Gespräch!

Von einigen Besuchern haben wir darüber hinaus auch die Rückmeldung erhalten, dass ihre Stellensuche erfolgreich war!

Wiss. Mit. Manuela Hundhausen

Vortrag von Prof. David Rabban gehalten am 13. März 2012 vor der Deutsch-Amerikanischen Juristen-Vereinigung e.V.

David Rabban sprach über „The role of German legal scholarship in the turn to history in late nineteenth-century American Legal thought“. Hintergrund ist ein Buch über diese Fragen, das in Kürze bei Cambridge University Press erscheinen wird.

Das Thema hatte zunächst eine inneramerikanische Perspektive. Seit der breiten Kritik von Roscoe Pound kurz vor dem ersten Weltkrieg steht die amerikanische Rechtswissenschaft des 19. Jahrhunderts im Ruf, die politische Dimension des Rechts durch eine konservative Rückwendung zur Rechtsgeschichte verschüttet zu haben. Zugleich habe man eine formalistische, bloß logische und damit weltfremde Rechtswissenschaft propagiert und zugleich mit einer Überbetonung der Privatautonomie eine liberalistische, unsoziale Privatrechtskonzeption vertreten. Die Einigkeit in Amerika darüber, wie abwegig eine solche rechtswissenschaftliche Position ist, hat dazu geführt, dass die von Rabban vorgestellten Juristen wie Francis Wharton, James Bradley Thayer oder Melville Madison Bigelow heute völlig vergessen sind. Rabban wollte zunächst aufzeigen, dass dies schon deshalb unberechtigt ist, weil die Konzepte dieser Denker weit differenzierter und wissenschaftlich fundierter waren, als spätere Kritiker glauben machten.

Die deutsch-amerikanische Perspektive resultierte daraus, dass die amerikanische Rechtswissenschaft des 19. Jahrhunderts sich intensiv nach Deutschland hin orientierte. Vorbild war zunächst Friedrich Carl v. Savigny und seine Historische Rechtsschule. Die Amerikaner studierten teilweise in Deutschland und lasen die deutschen Schriften im Original. Savigny lehrte die Amerikaner, dass man die eigene Rechtskultur nur verstehen kann, wenn man ihre Geschichte kennt. Da das

Common Law freilich – anders als das Jus Commune, in dem Savigny forschte – nicht auf dem Römischen Recht fußte, orientierten sich die Amerikaner bald zu den sog. Germanisten hin, die nach den nichtrömischen Grundlagen des deutschen Rechts forschten. Vorbilder wurden Rudolf Sohm, der mit seinen Forschungen zur Lex Salica, einem Rechtsbuch der Salfranken aus dem fünften nachchristlichen Jahrhundert am Mythos eines europäischen Germanischen Rechts arbeitete und Heinrich Brunner, der mit seinen Untersuchungen zur Geschichte des Schwurgerichts die Basis für die den Amerikanern fundamentale Jury legte. Eher auf Skepsis stieß demgegenüber die philosophische Aufladung der deutschen Rechtswissenschaft. Kant, Hegel oder Schelling blieben den Amerikanern fremd. Auch Roscoe Pound, der diese Zusammenarbeit zwischen Deutschland und Amerika kritisierte, basierte seine Kritik auf einen deutschen Autor, Rudolph v. Jhering, der in Deutschland in den 1880er Jahren zum großen Kritiker der Historischen Rechtschule geworden war.

Eine dritte, auch deutsch-amerikanische Perspektive hing damit zusammen. Es fällt auf, dass diese Untersuchungen Rabbans in Europa viele Parallelen finden. Auch hier waren die Rechtswissenschaftler des 19. Jahrhunderts als Formalisten, Positivisten, Liberalisten und Begriffsjuristen verschrien und werden erst in den letzten Jahren wieder entdeckt und neu diskutiert. Die Frage danach, wieso die so lange herrschende Gewissheit, es sei uninteressant diese Rechtswissenschaftler zu untersuchen, plötzlich geschwunden ist, war Gegenstand der abschließenden, sehr lebendigen Diskussion.

Prof. Dr. Hans-Peter Haferkamp

4. Moot Court der Deutschen Steuerjuristischen Gesellschaft e.V. und des BFH, 2011/2012

Der Bundesfinanzhof bietet gemeinsam mit der Deutschen Steuerjuristischen Gesellschaft e.V. im Zweijahresrhythmus einen Steuerrechts-Moot Court an, in dem anhand von Echtfällen ein vollständiges Revisionsverfahren inklusive einer mündlichen Verhandlung gegen ein finanzgerichtliches Urteil simuliert wird.

Nach einem Erfolg in der Vorrunde zog das Kölner Team bestehend aus Georg Dietlein, Saphira Jüdes, Sabrina Kohlen, Andrea Otten, Judith Pohler, Tobias Prommer und Lisa Riedel in die Finalrunde ein. Das von Frau Professor Hey und Herrn Professor Lang betreute Team reiste am 15. Und 16. März zur mündlichen Verhandlung nach München an den Bundesfinanzhof. Dort präsentierte es sich dem Moot Court Senat, dem neben dem Präsidenten des Bundesfinanzhofs ein Vertreter aus der Wissenschaft, der Anwaltschaft und der Finanzverwaltung, sowie ein weiterer Richter am Bundesfinanzhof angehörten. Das Team verhandelte in der Endrunde zwei Revisionsfälle, die zur Zeit beim BFH anhängig sind, und musste sich dabei gegen Teams der Bucerius Law School, der LMU München und der Universität des Saarlandes behaupten. Lediglich dem Team aus München mussten sich die Kölner geschlagen geben und belegten damit den zweiten Platz.

Insgesamt nahmen am diesjährigen BFH-Moot Court Teams von zehn verschiedenen Universitäten aus Deutschland und Österreich teil.

Weitere Informationen zum Moot Court finden Sie unter www.steuerrecht.uni-koeln.de. Ansprechpartnerin am Institut für Steuerrecht ist Frau Schlücke (katharina.schluecke@uni-koeln.de).

Wiss. Mit. Stephanie Tschersich

Vortrag von Prof. David Scheffer gehalten am 16. März 2012

„The End of Impunity“. Unter diesen monolithischen Titel stellte David Scheffer seinen Vortrag zur Verfolgung von Völkerrechtsverbrechen, mit dem er am 16. März im Neuen Senatssaal der Universität zu Köln zahlreiche Besucher in seinen Bann schlug. Die Veranstaltung erfolgte auf Einladung des Fördervereins des Instituts für Strafrecht und Strafprozessrecht unserer Universität im Zusammenwirken mit der Deutschen Gesellschaft für Auswärtige Politik sowie der Deutschen Gesellschaft für die Vereinten Nationen. Herr Professor Claus Kreß, Direktor des Instituts für Strafrecht und Strafprozessrecht, moderierte.

David Scheffer, Professor am Center for International Human Rights der Northwestern University Law School (Illinois), kann wie kaum ein zweiter Wissenschaftler für sich in Anspruch nehmen, auch die Praxis der jüngeren Entwicklung des Völkerstrafrechts mitbegleitet und mitgeprägt zu haben. Als langjähriger Mitarbeiter der US-Außenministerin Albright war er in den 90er Jahren maßgeblich an der Einrichtung der Internationalen ad-hoc-Tribunale zur Aburteilung der Völkerrechtsverbrechen im ehemaligen Jugoslawien und Ruanda beteiligt, führte als Sonderbotschafter 1998 die US-amerikanische Delegation bei den Gründungsverhandlungen des ständigen Internationalen Strafgerichtshofs (ICC) und dient zur Zeit dem UN-Generalsekretärs als Sonderberater zum Rote-Khmer-Tribunal in Kambodscha. Aus dem Füllhorn dieses Erfahrungsschatzes schöpfend begeisterte Scheffer mit einem Potpourri aus feinsinniger politischer Analyse, juristischem Scharfblick und Anekdoten aus dem Zirkel der Mächtigen. Trotz diplomatischer Gewandtheit in der Form geizte Scheffer dabei auch mit Blick auf die Haltung der USA nicht mit Kritik. Deutlich zeigte er den Widerspruch einer Politik auf, die die internationale Strafgerichtsbarkeit nur fördert, solange sie selbst und die

eigenen Staatsangehörigen sich nicht an ihr messen müssen. Die im gegenwärtigen Kampf um die Präsidentschaft vielbeschworene Idee des „American exceptionalism“ brandmarkte er in diesem Zusammenhang als kontraproduktiv und letztlich sicherheitsgefährdend. Einen Schwerpunkt seines Vortrags bildeten die immensen rechtlichen und praktischen Schwierigkeiten auf dem Weg zu den ad-hoc-Tribunalen für Ex-Jugoslawien und Ruanda. Hier gewährte Scheffer Einblicke in das Ringen um die Art und Weise ihrer Errichtung, ihrer Rechtsgrundlagen und die Rekrutierung einer geeigneten Richterschaft. Ferner betonte Scheffer den steigenden Einfluss der letzten beiden Jahrzehnte völkerstrafrechtlicher Praxis auf die praktische Politik und unterstrich ihn durch einen Vergleich des haitianischen Ex-Diktators Cédras mit dem syrischen Präsidenten Assad: Während Cédras seit seinem Sturz durch US-Militär im Jahre 1994 ein komfortables Leben in Panama City führe, dürfe die strafrechtliche Verfolgung Assads einen festen Bestandteil der US-amerikanischen Syrienpolitik bilden.

Ausgiebig nahm Scheffer Bezug auf sein kürzlich erschienenes Buch „All the Missing Souls – A Personal History of the War Crimes Tribunals“, was der Lebendigkeit und Eindrücklichkeit des Vortrages keinesfalls abträglich war. Im Gegenteil bereicherte Scheffer sein Publikum durch sehr persönliche Einblicke in die Schwierigkeit, Erfahrungen eines leidenschaftlichen Lebensabschnitts einer Öffentlichkeit näher zu bringen, ohne in Selbstbetrachtung, Apologien oder Verteidigung gegen den politischen Gegner zu verfallen.

Nach zwei Stunden Vortrag mit Diskussion und anschließendem Ausklang verabschiedete sich David Scheffer nach einer in jeder Hinsicht gelungenen Veranstaltung. Er hinterließ den Eindruck eines Mannes, der in Zeiten diplomatischer Verwendung das klare Wort nicht verlernt hat.

Dr. Lars Berster

Absolventen und Absolventinnen des Magisterstudiengangs Rechtswissenschaften für im Ausland graduierte Juristinnen und Juristen im Wintersemester 2011/2012*

Balic, Naser (*Bosnien Herzegowina*): „Kontopfändungsschutz nach deutschem und bosnisch-herzegowinischem Recht“

[Prof. Dr. Berger]

* Fortsetzung von Fakultätsspiegel n. F. Bd. 16, Sommersemester 2011, S. 5.

Absolventen und Absolventinnen des Masterstudiengangs Rechtswissenschaften für im Ausland graduierte Juristen und Juristinnen im Wintersemester 2011/2012*

van Bühren, Anna (*Deutschland*): „Die Haftung des Tierhalters“

[Prof. Dauner-Lieb]

Dobos, Timea (*Ungarn*): „Staatliche Förderung privater Altersvorsorge“

[Prof. Dr. Rolfs]

Pelgrims, Karen (*Belgien*): „Geschlechtsdiskriminierung im Arbeitsrecht: Umsetzung der europäischen Rahmenvorgaben in nationale Gesetzgebung - ein deutsch-belgischer Vergleich“

[Prof. Dr. Rolfs]

Prewett, Siegfried (*Großbritannien*): „Rechtsprobleme mit Blick auf die Stellung von Privatunternehmen bei der aktiven Beteiligung an militärischen Konflikten auf der Grundlage des Entwurfs der UN-Konvention "International Convention on Private Military and Security Companies"

[Prof. Nußberger]

* Fortsetzung von Fakultätsspiegel n.F. Bd. 16, Sommersemester 2011, S. 6 f.

Sittel-Esshabik, Ilham (*Marokko*): „Kann das marokkanische Personenstandsgesetz mit dem deutschen Familiengesetz harmonieren?“

[Prof. Dauner-Lieb]

Akademische Feier zu Ehren der Promovenden am 27. Januar 2012

Begrüßung durch Prof. Dr. Kurt Bartenbach (Cornelius, Bartenbach, Haesemann & Partner)

Magnifizenz,

Spektabilität,

sehr geehrte Preisträger und Doktores,

stolze Eltern, Anverwandte und Freunde,

sehr geehrte Damen und Herren,

Es ist mir eine besondere Ehre und Freude, im Namen unserer Sozietät Cornelius, Bartenbach, Haesemann & Partner anlässlich der heutigen akademischen Feier zu Ehren sämtlicher Doktoranden des Jahres 2011 wieder herausragende Promotionen mit unseren CBH-Dissertationspreisen auszeichnen zu dürfen.

Unsere drei CBH-Preise im Wert von jeweils 5.000,00 € - in diesem Jahr sogar im Gesamtwert von 16.000,00 € - werden alljährlich an Doktoranden der Rechtswissenschaftlichen Fakultät verliehen, und zwar für die jeweils beste Arbeit in den drei rechtlichen Grundbereichen, dem Bürgerlichen Recht, dem Öffentlichen Recht und dem Strafrecht. Sie sollen – bezogen auf das zurückliegende Jahr – hervorragende wissenschaftliche Leistungen von besonderer praktischer Relevanz auszeichnen.

Wie schon im letzten Jahr, werden wir auch dieses Jahr etwas von diesem System abweichen: Für den Bereich des Bürgerlichen Rechts wird der CBH-Preis auf drei Arbeiten aufgeteilt, bei denen sich die Fachkollegen der Fakultät einig waren, dass diese drei Arbeiten ungeachtet ihrer unterschiedlichen Themenstellungen

qualitativ gleichwertig sind. Insgesamt werden somit fünf Arbeiten ausgezeichnet, worauf ich noch näher eingehen werde.

Diese besondere Ehrung erfolgt nunmehr bereits zum 12. Mal. Ich erwähne dies, weil der Zahl 12 in unserem Leben eine besondere Bedeutung zukommt:

- Zwölf Stunden fasst ein Tag, zwölf die Nacht und in zwölf Monaten umkreist die Erde die Sonne – und das wird nicht wenigen von Ihnen, meine Damen und Herren Doktores, während des Promotionsstudiums als wesentlich zu kurz erschienen sein.

- Als „3 x 4“ – der Vereinigung der Zahl „3“ für die Gottheit mit der Zahl „4“ für die Welt – steht die Zahl „12“ für das vollständig Gewordene, für Glück. So zeigt die Flagge der Europäischen Union als Symbol der Vollkommenheit, Vollständigkeit und Einheit zwölf goldene Sterne auf blauem Grund. Der heutige – glückliche - Tag, sehr verehrte Damen und Herren Doktores, schließt Ihr z.T. jahrelanges, sicherlich mühsames und entsagungsvolles Forschen ab und vervollständigt mit dem Verliehenen des Doktorgrad Ihre wissenschaftliche Arbeit, vielleicht auch ein Symbol der Vollkommenheit und Vollständigkeit.

- Die Zahl 12 steht aber auch für Ihre Begleitung:

  Für die Freunde des „runden Leders“ des Fußballs, bezeichnet der „12. Mann“ die Fans, die die Spieler zum Sieg antreiben. Manche Fußballvereine vergeben daher die Nummer 12 als Dank an ihre Fans nicht für Spieler. Das Trikot mit der Nummer 12 dürfte wohl Ihnen, verehrte stolze Eltern und Großeltern, liebe mitunter leidgeprüfte Partnerinnen und Partner, Freundinnen und Freunde der frischgebackenen Doktores als FAN-Club gebühren!

Bevor ich auf diejenigen Doktores zu sprechen komme, die als Preisträger heute Abend unsere ganz besondere Aufmerksamkeit verdient haben, ist es mir ein persönliches Anliegen, die Leistungen von Ihnen allen zu würdigen.

Die Promotion ist ein oft langwieriger Prozess des wachsenden Erkenntnisgewinns. Dies gilt jedenfalls dann, wenn man nicht den verbotenen, in jüngerer Zeit aber gerade von Politikern in ihren Doktorarbeiten beschrittenen „Abkürzungsweg" des Plagiats einschlägt. Einen größeren Widerspruch zwischen den beiden Gutenbergs in Deutschland kann es kaum geben:

> „*Gutenberg hat vor 500 Jahren den Buchdruck erfunden und Guttenberg heute die Kopie",*

so kommentierte der Comedian Dieter Nuhr den erschlichenen Doktorgrad des Politikers in seinem satirischen Jahresrückblick 2011.

Im Zuge der zahlreichen Plagiatsaffären, die seit Monaten in regelmäßigen Abständen die Medien und die Wissenschaftlergemeinde beschäftigen, hat die Promotion in Deutschland bedauerlicherweise erheblichen Schaden genommen und an „Glanz" und „Würde" in der Öffentlichkeit eingebüßt.

Mein dringender Appell an Sie, sehr verehrte Doktores, lassen Sie sich dadurch nicht entmutigen, seien Sie stolz auf Ihre Arbeit und Ihre Leistungen! Sie haben mit Ihrer Promotion eine akademische Prüfung bestanden und damit in einem speziellen Gebiet die Befähigung zu vertiefter wissenschaftlicher Arbeit nachgewiesen. Sie gehören jetzt zum Kreis der Promovierten - ein übrigens kleiner Kreis: der Anteil der Promovierten an der Gesamtbevölkerung beträgt in Deutschland gerade mal 1,3%.

Vor dem Hintergrund der eingetretenen öffentlichen „Abwertung" des Doktorgrades aufgrund des Fehlverhaltens einiger weniger, erscheint es umso wichtiger, dass Sie die Ihnen verliehene Würde, die Doktorwürde, mit Stolz, vor allem aber

mit Verantwortung tragen. Wie der englische Schriftsteller und Philosoph John Ruskin (1819 – 1900) zutreffend bemerkte:

> *„Der höchste Lohn für unsere Bemühungen ist nicht das, was wir dafür bekommen, sondern das, was wir dadurch werden“,*

also was wir daraus machen.

Die Promotion ist nicht in erster Linie Statussymbol, sondern zentraler Qualitätsindikator.

Mit Ihrer Promotion haben Sie alle einen Beitrag zum wissenschaftlichen Erkenntnisfortschritt geleistet. Dies trifft in besonderem Maße auf die diesjährigen Preisträger des CBH-Promotionspreises zu.

Ich darf Ihnen nun diese ausgezeichneten Arbeiten, die die Preisträger selbst im weiteren Verlauf des Abends näher vorstellen werden, benennen:

1. Im Öffentlichen Recht untersucht die Arbeit von Herrn Marc Michael Ruttloff

> *„Die Zulässigkeit von Vertragsstrafenklauseln in städtebaulichen Verträgen im Zusammenhang mit großflächigen Einzelhandelsprojekten – Ein Beitrag zur Anwendbarkeit des Rechts der Allgemeinen Geschäftsbedingungen auf den verwaltungsrechtlichen Vertrag“.*

Herr Ruttloff hat sich mit seiner Arbeit insbesondere der schwierigen und praxisrelevanten Aufgabe gestellt, die städtebaulichen Verträge zu großflächigen Einzelhandelsprojekten rechtlich einzuordnen und zu bewerten, insbesondere unter dem Aspekt, ob und inwieweit die in ihrem Inhalt regelmäßig standardisierten Formulierungen einer Kontrolle des AGB-Rechts unterliegen.

Seine Arbeit leistet einen wertvollen Beitrag zum privatrechtlichen Bereich des Verwaltungsrechts.

Für diese herausragende Leistung, die höchsten juristischen Ansprüchen an eine Doktorarbeit gerecht wird, erhält Herr Ruttloff einen CBH-Promotionspreis in Höhe von 5.000,00 €, - herzlichen Glückwunsch!

2. Im Strafrecht behandelt Herr Till Gut in seiner Arbeit

„Reacting to Counsel Misconduct before the International Criminal Court“

die im Strafverfahren vor dem Internationalen Strafgerichtshof möglichen Reaktionsformen bei anwaltlichem Fehlverhalten, soweit dieses unmittelbar auf das Verfahren bezogen ist.

Der Arbeit von Herrn Gut ist es zu verdanken, „Licht“ in die komplexe Gesamtarchitektur der Reaktionsformen bei anwaltlichem Fehlverhalten nach dem Recht des Internationalen Strafgerichtshofs zu bringen - ein bis dato wenig erforschter Bereich. Diese eindrucksvolle Pionierarbeit untersucht erstmals im systematischen Zusammenhang und zugleich rechtsvergleichend die Frage der Verantwortlichkeit von Strafverteidigern für Fehlverhalten vor dem Internationalen Strafgerichtshof. Die in Englisch verfasste Arbeit dürfte internationale Beachtung finden.

Auch Ihnen, sehr geehrter Herr Gut, mein herzlicher Glückwunsch zu dem weiteren CBH-Preis in Höhe von 5.000,00 €.

3. Der dritte CBH-Preis wird auf drei Arbeiten aus dem Bereich des Bürgerlichen Rechts aufgeteilt.

a) Hierbei handelt es sich zunächst um die Arbeit von Herrn Maximilian Friedrich

„Die Verrechtlichung von Organbezügen als europäisches Problem – Rechtsvergleichende Betrachtung der Begrenzung der Vergütung geschäftsführender Organe in deutschen und französischen Aktiengesellschaften“.

Die Arbeit von Herrn Friedrich vergleicht die rechtlichen Restriktionen, die für Vergütungssysteme in Deutschland und in Frankreich gelten. Die Frage der „Angemessenheit von Vorstandsbezügen“ ist – nicht zuletzt aufgrund der Finanzkrise und tatsächlicher oder vermeintlicher Exzesse in der Vergütungspraxis der DAX-Unternehmen - ein in den letzten Jahren öffentlich, insbesondere aber auch im rechtswissenschaftlichen Bereich, intensiv und kontrovers diskutiertes Thema.

b) Die als absolut gleichgewichtig zu beurteilende Arbeit von Herrn Till Schmidt

> *„Die Geschäftsführerbestellung im reformierten GmbH-Recht. Eignungskriterien und Gesellschafterhaftung nach dem MoMiG“*

setzt sich mit den im Zuge des Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) erfolgten Änderungen hinsichtlich der Regelungen über die Geschäftsführerbestellung, und zwar mit den Eignungskriterien und der Gesellschafterhaftung, auseinander.

Die Ausführungen in der Arbeit zeugen von großer Kenntnis des Gesellschaftsrechts und enthalten überzeugende eigene Positionen und Wertungen. Sie sind von höchstem wissenschaftlichen Niveau geprägt.

c) Schließlich ist als dritte, gleichwertig zu beurteilende Arbeit die in französisch verfasste Arbeit von Herrn Jonas Knetsch

> *„Haftungsrecht und Entschädigungsfonds – Eine Untersuchung zum deutschen und französischen Recht“*

hervorzuheben.

Herr Knetsch widmet sich in seiner rechtsvergleichenden Arbeit der Frage, inwieweit Entschädigungsfonds zur Lösung von Regelungsproblemen innerhalb des bestehenden Schadensausgleichsrechts beitragen können. Bis dato präsentiert sich das Recht der Entschädigungsfonds sowohl in Deutschland als auch in Frankreich als „parzelliertes, unvollständiges und zusammenhangloses Werk“. Herrn Knetsch

ist es gelungen, erstmalig das Recht der Entschädigungsfonds übersichtlich zu präsentieren, Strukturprinzipien herauszuarbeiten und diese Fonds überzeugend in das allgemeine Schadensausgleichsrecht einzuordnen.

Die Arbeit von Herrn Knetsch leistet einen wertvollen Beitrag im Schnittpunkt zwischen (Sozial-)Versicherungs- und Haftungsrecht.

d) Die drei letztgenannten Arbeiten erhalten den dritten, geteilten CBH-Preis mit einer Dotierung von jeweils – aufgerundet – 2.000,00 €.

Auch hierzu, Herr Friedrich, Herr Schmidt und Herr Knetsch, meinen herzlichen Glückwunsch!

Liebe Preisträger, liebe Doktores, betrachten Sie diese Herausstellung einzelner Arbeiten als generelle Anerkennung der von Ihnen allen gezeigten besonderen wissenschaftlichen Leistung. Sie haben allen Grund, stolz auf sich und Ihre Leistung zu sein.

Durch Ihre erfolgreiche Promotion sind Ihre Chancen auf die Übernahme einer verantwortungsvollen Position gestiegen. Es warten Aufgaben auf Sie, die Ihnen auch die Möglichkeit geben, Verantwortung zu zeigen und unsere Gesellschaft aktiv mitzugestalten. Für diese neuen Aufgaben wünschen meine Kollegen von CBH und ich Ihnen gutes Gelingen und das notwendige Glück des Tüchtigen!

Als Trost zum Schluss:

Überwinden Sie evtl. Rückschläge mit den Überlegungen des römischen Philosophen Lucius Annaeus Seneca (1 – 65):

Wer Großes versucht, ist bewundernswert, auch wenn er fällt.

Festvortrag von Dr. Marc Ruttloff: „Die Zulässigkeit von Vertragsstrafenklauseln in städtebaulichen Verträgen im Zusammenhang mit großflächigen Einzelhandelsprojekten“

Spektabilität,

sehr geehrte Damen und Herren Professoren,

liebe doctores,

sehr geehrte Damen und Herren,

es ist mir eine große Ehre zu diesem ganz besonderen Anlass zu Ihnen sprechen zu dürfen. Mein herzlicher Dank gebührt der Juristischen Fakultät der Universität zu Köln und der Kanzlei Cornelius, Bartenbach, Haesemann und Partner für diese hohe Auszeichnung.

Ganz besonders möchte ich meinem Doktorvater Professor Schöbener danken. Er hat meine Arbeit in hervorragender Weise betreut. Ferner danke ich Herrn Professor Mansel für die Erstellung des Zweitgutachtens.

Und aus tiefem Herzen danke ich meiner Frau, der ich diese Arbeit widme.

Ich darf Ihnen an dieser Stelle einen kurzen Abriss über mein Thema geben.

> *„Die Zulässigkeit von Vertragsstrafenklauseln in städtebaulichen Verträgen im Zusammenhang mit großflächigen Einzelhandelsprojekten*
>
> *- Ein Beitrag zur Anwendbarkeit des Rechts der Allgemeinen Geschäftsbedingungen auf den verwaltungsrechtlichen Vertrag -“*

So lautet der Titel. Zugegebenermaßen: Der ausführliche Titel mutet beinahe an wie der angekündigte Abriss.

Um Ihnen das wissenschaftliche Anliegen meiner Arbeit zu erläutern, möchte ich zunächst der Frage nachgehen: Welcher Grundgedanke steht hinter dem Recht der Allgemeinen Geschäftsbedingungen?

Wir alle kennen „Allgemeine Geschäftsbedingungen“. Sie begegnen uns regelmäßig im privaten Leben, wenn wir beispielsweise mit einem Telefonanbieter, einer Fluggesellschaft oder einem sonstigen Unternehmer einen Vertrag abschließen. Das Unternehmen legt uns ein Vertragsformular vor, bei dem die wesentlichen Vertragsbedingungen bereits vorformuliert sind. Und über dieses „Kleingedruckte“ wird im Allgemeinen nicht verhandelt. Wir akzeptieren den Vertragsinhalt, weil wir nicht glauben, mit dem Unternehmen darüber verhandeln zu können.

Das Unternehmen hat damit faktisch eine überlegene Verhandlungsposition und kann die Vertragsbedingungen diktieren. Es droht eine unangemessene Benachteiligung des Vertragspartners. Um dies zu verhindern, gelten im Privatrechtsverkehr für solche vorformulierten Vertragsklauseln spezielle gesetzliche Mindestanforderungen für den Vertragsinhalt: Das Recht der Allgemeinen Geschäftsbedingungen.

Das Anliegen meiner Arbeit ist es zu zeigen, dass diese aus dem Privatrechtsverkehr bekannte Interessenlage in vergleichbarer Weise auch bei Verwaltungsrechtsverhältnissen – also im öffentlichen Recht – auftreten kann. Und warum auch hier das Recht der Allgemeinen Geschäftsbedingungen sachgerechte Lösungen bietet:

Die Ausgangssituation ist hier ganz ähnlich. Für einen Bereich des Verwaltungsrechts ist regelmäßig eine bestimmte Behörde allein zuständig. Wer einen Vertrag auf dem Gebiet des Verwaltungsrechts abschließen will, kann dies nur mit dem zuständigen Hoheitsträger tun. Es gibt keine alternativen Vertragspartner. Die zuständige Behörde ist letztlich ein Monopolist. Und sie kann diese Stellung nutzen, um vorformulierte Vertragsbedingungen zu verwenden und so einseitig ihre Interessen durchzusetzen.

Nach meiner Auffassung ist die Interessenlage vergleichbar mit der zuerst geschilderten Situation – wenn Unternehmen vorformulierte Verträge gegenüber Privatkunden verwenden: Auch hier droht eine unangemessene Benachteiligung des Vertragspartners, wenn die öffentliche Verwaltung die Vertragsbedingungen einseitig vorgibt. Um dies zu verhindern, muss ein geeigneter rechtlicher Kontrollmaßstab gelten. Diese Aufgabe kann das Recht der Allgemeinen Geschäftsbedingungen auch für das Verwaltungsrecht leisten.

Um dies plastisch darzulegen, habe ich für meine Arbeit das – im Titel genannte – Beispiel aus der Verwaltungspraxis herangezogen:

> *„Vertragsstrafenklauseln in städtebaulichen Verträgen im Zusammenhang mit großflächigen Einzelhandelsprojekten“*.

Was verbirgt sich dahinter?

Es geht um die Ansiedlung von Einkaufszentren und anderen Einzelhandelsbetrieben mit sehr großen Verkaufsflächen außerhalb der Innenstädte. Die Gemeinden haben bei solchen Vorhaben die oftmals berechtigte Befürchtung, die Innenstädte könnten veröden. Das Einkaufen in den Innenstädten soll attraktiv bleiben. Daher möchten die Gemeinden, dass die Einzelhandelsbetriebe außerhalb der Zentren nur ganz bestimmte Warensortimente vertreiben dürfen. Manche Waren soll es hingegen nur in den Stadtzentren geben.

All dies kann jedoch aus rechtlichen Gründen nicht im Detail in den Bebauungsplänen geregelt werden. Daher schließen die Gemeinden mit interessierten Investoren so genannte städtebauliche Verträge ab. In diesen Verträgen werden unter Anderem die jeweils zulässigen Warensortimente und Höchstgrenzen für die Verkaufsflächen vereinbart. Für den Fall, dass unzulässige Sortimente verkauft oder die vereinbarten Verkaufsflächen überschritten werden, sehen die Verträge teils hohe Vertragsstrafen vor.

Über solche Vertragsstrafenklauseln wird in vielen Fällen nicht verhandelt. Die öffentliche Hand verwendet hierfür vorformulierte Klauseln. Beispielsweise hat die Senatsverwaltung Berlin eine Formulierungshilfe für entsprechende Vertragsstrafen in ihren Allgemeinen Verwaltungsvorschriften herausgegeben.

Das Anliegen dieser Vertragsstrafen ist gewiss nachvollziehbar. Sie sind jedoch dann unangemessen, wenn bereits geringfügige oder unbeabsichtigte Verstöße pauschal mit sehr hohen Strafzahlungen belegt werden. Auch hier besteht also ein Bedürfnis, eine unangemessene Benachteiligung des Vertragspartners zu verhindern. Das Recht der Allgemeinen Geschäftsbedingungen bietet hierfür einen sachgerechten Maßstab. Die inhaltliche Angemessenheit des Vertrages kann anhand bewährter rechtlicher Strukturen überprüft werden.

Dieser Anwendungsfall aus der Praxis zeigt also exemplarisch, was der Untertitel der Arbeit besagt: Es besteht ein Bedürfnis für die „Anwendbarkeit des Rechts der Allgemeinen Geschäftsbedingungen auf den verwaltungsrechtlichen Vertrag“.

Vielen Dank!

Festvortrag von Dr. Till Gut: „Reaktionsmöglichkeiten auf das Fehlverhalten von Strafverteidigern vor dem Internationalen Strafgerichtshof“*

Sehr geehrte Frau Dekanin,

sehr geehrter Herr Professor Bartenbach,

sehr geehrte Damen und Herren Professorinnen und Professoren,

liebe ehemalige Doktorandinnen und Doktoranden,

sehr geehrte Damen und Herren!

Es freut mich außerordentlich, anlässlich dieser Feier zu Ihnen sprechen zu dürfen. Der Fakultät danke ich sehr für die Ehre des Promotionspreises und überhaupt für diesen schönen, festlichen Rahmen. Besonders ist natürlich auch die Anwaltskanzlei Cornelius Bartenbach Haesemann & Partner für die großzügige Stiftung des Preises zu nennen. Von meinem Doktorvater, Professor Claus Kreß, weiß ich, das er heute leider verhindert ist; um meinen Dank für die Jahre, die ich während meiner Dissertationszeit an seinem Lehrstuhl verbringen durfte, weiß er jedoch.

Ich möchte meine Worte noch kurz an einen weiteren Personenkreis richten. Diesem ist im Zusammenhang mit Promotionsvorhaben oft ein besonders großer und inniger, ja unermesslicher Dank geschuldet – bei mir ganz sicher: unseren Lebensgefährtinnen bzw. Lebensgefährten. Wie oft haben diese den Satz hören müssen: „Schatz, ich setze mich nur noch mal für ein Stündchen mit der Diss hin.“ Aus diesen „Stündchen“ wurden dann oft Stunden, die eindeutig länger und für

* Rede anlässlich der Verleihung des CBH-Promotionspreises; im Hinblick auf eine das Jahr 2011 prägende juristische Promotion nachträglich mit Fußnoten versehen.

unsere „Schätze“ weniger erfreulich waren als der Festakt heute. Mögen die gegenwärtigen Feierstunden versöhnen für das eine oder andere unfreundliche Verhalten seitens eines Doktoranden, manchmal geradezu Fehlverhalten.

Mit einiger Mühe hätte ich damit die schnelle Überleitung zu meinem Thema geschafft, dem Fehlverhalten von Strafverteidigern. Genauer gesagt: „Reaktionsmöglichkeiten auf das Fehlverhalten von Strafverteidigern vor dem Internationalen Strafgerichtshof“.[1] Ich habe in meiner Doktorarbeit im Schwerpunkt den Internationalen Strafgerichtshof in Den Haag behandelt, das wohl modernste und umfassendste weltweite Strafgericht (vor dem zuletzt diese Woche die Anklage gegen kenianische Politiker wegen der Wahlunruhen 2007/2008 zugelassen worden ist[2], und dessen Ankläger unter anderem auch in Sachen Gaddafi ermittelt[3]). Daneben bin ich in meiner Doktorarbeit vergleichend auch auf die Lage in Deutschland und den USA sowie auf die wichtigsten internationalen Vorgänger eingegangen, die Tribunale für das ehemalige Jugoslawien und für Ruanda sowie das Sondergericht für Sierra Leone.

Was ist in diesem Zusammenhang mit anwaltlichem Fehlverhalten gemeint? Fehlverhalten beginnt dort, wo Anwälte diejenigen Grenzen überschreiten, die ihnen aufgrund ihrer beruflichen Rolle gesetzt sind.

Dabei ist der Anwalt in einer Zwitterstellung. Einerseits soll und darf er nachdrücklich die Interessen seines Mandanten vertreten, und zwar durchaus bis an die Grenzen des Erlaubten.[4] Denken Sie an einen Strafverteidiger, der weiß, dass sein Mandant die Tat begangen hat. Dennoch darf er auf Widersprüche zwischen gegenläufigen, unklaren Zeugenaussagen oder Ermittlungsergebnissen hinweisen

1 Counsel Misconduct before the International Criminal Court, Oxford 2012 (im Erscheinen).

2 Internationaler Strafgerichtshof (IStGH), ICC-01/09-01/11-373, Vorverfahrenskammer II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23.01.2012.

3 Sicherheitsrat der Vereinten Nationen, Resolution 1970 (2011) vom 26.02.2011, S. 2.

4 Für Deutschland: BGHSt 38, 345, 347; 46, 53, 54; für die USA Hall, Professional Responsibility in Criminal Defense Practice, 3. Aufl., St. Paul/Minn. 2005, § 3:20, § 9:3, m.w.N.

und es darauf anlegen, dass beim Gericht letztlich Zweifel bleiben, die zum Freispruch führen. Anwälte sollen es dem Gericht und der Gegenseite schwer machen, dies entspricht ihrer Rolle innerhalb des Systems.[5]

Andererseits muss ein Anwalt oder eine Anwältin doch als Minimum bestimmte Regeln einhalten, die sich etwa durch die entsprechenden Verfahrensordnungen und andere Quellen ergeben (siehe für deutsche Strafverfahren z.B.: die Strafprozessordnung, das Strafgesetzbuch und auch die Bundesrechtsanwaltsordnung als das maßgebliche Berufsrecht für deutsche Anwälte). Als Beispiele für klare Verstöße, die nichts mehr mit kunstgerechter Strafverteidigung zu tun haben, seien aus der Praxis der von mir untersuchten Gerichte genannt: Bei einer anonymisierten Vernehmung eines bedrohten Zeugen nennt ein Verteidiger entgegen der Schutzanordnung der Kammer den wahren Namen und weitere Personalien.[6] Oder: Ein Anwalt soll mehrfach in einem Auto gesessen haben, das mitten in der Nacht am Haus eines Hauptbelastungszeugen vorbeifuhr, wobei wohl mindestens einmal ein Schuss abgegeben wurde.[7] Schließlich: Ein Anwalt verwickelt im Nachgang zu einem Kreuzverhör, zu dessen Verlauf es unterschiedliche Auffassungen gab, Mitarbeiter des Gerichts in eine Diskussion und schlägt eine Mitarbeiterin in das Gesicht.[8]

Fehlverhalten von Anwälten kann sich aber auch in kleineren Verfahrensverstößen niederschlagen. Oft handelt es sich um Grenzfälle, in denen die Gefahr nicht von der Hand zu weisen ist, dass Richter einfach unbequeme, unliebsame Anwälte maßregeln wollen. Die Fragestellung für meine Arbeit war, was Gerichten und

5 Vgl. BGHSt 46, 53, 54, mit Verweis auf BVerfG, NStZ 1997, 35 und BGHSt 2, 375, 378.; Hall (Fn. 4), § 2:2 und § 9:3 m.w.N., u.a. auf Supreme Court of the United States, U.S. v. Cronic, 466 U.S. 648, 655-657 (1984) und Strickland v. Washington, 466 U.S. 668, 688-689 (1984).

6 Internationaler Strafgerichtshof für das ehemalige Jugoslawien (JStGH), Prosecutor v. Zlatko Aleksovski, IT-95-14/1-AR77, Rechtsmittelkammer, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, 30.05.2001, Abs. 2-8, 21.

7 JStGH, Prosecutor v. Blagoje Simić et al., IT-95-9-R77, Verfahrenskammer, Judgement in the Matter of Contempt Allegations against an Accused and his Counsel, 30.06.2000, Abs. 41-42.

8 Sondergerichtshof für Sierra Leone, Re Williams and Yillah, Code of Conduct Hearing, 10.11.2005, S. 2-3.

anderen Akteuren an effektiven, aber eben auch angemessenen Maßnahmen zur Verfügung steht.

Die Problematik ist nicht neu. Bei meinen Recherchen bin ich unter anderem auf den englischen Fall *Mylward gegen Weldon* aus dem Jahr 1595 gestoßen. Dort heißt es:

> *Die Replik des Klägers umfasste 120 Blatt; das Maßgebliche hätte freilich auch auf sechzehn Blatt Papier bewerkstelligt werden können. Es stellte sich heraus, dass der Sohn des Klägers, Richard, diesen unbotmäßigen Schriftsatz erdacht, entworfen und ausgefertigt hat. Das Gericht ist der Ansicht, ein solcher Missbrauch kann keinster Weise hingenommen werden; damit wird die Verteidigung des Beklagten mutwillig erschwert und behindert.*[9]

Als zeitgenössische Juristen fühlen wir uns an das Phänomen der Prozessverschleppung erinnert.[10] Vor den internationalen Strafgerichten ist es in dieser Hinsicht übrigens inzwischen üblich, die Länge von Schriftsätzen für beide Parteien gleichermaßen zu begrenzen, quasi Seitenbeschränkungen und Überschreitungen zu ahnden[11] – was einem die Hausarbeiten, die wir aus unserem Studium kennen, nicht alles später Nützliche beibringen können!

Nun aber zu der damals als angemessen erachteten Ahndung:

> *Der Wachtmeister möge des besagten Richard Mylward habhaft werden und ihn nächsten Samstag nach Westminster Hall bringen; wo man in eine*

9 England and Wales High Court (Chancery Division), Mylward v. Weldon, [1595] EWHC Ch 1 (15.02.1595) (eigene Übersetzung). Tw. wird das Jahr 1596 angegeben.

10 Zur Frage der Prozessverschleppung durch Beweisanträge BGH NJW 2005; BGHSt 51, 333; 2466, BVerfG NJW 2010, 592.

11 JStGH, Practice Direction on the Length of Briefs and Motions, IT/184, 19.01.2001; IT/184 Rev. 2, 16.09.2005; Internationaler Strafgerichtshof für Ruanda, Practice Direction on the Length of Briefs and Motions on Appeal, 08.12.2006; Practice Direction on Length and Timing of Closing Briefs and Closing Arguments , 03.05.2010; IStGH, Regulations of the Court, ICC-BD/01-01-04, 26.05.2004, Regeln 36-38; Sondergericht für Sierra Leone, Practice Direction on Filing Documents before the Special Court of Sierra Leone, 27.10.2003, Art. 6.

Ausfertigung des besagten Schriftsatzes, ihm zu diesem Zwecke zugestellt, mittig ein Loch schneide; den Kopf des vorgenannten Richard stecke man genau durch dieses Loch; so dass ebendieser Schriftsatz um seine Schultern hänge, mit der beschriebenen Seite nach oben. Mitsamt des Schriftsatzes möge der Wachtmeister sodann den vorgenannten Richard barhäuptig und barfüßig zur Gerichtszeit um Westminster Hall herumführen, wo er ihn vor jedes der drei dortigen Gerichte bringe, hiernach zurück zum Gefängnis, wo dieser weiter verbleibe, bis dass er 10 Pfund Strafe an Ihre Majestät zahle, sowie 20 Nobel [eine damalige Goldmünze] *an die gegnerische Seite, um diese damit für die Unkosten aufgrund des vorgenannten Missbrauchs zu entschädigen.*[12]

Unter den möglichen heutigen Sanktionsmechanismen, die ich untersucht habe, findet sich eine Maßnahme wie die geschilderte öffentliche Vorführung nicht mehr, so effektiv und charmant sie einige der hier Anwesenden – möglicherweise eher die Richter als die Anwälte? – finden mögen.

Denkbar ist bei den vom mir untersuchten Gerichtshöfen erstens eine Ahndung durch eine eigene Disziplinargerichtsbarkeit, unter die speziell Rechtsanwälte bei Verstößen gegen das Berufsrecht fallen.[13] Daneben greifen gegebenenfalls Straftatbestände, besonders solche, die den Schutz der Rechtspflege bezwecken (wie etwa die Strafvereitelung).[14] Am geeignetsten erscheinen jedoch häufig solche Reaktionsmaßnahmen, die durch Verfahrensbeteiligte, insbesondere Richter, selbst ergriffen werden können und die unmittelbar an den Folgen des Verstoßes ansetzen.[15] Insofern finden sich mit der Zahlung einer Strafe an den Staat bzw. ei-

12 Mylward v. Weldon (Fn. 9).

13 Siehe Harting, Berufspflichten des Strafverteidigers und Sanktionierung pflichtwidrigen Verhaltens, Bonn 2008, S. 285-341; Tuinstra, Defence Counsel in International Criminal Law, Cambridge 2009, S. 196-198, 217-223.

14 Harting (Fn. 13), S. 344-363; Tuinstra (Fn. 13), S. 226.

15 Wilkins, Who Should Regulate Lawyers?, (1992) 105 Harvard Law Review 801, 807, 835-838, 875-883.

ner Entschädigung an die Gegenseite, die der Richter seinerzeit gegen *Richard Mylward* verhängte, durchaus schon Wegweisendes!

Zurück zum Hier und Heute: Ich danke Ihnen allen für Ihre Aufmerksamkeit und wünsche noch einen schönen Abend.

Festvortrag von Dr. Jonas Knetsch: „Haftungsrecht und Entschädigungsfonds – Eine Untersuchung zum deutschen und französischen Recht“

Sehr geehrte Damen und Herren Professoren,

sehr geehrte Damen und Herren,

liebe Freunde,

es ist mir eine große Ehre, dieser hervorragend organisierten Promotionsfeier beizuwohnen und für meine im Oktober in Paris verteidigte Doktorarbeit einen Dissertationspreis in Empfang zu nehmen. Mein ausdrücklicher Dank gilt der Kanzlei Cornelius Bartenbach Haesemann & Partner für die großzügige Stiftung dieses Promotionspreises.

Lassen Sie mich zunächst ein paar Worte an Sie richten, um Ihnen das Thema meiner Dissertation etwas näher zu bringen. Der Titel meiner Arbeit lautet

„Entschädigungsfonds und Haftungsrecht“.

In der Arbeit untersuche ich, inwieweit so genannte „Fondslösungen“ neben dem bürgerlichen Haftungsrecht, dem Rechtsinstitut der Privatversicherung sowie den sozialen Sicherungssystemen adäquate Schadenstragungsmodelle sind.

Es handelt sich bei Entschädigungsfonds um Sondervermögen, aus denen Kompensationsleistungen für Geschädigte finanziert werden, deren Beeinträchtigungen in einem rechtlich präzise definierten Zusammenhang verursacht worden sind. So lautet die Definition, die ich in meiner Arbeit entwickelt habe. Der eine oder andere wird vielleicht den Entschädigungsfonds für Verkehrsunfallschäden kennen, der im Pflichtversicherungsgesetz verankert ist. Eventuell auch den

Fonds, aus dem seit den 1970er Jahren Contergangeschädigte Ausgleichzahlungen erhalten. Aber Fondslösungen finden auch in zahlreichen anderen Rechtsbereichen Anwendung und werden aktuell für verschiedene Schadenstypen, so z.B. für Umwelt- oder Medizinschäden, diskutiert.

Hauptziel meiner Untersuchung war es, die rechtlichen Fragen dieser Kompensationsinstrumente systematisch aufzuarbeiten. Wie müssen Entschädigungsfonds in das bestehende Rechtssystem eingeordnet werden? Welche Vor- und Nachteile bieten Fondslösungen im Vergleich zu haftungsrechtlichen Ersatzansprüchen und Privat- und Sozialversicherungsleistungen? Welches Potenzial bieten derartige Kompensationsmodelle für die Regulierung neuartiger Schadensformen?

Nicht zuletzt galt es, die Einrichtung von Entschädigungsfonds auch mit den Motiven des Gesetzgebers in Verbindung zu setzen. Aus welchen Gründen entschließt sich der Gesetzgeber, einige Schadenskategorien über derartige Einrichtungen abzuwickeln?

Es ist natürlich richtig, dass Sonderkompensationsregimes einen vereinfachten, unbürokratischen Schadensausgleich ermöglichen. Dieser trägt ohne Zweifel zu einer zügigen Entschädigung bei und vermag es, die Nachteile eines Haftpflichtprozesses – Aufwand, Dauer, Kosten – zu mindern.

Nichtsdestotrotz stellt sich die Frage, ob die Kanalisierung des Schadensausgleichs außerhalb der Gerichtsbarkeit nicht auch Risiken birgt. Bedeutet eine unstreitige Anspruchsdurchsetzung gegenüber einer Entschädigungseinrichtung, welche das Verhältnis zwischen Schädiger und Geschädigten gleichermaßen auftrennt, nicht gleichzeitig auch ein Verlust an Verfahrensgarantien, an der Anwendung des Prinzips der Totalreparation, sprich: eine Aufweichung der Entschädigungsmaßstäbe des Bürgerlichen Rechts?

Dass ich Ihnen heute keine ausführlichen Antworten auf all diese Fragen geben kann, werden Sie sicher gut verstehen. Vor einigen Tagen erhielt ich die Nach-

richt, dass meine Arbeit im Laufe dieses Jahres im Verlag Mohr Siebeck in der Schriftenreihe zum internationalen und ausländischen Privatrecht erscheinen wird. Und so hoffe ich, Ihnen durch das Erscheinen meiner Arbeit zumindest auf *einige* dieser Fragen zufrieden stellenden Antworten geben zu können.

Meine Arbeit, deren Grundzüge ich Ihnen soeben geschildert habe, habe ich nicht in Köln, sondern in Paris verteidigt, was anlässlich einer Feier zu Ehren der „doctores iuris" der Universität zu *Köln* nach einer kurzen Erklärung verlangt.

Zwar war ich seit dem Jahre 2002 nur ein Jahr lang *nicht* eingeschriebener Student der Rechtswissenschaften der Universität zu Köln. Allerdings habe ich die meiste Zeit meiner Ausbildung in Paris verbracht. Begonnen habe ich mein Studium im Rahmen des Deutsch-Französischen Magisterstudiengangs, welcher damals noch von Herrn Professor Ulrich Hübner geleitet wurde und nunmehr erfolgreich von Frau Professor Dauner-Lieb, Herrn Professor Henssler und Herrn Professor von Danwitz betreut wird. Nach zwei Jahren Grundstudium in Köln, habe ich mein Studium an der Universität Paris 1 Panthéon-Sorbonne fortgesetzt.

In Paris habe ich dann mein Jurastudium abgeschlossen und im Anschluss daran, dank der Unterstützung des französischen Forschungsministeriums, meine Doktorarbeit angefertigt. Die Erfahrungen aus dem französischen Recht waren mir insofern eine große Hilfe, als die dortige Bedeutung von Entschädigungsfonds in den letzten Jahrzehnten enorm zugenommen hat.

Meine Promotion zum Doktor der Rechtswissenschaft ist daher das Ergebnis der Zusammenarbeit zwischen der Universität zu Köln und der Université Panthéon-Assas (Paris II), an der ich zunächst wissenschaftlicher Mitarbeiter war und nunmehr wissenschaftlicher Assistent am Institut für Rechtsvergleichung bin. Die Arbeit liegt sowohl in einer französischen als auch in einer deutschsprachigen Fassung vor, um den Anforderungen an ein *co-tutelle*-Verfahren zu entsprechen. Betreut wurde die Arbeit von Herrn Professor Christian Katzenmeier und (auf Pa-

riser Seite) Herrn Professor Yves Lequette, denen ich beiden zu großem Dank verpflichtet bin.

Lassen Sie mich zum Abschluss noch einige persönliche Worte an Sie richten. Als ich im zweiten Studiensemester meine Bewerbung für eine Stelle als studentische Hilfskraft an der Professur für Bürgerliches Recht und Zivilprozessrecht von Herrn Professor Katzenmeier abgab, hatte ich nicht im Traum daran gedacht, einige Jahre später eine wissenschaftliche Karriere anzustreben.

Auch aus diesem Grunde bin ich meinem akademischen Lehrer, Herrn Professor Christian Katzenmeier, zu tiefem Dank verpflichtet. Er hat mich zu Beginn meiner Zeit in Köln unter seine Fittiche genommen und mir das wissenschaftliche Denken und Arbeiten nahe gebracht. Die Hingabe, mit der er sich dem Medizinrecht, dem Haftungs- und dem Prozessrecht verschrieben hat, hat auf mich stets eine ansteckende Wirkung ausgeübt und mir gezeigt, mit welcher Freude eine Betätigung in der Wissenschaft verbunden sein kann. Das Vertrauen, was er über die Jahre in mich gesetzt hat, war mir denn auch immer eine nie versiegende Quelle der Motivation.

Wenn ich auf meine Anfangsjahre in Köln zurückblicke und nun auf die dicht besetzten Ränge der Aula schaue, in der ich meine allerersten Juravorlesungen gehört habe, so bleibt mir nur eines zu sagen:

Vielen Dank!

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Deutsch–japanisches Kolloquium
Japan and Germany – 150 Years of Cooperation

The Crime of Aggression under International Law after the Kampala Compromise – Japanese and German Perspectives

Universität zu Köln
8. - 10. November 2011

Begrüßung durch Prof. Dr. Claus Kreß

Distinguished Japanese guests,

Ladies and gentlemen,

it is my great pleasure to welcome you all at the University of Cologne to the lawyers workshop of our Japanese-German symposium.

My warmest thanks go to our distinguished Japanese guests Mr. *Mikami*, Prof. *Ko* and Prof. *Osten* for having taken all the trouble to come to Cologne for this special event. Cologne University and Cologne Law School feel honoured by your presence and your gesture of friendship is much appreciated. This is all the more so in your case, Mr. *Mikami*, as you have left the Foreign Office in *Tokyo* despite the recent formation of a new cabinet in your country. Thank you so much for your extraordinary effort.

I would also like to welcome Dr. *Hildner* and Mr. *Leymann* from the Foreign Office in Berlin and to thank them warmly for having accepted the invitation to participate in our workshop. It is very good to see you in Cologne.

I am glad that our debate receives such a splendid audience. Thank you all for coming. It is my special pleasure to welcome *Angelika Nussberger*, my dear Faculty member who is the German Judge at the European Court of Human Rights, Dr. *Weingärtner*, the Head of the Legal Department of Germany's Ministry of Defence, and Dr. *Ritscher* from the International Criminal Law Section of the Federal Prosecution Office.

Ladies and gentlemen,

last year in Kampala, States reached consensus on the definition of the crime of aggression under the Statute of the International Criminal Court. As a result of this agreement, it has become likely that, in a couple of years, the first permanent International Criminal Court in history will be able to exercise its jurisdiction over a State leader who initiates a war of aggression. It is hard to believe that the Kampala compromise on the crime of aggression could have been achieved without the precedents set in the Nuremberg and Tokyo trials after the Second World War. Germany and Japan are therefore intimately connected with the long journey to Kampala and, unsurprisingly, both States actively participated in the negotiations in and before Kampala. We therefore thought it might be interesting to take the opportunity of this Symposium to look at last year's decision from the perspective of both countries. Hence, the topic of our workshop.

Earlier this year there was a time when we had reason to fear that our reunion today would not be possible. This was when Japan was hit by a terrible disaster. At this time our thoughts were constantly with our Japanese friends. A visiting fellow from Keio University, who had become our dear friend over the two years of his research stay in my institute, was flying back to Tokyo on the very day when the earthquake happened and we did not hear from him for a while. During this period of suspense we felt particularly close to Japan. We feel a great relief that the worst now seems to be over and we wish Japan the very best in facing the enormous challenge which I am sure continues to exist. In memory of the catastrophe earlier this year, we feel a particular gratitude that it is possible to hold this workshop today.

Once again, a warm welcome to all and I now pass the floor to my colleague, Prof. Weigend, who will chair the first panel.

Thank you.

Beitrag von Prof. Dr. Claus Kreß: „The *Nuremberg* Judgment on Crimes Against Peace and the Crime of Aggression"

When *Hermann Jahrreiß*, formerly a professor for international law at this university, took the floor in *Nuremberg*, he placed all emphasis on the principle of legality to make the case for the defendants. His point was that in 1939 there was no such thing as a crime against peace under international law. Any conviction would thus violate the prohibition of non-retroactivity in criminal law.[1] In Germany, this *nullum crimen* – argument was to dominate the debate about *Nuremberg* for a long time and *Thomas Weigend* will shed light on this important debate a little later. My interest in *Nuremberg* today is a different one. I would like to reflect on two questions. First, does the creative *Nuremberg* precedent on crimes against peace retain any legal significance after last year's breakthrough in defining the crime of aggression? And second, what is the content of the *Nuremberg* precedent? In my 25 minutes, I shall focus my considerations on the State component of the crime.

I.

In the night of 11 to 12 June last year, States reached a consensus about the definition of the crime of aggression under the *Statute of the International Criminal Court* (ICC Statute). We shall hear more about this historic breakthrough later today from *Guido Hildner* and *Masahiro Mikami*.[2] For my purposes, it is suffi-

1 On „*Jahrreiß* in *Nuremberg*", see *Claus Kreß*, Versailles – Nürnberg – Den Haag: Deutschland und das Völkerstrafrecht, Verein der Rechtswissenschaft (Hrsg.), Fakultätsspiegel Sommersemester 2006, p. 25 *et seq*.

cient to refer you to the first paragraph of Art. 8bis of the *Kampala* compromise.[3] You will immediately recognize that this text differs considerably from the formulations contained in the *London Charter*[4] and in *Control Council Law No. 10*[5] which formed the bases for the *Nuremberg* Judgments. Does this mean that the *Nuremberg* precedent on crimes against peace is now a matter of interest for legal historians only? The short answer is: far from this.

A more comprehensive answer must distinguish between the different elements of the newly defined crime of aggression. The continuous relevance of the *Nuremberg* precedent is obvious where Art. 8bis of the *Kampala* compromise *directly* builds on it. This is the case with respect to the description of the conduct of the *individual* perpetrator where only the old term of "waging" has been replaced by that of "execution". It is also safe to predict that the ICC will turn to the *Nuremberg* judgments in the interpretation of the so-called leadership requirement of the crime of aggression. Here again the basic approach is the same despite of nuances between the language used in certain *Nuremberg* judgments and that in Art. 8bis of the ICC Statute.

1. What, however, is the *State* element of the crime? The *London Charter* refers to a "war of aggression, or a war in violation of international treaties, agreements or assurances" and to this *Control Council Law 10* adds the alternative of an "invasion of another country". Art. 8bis of the ICC Statute, however, defines the State component of the crime of aggression as

> *"an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".*

2 For my own initial assessment, see *Claus Kreß/Leonie von Holtzendorff*, The Kampala Compromise on the Crime of Aggression, 8 Journal of International Criminal Justice (2010), 1179 - 1217.

3 For the text, see *Stefan Barriga/Claus Kreß*, eds., The Travaux Préparatoires of the Crime of Aggression, 2011, p. 102/03.

4 *Barriga/Kreß*, n. 3, at 131.

5 *Barriga/Kreß*, n. 3, at 132.

This looks as if States decided in *Kampala* to leave the *Nuremberg* legacy behind. On somewhat closer inspection, though, the picture gets more nuanced. Instead of using the main *Nuremberg* term "*war* of aggression", the *Kampala* definition includes that of "*act* of aggression". The latter term, however, is qualified by the so-called threshold requirement. The State use of armed force must "by its character, gravity and scale constitute a manifest violation of the Charter of the United Nations". It is reasonably clear that this formulation has a *quantitative* and a *qualitative* dimension.[6] The precise content of both those dimensions, however, leaves room for interpretation. The ICC will have to determine the necessary level of intensity, as referred to by the terms "gravity" and "scale". It will also fall upon the Court to specify the "character" by which an act of aggression constitutes a *manifest* violation of the UN Charter.

In the latter respect, the choice is between an entirely negative approach and one that includes a positive element. Under the negative approach, the qualitative threshold requirement is satisfied where the State use of armed force is unambiguously illegal. Lawful and legally controversial instances of the use of force by States would thus be excluded from the definition of the crime - but only those. The partly positive approach is more restrictive. It would require for a "character" on which manifest illegality can be based that the State use of armed force, apart from being clearly illegal, must be carried out for an illegal purpose. I would submit that the alternative between a "purely negative" and a "partly positive" approach is of more than academic interest. Let me give you a hypothetical example to explain why. Let us assume that the political relationships between *Utopia* and *Arcadia* are deeply disturbed. *Utopia* has acquired nuclear weapons in violation of international law, but it is not about to use those weapons. Would the character of *Arcadia*'s use of armed force in *Utopia* with the sole purpose to destroy the latter State's nuclear arsenal be such that it manifestly violates the UN

6 *Kreß/v. Holtzendorff*, n. 2, at 1190 *et seq*., 1204 *et seq*., and 1210/11.

Charter for the purpose of Art. 8bis of the ICC Statute? According to the "purely negative" approach, the answer must be in the affirmative because there is clearly no legal justification for a preventive use of force in the absence of an imminent armed attack.[7] Under the "partly positive" approach, however, the additional question to ask would be whether *Arcadia* acted for an illegal purpose which goes beyond the illegality of the use of force. Here, the answer is negative because *Arcadia* acted to enforce international law.

2. The formulation of the State component of the newly defined crime of aggression thus leaves room for interpretation in at least two important respects. But why should the *Nuremberg* precedent be relevant for the interpretation despite the different language used? A first consideration in answering this question is that it is difficult to identify a decision by the drafters of the Kampala compromise to depart not only from the language, but also from the substance of the *Nuremberg* precedent on the State component of the crime. The reason for this difficulty is twofold. First, the drafters of the *Kampala* compromise had no clearly articulated common understanding of the content of the *Nuremberg* precedent and, second, the drafters did not clearly articulate a common understanding about the relationship between the definition of the State component in the *Kampala* compromise and current customary international law. Against this background, I wish to set one premise and to then formulate two presumptions which, if taken together, indicate why the *Nuremberg* precedent may well be of some significance for the interpretation of the threshold clause contained in the *Kampala* compromise. The premise, which I cannot explain any further today, is that a crime of aggression exists under customary international law.[8] *Nuremberg* has decisively contributed to the formation of this custom and, except from *Tokyo*, there has been no sub-

7 See, e.g., *Thomas M. Franck*, Recourse to Force. State Action Against Threats and Armed Attacks, 2002, p. 97 *et seq*.

8 For the most important judicial determination to this effect, see the British House of Lords in *R. v. Jones et al.* (2006) UKHL 16, §§ 12, 19 (Lord Bingham), §§ 44, 59 (Lord Hoffmann), § 96 (Lord Rodger), § 97 (Lord Carswell), § 99 (Lord Mance).

sequent judicial precedents to further develop it. This leads me to my first presumption that the *Nuremberg* precedent remains valid for the existing state of customary international law unless there is clear verbal State practice to go beyond it. Second, I would submit that it is to be presumed that the new treaty definition of the crime of aggression should, as is the case for the other definitions of crimes under international law contained in the ICC Statute[9], be construed in conformity with customary international law. One reason for this presumption is the general intention of the drafter's of the ICC Statute to codify crimes under customary law rather than to cover (or create) crimes of a purely treaty-based nature. A second reason is that the Court will have jurisdiction over crimes of aggression committed by nationals of non-State parties on the territory of non-State parties in cases of Security Council referrals. And thirdly, an attempt made by the *United States* in *Kampala* to explicitly divorce the *Kampala* compromise from customary international law[10] was rejected.[11] On that basis I would now like to turn to the content of the *Nuremberg* precedent.

II.

The *Nuremberg* precedent on the State component of the crime of aggression is contained in the main *Nuremberg* judgment[12] and in the subsequent *Nuremberg*

10 For this attempt, see *Barriga/Kreß*, n. 3, at p. 751.

11 *Claus Kreß/Stefan Barriga/Leena Grover/Leonie von Holtzendorff*, Negotiating the Understandings on the crime of aggression, in *Barriga/Kreß*, n. 3., at p. 92/3.

12 For the text, see, e.g., 41 The American Journal of International Law (1947), 172.

judgments in the *High Command*[13], in the *Ministries*[14], in the *Farben*[15] and in the *Krupp* case[16].

1. The main judgment sets the precedent in that it recognizes the initiation of a war of aggression as the "supreme international crime".[17] The application of this law to the facts contains one famous perplexity. The judgment states that *Germany* has waged twelve wars of aggression[18], but it makes an explicit determination to that effect only in the ten cases of *Poland*[19], *Denmark*[20], *Norway*[21], *Belgium*[22], the *Netherlands*[23], *Luxemburg*[24], *Yugoslavia*[25], *Greece*[26], the *Soviet Union*[27] and the *United States*[28]. The two other candidates are *Austria* and *Czechoslovakia* or *England* and *France*. The better case is for *England* and *France* because only those were referred to in the Indictment as *wars* of aggres-

13 For the text, see Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume XI, p. 462.

14 For the text, see Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume XIV, p. 314.

15 For the text, see Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, p. 1081.

16 For the text, see Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, p. 390 (Opinion of the Tribunal concerning the Dismissal of the Charges of Crimes Against Peace).

17 41 The American Journal of International Law (1947), 172, at 186.

18 *Id*., at 214.

19 *Id*., at 203.

20 *Id*., at 207.

21 *Id*., at 207.

22 *Id*., at 209.

23 *Id*., at 209.

24 *Id*., at 209.

25 *Id*., at 211.

26 *Id*., at 211.

27 *Id*., at 213.

28 *Id*., at 214.

sion.[29] Accordingly, the main judgment qualifies *Austria* and *Czechoslovakia* as aggressive measures short of wars of aggression.[30]

2. Now what is the precise content of these determinations? Unfortunately, this question is fraught with difficulties. Let us start, however, with what is fairly clear. While the *London Charter* and *Control Council Law No 10* distinguish between wars *of aggression* and wars *in violation of international treaties*, the *Nuremberg* precedent is confined to the *former* alternative. Convictions were only based on the participation in *wars* of aggression[31] and it is only this crime which the Tribunals determined to be grounded in customary international law.

3. a) As far as the legal concept of 'war of aggression' is concerned, *Robert Jackson* observed in his Opening Address for the *United States* prosecution team that 'it is perhaps a weakness in this Charter that it fails to define a war of aggression'.[32] *Jackson* was right. Any attempt to include such a definition into the *London Charter* had proved futile. At the end of the debate the *Russian* General *Nikitchenko*, who was to become the *Russian* Judge, remarked that "if we start discussion on that again, I am afraid the war criminals would die of old age".[33] In fairness to the drafters of the *London Charter*, it should be said, though, that they could not rely on a generally accepted definition of "war of aggression". Quite to the contrary, both "war" and "aggression" were ambiguous legal terms.

b) The traditional concept of "war" had developed as a term of the laws of war and there was a long standing controversy as to its precise meaning. Even after

29 On the indictment, see *Oscar Solera*, Defining the Crime of Aggression, 2007, p. 232 *et seq*.

30 41 The American Journal of International Law (1947), 172, at 192 ('The invasion of Austria was a pre-meditated aggressive step in furthering the plan to wage aggressive wars against other countries').

31 41 The American Journal of International Law (1947), 172, at 214.

32 Trial of German Major War Criminals by the International Military Tribunal Sitting At Nuremberg Germany, Opening Speeches of the Chief Prosecutors, repr. by William S. Hein & Co., Inc., Buffalo, New York 2001, p. 40.

33 On the debate preceding the London Charter, see *Solera*, n. 30, p. 208 *et seq*.

the adoption of the *Kellogg-Briand Pact* in 1928, there was the widespread view in the international practice that there existed a thing called "hostile measures short of war". Where and how to draw the line between such measures and a State of war, and, more particularly, whether the attitude of the States concerned mattered or whether it was solely a question of the intensity of the military action, this remained very much an unsettled issue when the *London Charter* was drafted.[34]

c) The concept of "aggression" had been introduced into the context of the modern *ius contra bellum* through the *Versailles Treaty*. It was referred to in the *Covenant of the League of Nations*[35] and in a number of subsequent draft treaties and non binding declarations. This development had not, however, yielded one generally accepted definition. Instead, it is possible to identify at least four different approaches to capture the essence of "aggression" in the Inter-War Period. First, aggression was linked to the infringement upon the two distinct legal rights of the political independence and territorial integrity of another State. This was the case in the *Covenant of the League of Nations* and in the 1923 *Draft Treaty of Mutual Assistance*[36]. Second, aggression was defined as military action for a purpose different than defence. Such was the suggestion in the *1924 American Draft Treaty of Disarmament and Security*.[37] Third, aggression was defined as a violation of existing undertakings, including procedural restraints on the waging of war. This was the approach of the *1924 Geneva Protocol for the Pacific Settlement of Disputes*.[38] And fourth, the famous *1933 Soviet draft* on the subject relied on the pri-

34 *Ian Brownlie*, Internation al Law and the Use of Force by States, 1963, p. 26 *et seq*.

35 Cf. Art. 10; for the text, see *Barriga/Kreß*, n. 3, p. 114.

36 Cf. Art. 1; for the text, see *Barriga/Kreß*, n. 3, p. 119.

37 Cf. Art. 2; for the text, see *Benjamin Ferencz*, Defining International Aggression. The Search for World Peace, Volume 1, 1975, p. 124.

38 Cf. Art. 10; for the text, see *Barriga/Kreß*, n. 3, p. 120/21.

ority principle. Whichever State resorted to violence first, was the aggressor.[39] Interestingly, the *Kellogg-Briand Pact* avoids the use of the word "aggression" altogether due to *Kellogg*'s objection. The main prohibition in this treaty refers to war as an instrument of national policy'[40], which *Kellogg* understood to be a broader term.

d) In light of this complexity, it is perhaps unsurprising that the Prosecution teams in *Nuremberg* did not come up with a coherent approach, either. Let me only quote two passages from a declaration made by the British Chief Prosecutor, Sir *Hartley Shawcross*, before the Tribunal in the main proceedings:

> *"A war of aggression is a war which is resorted to in violation of the international obligation not to have recourse to war, or, in cases in which war is not totally renounced, which is resorted to in disregard of the duty to utilize the procedure of pacific settlement which a State has bound itself to observe."*[41]

In this attempt to come up with a general formula, *Shawcross* links the concept of "aggression" with that of illegality. The obvious problem with this approach under the *London Charter* was that it confuses the two concepts of "war of aggression" and "war in violation of international law" which the Charter listed in the alternative. Perhaps, the *British* prosecutor felt this difficulty because he did not insist strongly on his suggested definition. In fact, he pleaded for an entirely pragmatic approach and said the following:

> *"This Tribunal will not allow itself to be deflected from its purpose by attempts to ventilate in this Court what is an academic and, in the circumstances, an utterly unreal controversy, as to what is the nature of a war of aggression, for there is no definition of aggression, general or particular,*

39 For the text, see *Barriga/Kreß*, n. 3, p. 126.

40 Cf. Art. I; for the text, see *Barriga/Kreß*, n. 3, p. 124.

41 For the full citation, see *Solera*, n. 30, p. 245.

> *which does not cover and cover abundantly and irresistibly in every detail, the premeditated onslaught by Germany on the territorial integrity and political independence of so many sovereign states."*[42]

Although it is interesting to note that this sentence refers to the positive approach to link aggression with the violation of the political independence and territorial integrity of a State, *Shawcross* essentially pleads against any attempt to come up with a general definition. The Tribunal should simply state that, whatever the proper definition of aggression, *Germany*'s wars fell under it.

e) Quite understandably, the *Nuremberg* Tribunals essentially followed this pleading for pragmatism and did not explicitly define the concept of "war of aggression". For this reason, it is often said that the *Nuremberg* precedent is of limited significance when it gets to the specifics of the crime of aggression. *Oscar Solero*, for example, argues in his recent monograph on the crime of aggression that the main *Nuremberg* Judgment 'certainly provides very few elements for the determination of a legally sound definition of aggression' and that it left 'a cloud of doubt'.[43] While there is some truth in this statement, I would argue that it remains important to determine the elements provided by the *Nuremberg* judgments with as much clarity as possible. The rest of my remarks are devoted to this endeavour.

aa) I shall begin with a few words on the concept of "war". The only real issue here was how to deal with those *German* military operations which had not met with military resistance. The main Judgment had not included those cases within the concept of 'war'. *Control Council Law No 10* had then broadened the concept of crimes against peace by adding the 'invasion of another country' to the list of alternatives. This concept has received the closest attention in *Ministries*. The relevant passage of the judgment tends to blur the distinction made by the main judgment between 'war of aggression' and 'act of aggression' as it designates the

42 *Id.*

43 *Solera*, n. 30, p. 251.

invasions into *Austria* and *Czechoslovakia* as 'acts of war'.[44] Perhaps more importantly, however, the Tribunal places the invasion of another country without the latter's military resistance at the same level of international criminality as a war of aggression.[45] This is an important point to be kept in mind for the interpretation of the threshold clause contained in the *Kampala* compromise.

bb) As far as the concept of aggression is concerned, the Tribunals followed the case-by-case approach as suggested by *Shawcross* and based their determination of the aggressive nature of *Germany*'s wars on the factors of the individual case. The *Australian* scholar *Carrie McDougall* has analysed the factors considered by the Tribunals in each case and has generalized the findings as follows: A war is aggressive if it is conducted either with the object of occupation or conquest[46] or with the purpose to support another State's war of aggression.[47] *McDougall* derives the latter alternative from the findings relating to *Germany*'s war against the *United States*. Those findings, in fact, do not establish a *German* desire to either occupy or conquer.[48]

McDougall's reading of the *Nuremberg* precedent is the narrowest possible one, perhaps with the proviso that the purpose of occupation could be qualified even further as 'hegemonic' occupation as distinguished from 'benevolent' occupation for humanitarian ends. Such a restrictive reading of the *Nuremberg* precedent would not even include wars conducted with the purpose to destroy or damage another State from the air. The advantage of *McDougall*'s approach is its solidity.

44 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume XIV, p. 331.

45 *Id.*

46 *Carrie McDougall*, The Crime of Aggression: Born of the Failure of Collective Security - Still Shackled to its Fate? Time to Catch up or Part Ways, in: David A. Blumenthal/Timothy L.H. McCormack, eds., The Legacy of Nuremberg, p. 155.

47 *Id.*, p. 159.

48 For a third alternative derived from the *Tokyo* precedent, that is 'a war with the object of disabling another State's capacity to provide assistance to a third State (or states) victim to a war of aggression initiated by the aggressor', see *McDougall*, n. 46, p. 159.

In the absence of a general definition of the legal concept of 'war of aggression' the Tribunals have adopted a case-by-case approach and *McDougall* rigorously confines the precedent accordingly.

It is possible, though, to identify a number of elements in the three most important judgments which point beyond *McDougall*'s conservative reading. Those elements can be grouped around the fundamental distinction between a partly positive and a purely negative approach to the definition of aggression - a distinction which remains relevant after *Kampala* as we have seen. With respect to elements pointing to a broader positive approach, it is the judgment in *Ministries* which is most instructive. After an interesting perusal of instances of war before the modern times and obviously inspired by the traditional just war - debate, the judgment holds that wars of aggression are those which are

> *'not resorted to only as a last resort to remedy wrongs already or imminently to be inflicted'*.[49]

In a nutshell, wars of aggression, according to this traditional approach, are those which are conducted for a purpose different from that of enforcing the law. Interestingly, the judgment goes on to observe that the prohibition of war contained in the *Kellogg-Briand Pact* makes an important step beyond wars of aggression and covers also wars conducted with the purpose of enforcing lawful claims and demands.[50] Under this reading, the Antiwar Treaty outlaws *all* wars *except* from those conducted *in self-defence* and as a *collective sanction*. It is not entirely clear whether the Tribunal in *Ministries* held that the *Kellogg-Briand* Pact, by making this step, brought about a change of the concept of war of aggression, or whether the latter concept retained its traditional meaning. In the latter case, the concept of war of aggression would only be a special application of the broader concept of a

49 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume XIV, p. 319.

50 *Id.*

war in violation of the *Kellogg-Briand* Pact and there would be no complete congruence between the two concepts. This appears to have also been the view espoused by the main judgment which contains the following passage:

> *'War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.'*[51]

Inclusion is different from *identity*.

The judgment in the *High Command* case, however, identifies wars of aggression and wars in violation of the 1928 Pact. It states:

> *'[T]he changing or attempting to change the international relationships by force is an act of aggression and if the aggression results in war, the war is an aggressive war. It is, therefore, aggressive war that is renounced by the pact. It is aggressive war that is criminal under international law. The crime denounced by the law is the use of war as an instrument of national policy.'*[52]

Under this definition, every war would seem to be aggressive except for cases of self-defence and collective sanctions. This would point to a purely negative approach, identifying aggression with illegality. There are a few more elements of the *Nuremberg* precedent pointing in this direction. Interestingly, *Robert Jackson* had pleaded for such an approach in his opening statement in the main Trial.[53] While the Tribunals at no point went so far as to explicitly endorse this pleading, they occasionally placed at least primary emphasis on the fact that *Germany*'s war

51 41 The American Journal of International Law (1947), 172, at 218.

52 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume XI, p. 490.

53 Trial of German Major War Criminals by the International Military Tribunal Sitting At Nuremberg Germany, Opening Speeches of the Chief Prosecutors, repr. by William S. Hein & Co., Inc., Buffalo, New York 2001, p. 39.

was without justification. In the case of *Luxembourg*, the judgment in *Ministries* reads as follows:

> *'No justification or excuse is offered regarding the invasion of Luxembourg other than military expedience. No claim is made that Luxembourg had in any way violated its neutrality. In fact, it had not. The German invasion was aggressive, without legal justification or excuse.'*[54]

And in the cases of *Denmark* and *Norway*, the main judgment concludes:

> *'In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggressive war.'*[55]

Those statements can be read so as to suggest that a war is aggressive if it is conducted without justification, in particular in the absence of a situation of self-defence.

III.

What can we make of all this? Does this leave us with no more than a "cloud of doubt" about the *Nuremberg* precedent? This is a workshop and my thinking on the continuous significance of the *Nuremberg* precedent is still in progress. I will therefore not come up with a comprehensive answer today. My preliminary view is as follows: The *Nuremberg* precedent on the State act of the crime of aggression certainly includes a massive use of force on the territory of another State with or without actual combat for the purpose to annex or to otherwise dominate at least part of the latter State's territory or military action in support of a third State's use of force of such kind. The *Nuremberg* precedent also contains certain

54 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume XIV, p. 334.

55 41 The American Journal of International Law (1947), 172, at 207.

elements which point towards a broader concept of aggression. There are indications that would support a reading that wars conducted for any purpose other than the enforcement of the law are aggressive. There are even certain elements which would support an even broader negative concept of war of aggression in the sense of a war conducted without legal justification. The question is what weight can be attributed to those elements which would seem to open the door for a broadening of the concept of aggression under customary international law. As I tried to show, the answer to this question might be of some relevance for the proper construction of the *Kampala* compromise. To conclude, the *Nuremberg* precedent on crimes against peace, also with its difficulties and ambiguities, remains fresh and alive.

Beitrag von Prof. Keiko Ko: "The Tokyo Judgment on Crimes against Peace and the Crime of Aggression"*

1. Introduction

The adoption of the definition of the Crime of Aggression and the conditions for the ICC to exercise its jurisdiction over that crime at the Review Conference of the Rome Statute of the International Criminal Court (ICC) in Kampala, Uganda, in 2010, had been considered to be almost impossible and it was truly a "historic achievement".[1] While two distinguished Ambassadors, Ambassador Christian Wenaweser [2] and Prince Zeid Ra'ad Zeid Al-Hussein[3] doubtlessly contributed to the successful adoption, we must not forget the substantial contribution made by Prof. Kreß. He helped the negotiations in the Special Working Group on the Crime of Aggression (SWGCA) to remain on the legal ground and he kept his faith in the value of the Work on the Crime of Aggression, which inspired many of us along the way.

The topic of this article is the Tokyo Judgment on Crimes against Peace and the Crime of Aggression. The Crimes against Peace and the Crime of Aggression are very similar concepts and they both criminalize the violation of 'jus ad bellum'

* Professor of Law, Mie University, Japan. This text is the extended version of the author's presentation at the Deutsch-Japanisches Symposium at the University of Cologne, Friday, 9 September 2011. I am grateful to the University of Cologne, and in particular to Prof. Dr. Claus Kreß for providing me with this incredible opportunity. The author was an academic advisor to the Japanese Delegation to the Special Working Group on the Crime of Aggression (2007-2009). The views expressed in this article are personal.

1 Neils Blokker and Claus Kreß, A Consensus Agreement on the Crime of Aggression: Impressions from Kampala, *LJIL* vol. 23, 2010, p.889. For a detailed analysis on the agreement at Kampala, see Claus Kreß and Leonie von Holtzendorff, The Kampala Compromise on the Crime of Aggression, *JICJ* vol. 8, 1179-1217.

2 Ambassador of Liechtenstein to the UN, the Chairman of the SWGCA (2003-2009), the President of the Assembly of State Parties to the Rome Statute of the ICC.

3 Ambassador of Jordan to the US, the first President of the Assembly of States Parties, the Chairman of the SWGCA (2009-2010).

and punish the individual for committing these crimes. Indeed, in the course of the negotiations in the SWGCA, "it was never disputed that the precedents of Nuremberg and Tokyo provided crucial guidance in defining the crime."[4] As Prof. Osten has already articulated in his comparative study, the two big legal issues at the Tokyo Tribunal were (1) whether an aggressive war was a crime under international law and (2) whether an individual should be held criminally responsible. These were similar to the issues discussed in the Nuremberg Tribunal,[5] but they are not the topic of this article. Instead, I would like to focus on two peculiar aspects of the Crime of Aggression, those are (1) the leadership requirement and (2) requirement of an internationally wrongful state act and I will try to describe how they played out in the Tokyo Tribunal. By providing the factual background, I will explain how the discretion of the prosecutors affected the determination of 'leadership' for the Crime against Peace and thereby to caution against treating what had been decided in the Tokyo Tribunal in this matter to have the legal precedential effect. I will then illustrate the practical difficulty of the trial of the Crime against Peace in Tokyo that would most likely be faced in future trials of the Crime of Aggression in the ICC. That is, how to defend the individual for the crime of his State in criminal proceedings.

2. The 'leadership' requirement in Tokyo: How were the defendants selected?

The Tokyo Tribunal was established by the Special Proclamation by Douglas MacArthur, the Supreme Commander for the Allied Powers on 19 January, 1946.

4 Kreß/von Holtzendorff, *supra* (n.1), p. 1188. Interestingly, this contrasted sharply with the negotiations of the basic design of the International Criminal Court in the International Law Commissions. Professor James Crawford, who chaired the Working Group on the Draft Statute of the International Criminal Court in the International Law Commission wrote in 1995; "The two previous occasions when criminal trials were held at the international level, those at Nuremberg and Tokyo, followed the unconditional surrender of a defeated enemy and constituted no precedent for a general and permanent court operating in conditions of "peace." James Crawford, the ILC Adopts a Statute for an International Criminal Court, *AJIL*, vol. 89, 1995, p.407.

5 Philip Osten, Tokyo Saiban ni okeru Hanzaikouseiyouken no Saiho-Shoki Kokusaikeihou Si no Ichidanmen no Sobyo, *Hogaku Kenkyu* (Keio University) vol. 82, No. 1, 2009, p.328.

The subject-matter jurisdiction of the Tribunal was provided in Article 5: "(a) Crimes against Peace, (b) Conventional War Crimes, and (c) Crimes against Humanity." The Crimes against Peace was defined as follows: "Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." While there is no qualification on the status of the defendants, the intrinsic nature of the crime defined as such required the potential defendants to be political or military leaders. Moreover, if one looks at the wording of the Proclamation Defining Terms for Japanese Surrender delivered on 26 July, 1945, it becomes more apparent that the aim of the Allied Powers was to try the leaders of Japan (in addition to conventional war criminals). For example, in paragraph (6): "There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world." And in paragraph (10): "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners…." There has been a discussion over whether the terms "war criminals" here included those charged with Crimes against Peace, but for the purpose of this article, it would suffice to point out that the intention to try the leaders of Japan had been expressed even before the end of the war and the development of the proceedings for Crimes against Peace. Indeed, as early as 11 September[6], General MacArthur ordered the arrest of Mr. Tojo, the Prime Minister when Japan attacked Pearl Harbor in December 1941, and it was expected that many others would also be arrested and,

6 Japan surrendered to the Allied Powers on 15 August, 1945 and the Japanese Instrument for Surrender was signed on 2 September, 1945.

in fact, about 100 people were eventually arrested as suspects for the major war crimes by April 1946.

However, it is important to note that there was from the beginning no such thing as a solid 'list' of persons accused of Crimes against Peace. Many arrests were conducted in the context of the administration of the occupation policy of the US.[7] Moreover, even though the jurisdictional basis of the Tokyo Tribunal was a Special Proclamation by the Supreme Commander, General MacArthur, the actors involved in the project of the Tokyo Tribunal were the Allied Powers. Indeed, 11 States[8] were the Prosecutors before the Tokyo Tribunal: the US, the Nationalist Government of the Republic of China, the UK, the USSR, Australia, Canada, France, the Netherlands, New Zealand, India and the Philippines. On 29 April, 1946, the Indictment (55 Counts in total) was submitted to the Tribunal and ultimately 28 defendants were selected[9].

Professor Neil Boister and Professor Robert Cryer described that "The individuals put on trial in the first (and ultimately the last) trial of Japanese leaders by the Tokyo IMT were a motley collection representative of the Allied prosecutors' perception of who exercised influence and authority in Japan from 1929-1945 rather than those whom historical hindsight might suggest actually exercised such influence and power."[10] Moreover, even if they all had been political or military leaders who *actually* 'exercised influence and authority' in Japan, it does not fully answer the question of what "leadership" meant at the Tokyo Tribunal. Because, there were about 100 other suspects in custody and they were also more or less

7 For a detailed analysis of the political process of drafting the indictment and arresting potential war criminals, see Yoshinobu Higure, *Tokyo Saiban no Kokusaikankei-Kokusaiseiji ni okeru Kenryoku to Kihan (International Relations of the Tokyo Tribunal-Authority and Norm in International Politics)*, Bokutakusha, 2002, pp.233-305.

8 Neither India nor the Philippines were sovereign (independent) States at that time but were the members of the Far Eastern Commission.

9 The Indictment has a short biography for each defendant. Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal-Charter, Indictment and Judgments*-, Oxford Univ. Press, 2008, pp. 63-69.

10 *ibid*., p.xxxix.

the political or military leaders who *actually* exercised influence and authority in Japan. Then, we need to find other criteria for "why these 28", instead of, say, 'those 28'. Here I will explain the process and the actors who participated in the selection in order to search the reasons why these 28, instead of describing how the defendants *actually* 'contributed' to the commission of the Crime against Peace.

Until recently, the process of selection of the defendants has not been well known even to the Japanese, but thanks to recent studies by historians, we are beginning to have a better understanding. Let me explain chronologically[11]. On 30 November, 1945, Joseph Keenan was appointed as a US prosecutor and came to Japan on 6 December, 1945. Two days later, the International Prosecution Section (IPS) was established in the General Head Quarter of the Supreme Commander for the Allied Powers and General MacArthur appointed Keenan to be its head. Keenan and his team were given two objectives for the coming trial. On the one hand, there was a US government policy that the trial should include Japanese responsibility not only on the attacks on Pearl Harbor but also its plan to control Asia and the World, which had started long before Pearl Harbor. On the other hand, General MacArthur attached the greatest importance to indicting those who were responsible for the attack on Pearl Harbor, namely Mr. Tojo and his cabinet. In order to fulfill these two objectives of the trial, the IPS decided to adopt the prosecution policy of using the concept of the 'conspiracy' (as a substantive offence) of Japan[12]. This conspiracy was later described in the Indictment, in Count 1, as follows: "All the Defendants together with divers other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy and are responsible for all acts performed by themselves or by any

11 See Higure, *supra* (n. 7), pp. 233-305, also see Higure, *Tokyo Saiban (The Tokyo Tribunal)*, Kodansha, 2008, pp.100-114.

12 Higure, *supra* (n. 7), p.256.

person in execution of such plan. The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein and bordering thereon and for that purpose should also or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against any country or countries which might oppose that purpose. The whole of the Particulars in Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C, relate to this Count."[13] This concept of the conspiracy of Japan is sometimes called a 'grand' conspiracy. It must be noted that the adoption of the 'grand' conspiracy had a significant impact on the selection of the defendants.[14] In other words, with the 'grand' conspiracy at hand, the prosecutors and the Tribunal were able to have as long as almost 18 years of the Japanese diplomacy in front of them and thereby were able to indict almost whoever they liked as long as they could find any connection to Japanese foreign policy.

Nevertheless, the US prosecutors did not have the exclusive authority for the selection of the defendant in the IPS. On 2 February, 1946, the team of the prosecutors from the UK arrived in Tokyo. Some of the Allied governments, including the UK, had prepared their own lists of defendants. On 16 February, the Committee on the Indictment was established in the IPS and the prosecutors continued drafting the Indictment, namely what to charge and who to indict. On 2 March, 1946, an important proposal for the method of selection was submitted to the meeting. [15] That is, first to take the years from 1931 until 1945 and divide them into 15-20 'events' and then, to choose the most representative figure of each 'event'. It must be noted that when choosing the most representative figures, the

13 Boister/Cryer, *supra* (n. 9), pp. 16-17.

14 Higure, *supra* (n. 7), p. 257.

15 Ibid., pp.269-270.

'positions' they held played a major role, although this might not have been a result of the logical examination but presumably because it was easier.[16] However, with this method, the IPS would still be left with many potential defendants. Then, there were other criteria discussed and supposedly used in the IPS: (1) those who may not be charged with the Crimes against Peace should be eliminated, (2) the defendants' list should cover the most representative of all the events and the positions, (3) indict those for whom there is enough evidence to convict. Moreover, (4) as regards to the Crimes against Peace, the ministers and the military leaders who were involved in the planning of the aggressive war should be indicted but those who opposed the aggressive war in public should be eliminated and, (5) as for the other State officials, those who willingly participated in the conspiracy of the aggressive war or those who did not oppose it when they had an opportunity to do so will be indicted[17].

By March 1946, the IPS decided to charge 26 and this was reported to General MacArthur. However, this was not the end of the story: the Soviet Union had not sent its prosecutors to the IPS by that time and they only arrived in Tokyo on 13 April[18]. They insisted on adding two 'events' (the Battles of Khalkhin-Gol River and the Battle of Lake Khasan (the Changkufeng Incident) and four more people to be included in the Indictment. Out of the four, two were added to the list, Umezu and Shigemitsu, who had been excluded from the list of 26.[19] In the end, there were 28.

The most famous figure who was NOT indicted, but who many people believe should have been brought before the Tokyo Tribunal as a defendant was Kanji

16 Higure, *supra* (n. 7), p.259. It was not that the prosecutors were not diligent but there was a serious problem in collecting the evidence. After the surrender, many official documents were burned, which compelled the prosecutors to depend heavily on the testimony. Majority Judgment, in Boister/Cryer *supra* (n. 9), p. 78.

17 *Ibid*., pp.269-273.

18 The prosecutors from the Netherlands, France and the Philippines arrived after February. *Ibid*., p.276.

19 Higure, *supra* (n. 11), pp. 105-108.

Ishihara. For the Manchurian Incident, there were three people who could have been charged: Shigeru Honjo, Seishiro Itagaki and Kanji Ishihara. In terms of 'status/position' (rank), Shigenru Honjo should have been selected because he was the General of Kwantung Army (Kanto Gun Shireikan), but Honjo had committed suicide. Seishiro Itagaki served as a full Colonel of Kwantung Army and later as a Major General of Kwantung Army and, in fact, he was indicted, found guilty and sentenced to death at the Tokyo Tribunal. No one thinks that he was not guilty but the problem here is that why Ishihara had not been indicted as well. Ishihara, in terms of military rank, was much lower than Itagaki and was just a Lieutenant-Colonel of the Military Staff. However, later studies disclosed that Ishihara was a principal planner of the Manchurian Incident and he himself suggested his substantive role in his testimony at the trial.[20] Some reasons have been suggested to explain his non-indictment including, (a) he was too sick (the prosecutors were afraid to lose the defendants during the trial), (b) he once opposed Tojo's policy etc. Arguably another important factor was that the prosecutors from the Nationalist Government of the Republic of China did not designate him as a war criminal – at least in the beginning.[21]

Ishihara's case is just one example. There were cases where the national interests of the Allied Powers obviously affected indictment, including the cases of Umezu and Shigemitsu explained in the above. Moreover, political considerations were very influential, most notably in the case of the Emperor, who would have been the first choice if "position" was used as the principal criteria. However, the decision not to indict him was made in the Far Eastern Commission on 3 April, 1946[22]

20 Ishihara's testimony, the transcript of the proceedings, 22094-22253, R. John Pritchard, Sonia Magbanua Zaide, *The Tokyo War Crimes Trial*, annot. comp. ed., Garland Pub., 1981.

21 Higure, *supra* (n. 7), pp. 272-273.

22 *Ibid.*

In relation to this, it may be necessary to consider the recent argument on the selection standard for the defendants in the Tokyo Tribunal. It has been argued that the standard chosen by the SWGCA, so-called "control or direct" standard for the determination of the leadership for the Crime of Aggression would be a retreat from the standard chosen at the Nuremberg Tribunal and the Tokyo Tribunal, which used "shape or influence" standard for the Crimes against Peace.[23] However, it must be noted that the interest of each prosecuting State and the multiple criteria used to choose (and to eliminate) the defendants in the Tokyo Tribunal (adopted by the Prosecutors and affirmed in the Judgment) would not allow us to find anything that can properly be called a 'standard' for the selection of the defendants at the Tokyo Tribunal. If one should be compelled to find the standard of "shape or influence", it would only have functioned as a framework to allow the unlimited prosecutorial discretion and did not provide any objective criteria. Moreover, whether or not the standard chosen by the SWGCA would be a 'retreat' depends on one's legal appreciation of the relevant decisions made by the Prosecutors and affirmed by the Judges of the Tokyo Tribunal, which may bring us to the broader issue of the precedential value of the Judgment of the Tokyo Tribunal. I am not able to discuss this in detail in this article, however, it must be noted that whether or not, and to what extent, the Tokyo Judgment on Crimes against Peace may be considered as a legal 'precedent' for the ICC merits careful consideration.[24] Needless to say, "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Trial" was affirmed unanimously at the General Assembly of the UN and they were formulated by the International Law Commission in 1950 and to the extent that they were adopted in the Charter and the Judgment of the Tokyo Tribunal, they should be treated as reflecting customary international law. However, this does not mean

23 Kevin Jon Heller, Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression, *EJIL* vol. 18, 2007, pp.477-497, on the Tokyo Tribunal in particular, p.488.

24 For one of the earliest work on this issue, see Hans Kelsen, Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?, *International Law Quarterly*, Vol. I, No. 2, 1947, pp.153-171.

that every decision made at the Tokyo Tribunal has legal effect as a precedent or offers the customary rules of international law.

It must also be emphasized that the lack of an objective standard for the selection of the defendants and 'events' has been, in turn, the source of continuing debate on 'who should have been tried' and as the selection of the defendants was closely related to the content of the charges, the debate over 'what should have been tried' still continues as well.[25]

3. The 'state conduct' requirement in Tokyo: Defending Japan or defending the individuals?

One of the characteristics peculiar to the Crime of Aggression, compared with other crimes under international law, is that it requires an internationally wrongful State act.[26] Other crimes that are within the jurisdiction of the ICC, genocide, crimes against humanity and war crimes may be committed by an individual without the involvement of a State, although State participation may be more frequent than not[27]. Indeed, all the 'core crimes' of the Rome Statute are usually committed with some organizational structure behind them[28] and in the case of the Crime of Aggression, the organizational structure is a 'State'. The definition adopted at the Review Conference expresses this in the following: "Article 8 *bis* 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise con-

25 For example, see Boister/Cryer, "Omissions", *supra* (n. 9), pp. xliv-xlvi.

26 Kreß/von Holtzendorff, *supra* (n. 1), p.1190.

27 Elizabeth Wilmshurst, Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?, Mauro Politi and Giuseppe Nesi, *The International Criminal Court and the Crime of Aggression*, Ashgate, 2004, p.93.

28 Shuichi Furuya, Kojin no Kokusaisekinin to Soshikitekisihai no Kozo (Individual Responsibility for the System Criminality), *Kokusaiho Gaiko Zasshi (Journal of International Law and Diplomacy, the Japanese Society of International Law)*, vol. 109., no. 4, 2010, pp.34-66. For a critical analysis on the ICC' response to a 'systemic' crime, see Thomas Weigend, Perpetration through an Organization-The Unexpected Career of a German Legal Concept, *JICJ*, vol. 9, 2011, pp.91-111.

trol over or to direct the political or military action *of a State*, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force *by a State* against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXXIX) of 14 December 1974, qualify as an act of aggression: (…)" (emphasis added)

In the case of the Crimes against Peace at the Tokyo Tribunal, the Charter of the Tribunal only provides that it was established to try the individual (Article 1) and it had jurisdiction over the individual (Article 5). However, it defined the Crimes against Peace as: "the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Since the war was an act of State and not of a group of private individuals, it was never disputed that the Tokyo Tribunal would have jurisdiction over individuals for the State acts of Japan.

Then, what needed to be established at the Trial was that what Japan did (State act) fall under the definition of the Crimes against Peace and that the defendants were individually criminally responsible for those acts. As it has been noted at the outset, one of the two big legal issues at the Tokyo Tribunal was whether or not an individual should be held criminally responsible for the acts of Japan and the Majority Judgment decided in the affirmative, based on the same reasoning adopted at the Nuremberg Tribunal[29]. There is no need to discuss the validity of this proposition for the purpose of this article, and rather, it would be worthwhile to

29 Majority Judgment (Part A-Chapter II, The Law (a) Jurisdiction of the Tribunal), in Boister/Cryer, *supra* (n. 9), pp.79-82.

examine how this understanding of the Crimes against Peace affected the actual proceedings of the Tokyo Tribunal, particularly in respect to the defendants.

First, let us take a look at the composition of the defense team of the Tokyo Tribunal. The Japanese counsels were called through various routes and their backgrounds were very different. Some were scholars, former State officials, and attorneys. The official language of the Tribunal was English and the procedures were styled heavily on the common law, but none of the Japanese counsel had experience defending clients in a common law court. Fortunately, however, unlike the Nuremberg Tribunal, American counsels were provided to the defense team. This did help it to conduct the defense at the trial, but this composition brought confusion as well.

There was a huge divide in the Japanese defense team from the beginning to the end of the trial. It was called the divide between the 'defending the State' approach versus the 'defending the Individual' approach ("Kokka Bengo tai Kojin Bengo")[30]. As it has already been explained, since the Crimes against Peace condemns the State act and holds the individual responsible for that State act, the defense counsels' mandate was twofold: Firstly, they had to prove what Japan did was not an aggressive war or a war in violation of international law, and secondly, they had to prove that the defendants were, individually, not guilty of the charges against them. The 'defending the State' approach put emphasis on the former and the 'defending the individual' approach focused on the latter. It has been roughly characterized that the Japanese counsels were for the 'defending the State' approach whereas the American counsels pursued the 'defending the individual' approach[31]. However, a recent study shows that the picture was not that simple and

30 Noboru Kojima, *Tokyo Saiban (Jou)*, Chuokoron Shin Sha, 1971, pp. 125-127.

31 One of the Japanese defense counsel, Seijiro Takigawa, explained the difference of the approaches in this way in his book and one of the reasons why he pursued the 'defending the State' approach was that he could not have sympathy for Japanese defendants, particularly those who belonged to the military, but as a Japanese national, he felt compelled to accept the job as he thought it was unfair that the victorious State would punish the losers. Seijiro Takigawa, *Tokyo Saiban wo Sabaku (Judging the Tokyo Tribunal)*, Keibunsha, 2006, pp.94-99.

there were differences even among the Japanese counsels.[32] Indeed, before the opening of the trial, there had been efforts to establish a common policy by the Japanese government, the Ministry of Foreign Affairs, the Army, the Navy and the defense counsels and, generally, the 'defending the State' approach was considered to be primary. Nevertheless, a common policy of the defense team was never adopted due to conflicts among the ministries, the defendants and the counsels[33]. Furthermore, the political setting at that time did not allow the Japanese government to publicly form the defense policy. The lack of a common defense policy was unfortunate because all 28 defendants were charged under Count 1, which accused the Japanese of a 'grand' conspiracy to dominate Asia/Pacific during the years 1928-1945.

Logically speaking, the importance of the 'defending the State' approach is evident. If the Japanese actions were not determined to be part of the conspiracy of an aggressive war, there would be no criminal responsibility for the individuals. In this connection, it is interesting to see the order of the proceedings. The Prosecutors presented their cases by the 14 'Phases of the Events' first, and then, there were the 'Phases of the Individuals'. The Phases of the Events included, the preparation of war, the Manchurian Incident, Japan-China war, Collaborating with Germany and Italy etc. and it began on 4 June, 1946 until 24 January, 1947 and the Phase of the Individuals began on 10 September 1947 and lasted until 12 January, 1948. Correspondently, the defense counsels needed to respond to the allegations regarding the Events first, which presumably required them to adopt the 'defending the State' approach and, then, they would have been required to defend the individuals in the Phases of the Individuals.[34]

32 Noboru Kojima, *Tokyo Saiban (Ge)*, Chuokoron Shin Sha, 1971, pp.32-38.

33 Higure, *supra* (n. 7), pp. 306-314.

34 To be precise, the defense team was divided not into the Phases but in "the Divisions", such as the preparation of war, Manchuria, China, the USSA, the Pacific War. Higure, *supra* (n. 7), p.361.

However, the relationship between the approaches of 'defending the State' and the 'defending the Individual' in the actual trial was not as simple as it might look in the logical framework. One example may be taken from the case of Togo. In the phase of the Individuals, Togo adopted the 'defending the Individual' approach and claimed that he was vehemently opposed to waging a war against the US. And yet, he was the Minister of Foreign Affairs at that time. If he was against the war, whose idea was it to agree? What exactly was the responsibility of the Ministry? His decision to adopt the individual defense only made it difficult to articulate the responsibility of the Japanese government[35]. Moreover, as Professor Higure, who conducted the most recent detailed study on the Tokyo Tribunal, wrote: "It is natural for the defendant at a criminal trial to try to defend himself. In the case of the Tokyo Tribunal, the defendant needed to show that he was against the aggressive policy and was a pacifist who had tried to stop the war in order to prove that there was no *mens rea*. However, someone should have taken responsibility for things that actually happened, and the fact that no one did caused personal conflicts among the defendants. They might not have been antagonistic towards one another but it was natural for them to have different views due to their previous positions. We can roughly point out that there tended to be a conflict between 'civilian and the military', 'the Army, Navy and Ministry of Foreign Affairs' had conflicts between them, and there was a conflict between 'the administration and the command' in the military and yet, the reality was much more complex."[36] The most notable example may be found in the conflict between the Ministry of Foreign Affairs and the Navy as to the Pearl Harbor attack. Shimada, from the Navy and Togo, from the Foreign Ministry, both testified at the trial and accused each other's organization for the responsibility of the

35 Kazutoshi Hando, Masayasu Hosaka, Makoto Inoue, *Tokyo Saiban wo yomu (Reading "the Tokyo Tribunal")*, Nihonkeizaishinbunsha, 2009, pp. 322-323. In the end, the Majority Judgment did not appreciate his alleged effort to stop the war. "However, when the negotiations with the United States failed and war became inevitable, rather than resign in protest he continued in office and supported the war." Majority Judgment, in Boister/Cryer, *supra* (n. 9), p. 622.

36 Translation by the author from the original text in Japanese, Higura, *supra* (n. 7), p. 374.

'delayed' notification of the Japanese attack on Pearl Harbor[37]. Arguably, the only one defendant who tried to defend Japan ("defending the State") outright at the Phase of the Individuals was Tojo. He submitted that the Japanese policy was not an aggression. On the other hand, he also claimed that the question of whether or not a war may be justified under international law was different from who should take the political responsibility of losing the war and that he would be willing to assume this political responsibility.[38]

Between 4-12 November, 1948, the Majority Judgment was delivered at the Tribunal[39]. In the end, all the defendants were found guilty and 23 out of 25 defendants were found guilty for the 'grand' conspiracy of Japan (Count 1) The Majority Judgment did not try to define or develop its interpretation on a war or aggression or a war in violation of international treaties, or to articulate the difference between a war of aggression and a war in violation of international treaties. It stated, "The Tribunal does not find it necessary to consider whether there was a conspiracy to wage wars in violation of the treaties, agreements and assurances specified in the particulars annexed to Count I. The conspiracy to wage wars of aggression was already criminal in the highest degree." Since the Majority Judgment dismissed the counts relating to conspiracy to commit murder and war crimes, the use of conspiracy for establishment of the Crimes against Peace is striking. Moreover, when they determined the conspiracy to wage a war of aggression, they did not focus on the specific use of the armed forces but on the motive and the nature of Japanese policy.[40] In order to establish the Japanese con-

37 Higure, *supra* (n.11), 192-199. See, for example, the testimony by Shigenori Togo, 35834-35871, Shigetaro Shimada, 37020-37046, Pritchard/Zaide, *supra* (n.20).

38 Hideki Tojo's testimony, the transcript of the proceedings, 36489-36839, Ibid., Hando/Hosaka/Inoue, *supra* (n. 35), pp. 267-269.

39 The Majority Judgment was primarily written by seven Judges (those from the UK, Canada, New Zealand, the US, China, the USSR and the Philippines) and other four Judges wrote their own Opinions (those from Australia (the President of the Tribunal, Webb), the Netherlands, India and France). (Judge Jaranilla from the Philippines wrote the concurring opinion.) Higura, *supra* (n. 7), pp. 399-438.

40 The Majority Judgment states: Article 13 (a) of the Charter provides that "the Tribunal shall not be bound by technical rules of evidence. It shall…admit any evidence which it deems to have pro-

spiracy, the method that the Majority Judgment used was to rely heavily on the *history* of Japan and in fact, the Majority Judgment spent more pages on the "The Military Domination of Japan and Preparations for War, Introductory" than any other section in the Judgment.) All the differences of the opinions and even conflicts among the defendants exhibited during the trial could not negate the allegation of the 'grand' conspiracy of Japan.

4. Concluding remarks

The definitions and the conditions for the ICC to exercise its jurisdiction over the Crime of Aggression adopted at Kampala are not without criticism. However, this does not mean that there may be a better version, but it is appropriate to consider those definitions and conditions as the best available for the international community today. At the same time, however, it may also be wise to acknowledge that the future trials at the ICC on the Crime of Aggression would face both theoretical and practical difficulties. Needless to say, the ICC is a much more sophisticated judicial institution than the Tokyo Tribunal, for example, the defendants would no longer be prosecuted by the victorious States and the Rome Statute does not include the crime of conspiracy. Nevertheless, the nature of the Crime of Aggression as a 'leadership' crime and the basic structure of the Crime, that is to have both elements of the State act and of the act of the individual, remains the same.

In this article, I have tried to explain the two problems of the Tokyo Tribunal from the viewpoint of the Japanese lawyer. For so many years after the trial, the Japanese lawyers' attitude toward the Tokyo Tribunal may be characterized as being quite 'indifferent'. This attitude, in my view, is partly because the Tokyo

bative value…" The application of this rule to the mass of documents and oral evidence offered inevitably resulted in a great expenditure of time. Moreover, the charges in the Indictment directly involved an inquiry into the history of Japan during seventeen years, the years between 1928-1945. In addition our inquiry has extended to a less detailed study of the earlier history of Japan, for without that the subsequent actions of Japan and her leaders could not be understood and assessed. Boister/Cryer, *supra* (n. 9), p.76.

Tribunal was so different in so many ways from Japanese notion of a criminal trial under modern law that we had received from highly modernized European States, Germany in particular, in late 19th and early 20th century when Japan abandoned its closed-door policy and joined "the international society". Although it has been difficult for us to treat the Tokyo Tribunal as a criminal trial without hesitation, if we can find anything that might contribute to a fairer trial on the Crime of Aggression at the ICC in what happened at the Tokyo Tribunal, we may finally be able to discover a legal meaning in our extraordinary experience of the Tokyo Tribunal.

Beitrag von Prof. Dr. Philipp Osten: "The Scholarly Debate in Japan about "Crimes against Peace" in the Tokyo Major War Crimes Trial"*

I. Introduction

The Nuremberg trial and the Tokyo trial are often regarded as twin institutions in being the first international tribunals which have prosecuted and punished political and military leaders for crimes under international law. However, the Japanese counterpart to the International Military Tribunal (IMT) at Nuremberg, the International Military Tribunal for the Far East (IMTFE), as it was formally named, did not receive much attention in the international scholarly debate in the following decades and was often degraded to a mere footnote to the Nuremberg proceedings. Interestingly, the Tokyo trial and its main legal issue – the notion of crimes against peace – remained relatively unstudied even among Japanese legal scholars for a long time.

Through the course of this short lecture, I will only briefly touch upon some features of the trial, its proceedings and the judgment itself.[1] I will concentrate on the center-piece of the scholarly debate, the crimes against peace, and the reaction to and perception of this legal concept in Japan during and after the Trial, until this day. A special focus shall be put on the views of Japanese legal scholars, as their discussions are more or less unknown outside Japan.

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1 These matters mainly fall in the scope of the lecture of my esteemed colleague Prof. Ko at this symposium.

I will try to demonstrate that even though this topic has been (and still is) largely ignored or discussed in a very emotional manner, some legal concepts which are now generally recognized in international criminal law were already anticipated by some Japanese scholars more than 60 years ago.

II. Overview of the Tokyo Trial

The Allied powers established a special international tribunal in the capital of Japan in order to put on trial the wartime leaders of Japan. The principal charge against them was that they had participated in the planning and execution of aggressive war in the Asia-Pacific area. Based on an order by the Supreme Commander of the Allied Powers in Japan, General MacArthur, the Charter of the IMTFE was drafted by the International Prosecution Section; it was modeled on the Nuremberg charter, but with some adjustments, as we shall see. The charter was publicized as an attachment to a "Special Proclamation" of the Supreme Commander in 19 January 1946 and constituted the formal legal basis for the establishment of the IMTFE. It included the three categories of crimes applied in Nuremberg, i.e. besides crimes against peace, conventional war crimes and crimes against humanity. The tribunal was composed of 11 judges, appointed by the signatories of the Instrument of Surrender (with the addition of India and the Philippines), with each country also appointing a member of the prosecution section.

The proceedings of the Tokyo trial against 28 defendants indicted as "Class A" (or major) war criminals turned out to be far more time-consuming than those of its predecessor at Nuremberg. This was – along with the unfamiliarity of most Japanese defense lawyers with Anglo-American adversarial proceedings – largely due to language-related problems, in particular the immense difficulties encountered in providing translation and interpretation between the two official

courtroom languages, English and Japanese.[2] Furthermore, the number of sessions and witnesses were double those held in Nuremberg, resulting in a duration of the proceedings more than twice (nearly three times) as long as the Nuremberg precedent. Having lasted for two years, the court hearings ended in April 1948; writing the judgment took the judges another half a year. All defendants were found guilty; seven were sentenced to death, 16 to life imprisonment. The judgment was not unanimous. Five judges wrote separate opinions, including two dissenting opinions, which, however, were not read out in court. The defendants sentenced to imprisonment were all set free soon after the end of the American occupation in 1952, with the last prisoner being pardoned in 1956.

Through the public trial proceedings, held in open session, the Japanese people were able to gain access to substantial information about the devastating war for the first time. Consequently, by trying to determine the responsibility of the Japanese leaders for initiating and executing such a war, the Tokyo Trial also marked the starting point of Japan's confrontation with its past, a process that – to some extent – continues to this day. Therefore, in this respect, the Tribunal also has an important historical significance, which, together with the general reaction of the wider public is, however, too complex to be sufficiently discussed in this presentation and can only be touched upon rudimentarily.

III. Crimes against Peace on Trial: Counts and Judgment at Tokyo

Crimes against peace were the central charge of the Tokyo trial and constituted the heart-piece not only of the court proceedings, but also of the ensuing scholarly debate. Unlike the Nuremberg charter (Article 6), Article 5 of the charter of the

2 In contrast to the simultaneous interpretation (in four languages) provided at Nuremberg, the trial at Tokyo was for the most part rendered in consecutive interpretation (in two languages), which further protracted the proceedings. For a recent analysis on the language problems at the Tokyo trial see Kayoko Takeda, *Interpreting the Tokyo War Crimes Trial: A Sociopolitical Analysis*, Ottawa: 2010.

IMTFE limited the scope of war criminals to be tried at Tokyo to those who "are charged with offenses that include Crimes against Peace". In other words: no defendant was prosecuted without a charge of committing crimes against peace. As a result, nearly all (23 of 25 remaining) defendants were found guilty of crimes against peace.

While the Nuremberg IMT had only four counts for indictment, there were 55 counts in Tokyo, which were separated into three groups. In the first and most important group, the prosecution developed 36 counts pertaining to crimes against peace. The remainder of counts was indicted as "Murder" (group 2) – which was not provided for in the statute and eventually was dismissed by the tribunal – and as "Conventional War Crimes and Crimes against Humanity" (group 3). Interestingly, crimes against humanity were not dealt with separately but combined with conventional war crimes. Ultimately, no defendant was found guilty on singular charges of crimes against humanity. In comparison to this minimal focus on crimes against humanity, the focus on crimes against peace was far higher in the Tokyo trial than at Nuremberg. Or to anticipate a conclusion: as a consequence of this heavy focus on crimes against peace, the trial was examining "less *the way* Japan had conducted the war but more *the reasons* why" Japan had conducted it.[3] From a strictly legal point of view, this made the trial more vulnerable. With the notion of aggressive war as its nucleus, crimes against peace was a much more disputed concept than conventional war crimes (and even crimes against humanity), because it dealt directly with the nature and cause of war. This turned out to be considered one of the weaknesses of the trial; this point constituted the centre of the debate at the trial and in the Japanese public and it is still raised by critics in Japan today. The central role of crimes against peace – in the eyes of some scholars – is the main reason why the Tokyo trial was and is more controversial than its Nuremberg precedent.

3 *Cf.* Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, London: 2008, p. 65.

The definition of crimes against peace in Article 5 (a) of the charter of the IMFTE[4] had been constructed on the Nuremberg model, with one remarkable difference: the words "*declared or undeclared*" were added to the term "war of aggression" in order to underline the understanding that the manner in which a war was commenced (or qualified by one of the belligerent parties, respectively) was immaterial to determining its legal character (i.e., as an international armed conflict).[5] It is interesting to note that a strikingly similar wording has also been adopted in the Kampala definition of the crime of aggression for the International Criminal Court ("regardless of a declaration of war").[6] Furthermore, the term "international law" ("a war in violation of international *law,* treaties, agreements or assurances…") was inserted in the definition, supposedly in order to highlight the understanding that the criminality of aggressive war had been established under international law itself.[7]

Of the 36 counts related to crimes against peace, five were conspiracy counts and the remaining 31 were substantive counts. Most of these counts were not examined in court and/or dismissed from the judgment, as the judges considered them repetitious and redundant. In particular, the judges decided to not consider the counts that fell under the category of "planning" and "preparation" on grounds that these counts were already subsumed under the conspiracy counts. Also, all counts that fell under the category of "initiation" were regarded as necessarily being included in the "waging" of a war. Thus, out of the 36 counts,

4 "Crimes against Peace: Namely, the planning, preparation, initiation or waging of a *declared or undeclared* war of aggression, or a war in violation of international *law*, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" (italicized by the author).

5 Thus, the compliance (or non-compliance) with formal requirements for the declaration of war was irrelevant for the purpose of determining the aggressive (and therefore criminal) nature of a war. See Philipp Osten, *Der Tokioter Kriegsverbrecherprozeß und die japanische Rechtswissenschaft*, Berlin: 2003, p. 88.

6 Article 8 *bis*, paragraph 2, of the amended Rome Statute of the International Criminal Court (henceforth ICC); RC/Res.6, Annex I, of 11 June 2010.

7 *Cf.* Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Cambridge (Mass.): 2008, p. 81.

judgment was finally made on only eight counts. The first count was a conspiracy count; it epitomized all charges related to crimes against peace. It charged, in summation, that there had existed a grand plan or conspiracy to secure domination over the Asia-Pacific region by waging a war of aggression from 1928 to 1945, and that all accused had taken part in this plan or conspiracy in some form. This alleged conspiracy against world peace constituted the backbone of the indictment and was the most important single count in the Tokyo trial. The court (in its majority judgment) established that such a (single) grand conspiracy over 18 years did indeed exist. It also upheld seven substantive counts of crimes against peace, namely the waging of wars of aggression against China, the United States and five other nations. While holding that such aggression was criminal, the court, however, did not attempt to provide an express definition of "aggression". This, as we shall see, was conceived by critics of the trial as a decisive legal weakness. It leads us to the next part of this lecture.

IV. The Scholarly Debate about Crimes against Peace

The next (and main) issue to be examined is: How did Japanese scholars react to the trial?[8] In particular: How was the concept of crimes against peace discussed?

1. The Post-War Debate during and after the Trial

Already during the trial, the defense challenged all counts of aggressive war by questioning, in principle, the legality of the concept of crimes against peace and, thus, the jurisdiction of the tribunal itself. The defense lawyers claimed that the criminality of such notion was not recognized under international law; it would be tantamount to *ex post facto* legislation (retroactive application of new law) and

8 For a more detailed analysis of the Japanese scholarly debate on the Tokyo trial and of some findings in this chapter see Osten, *Tokioter Kriegsverbrecherprozeß*, *supra* note 5.

therefore would violate the *nulla poena*-principle. Furthermore, they argued that an individual could not be made criminally liable for a war which was waged by the state (act-of-state doctrine).

The court rejected these motions, however, but did not present any in-depth reasoning of its own regarding these legal questions. Instead, the majority judgment, besides stating that it was bound and empowered by the charter, simply adhered to the Nuremberg judgment.

In the words of the majority judgment:

> *"In our opinion the law of the Charter is decisive and binding on the Tribunal. This is a special Tribunal set up by the Supreme Commander under authority conferred on him by the Allied Powers. It derives its jurisdiction from the Charter. In this trial its members have no jurisdiction except such as is to be found in the Charter. (...) In the result, the members of the Tribunal, being otherwise wholly without power in respect to the trial of the accused, have been empowered by the documents, which constituted the Tribunal and appointed them as members, to try the accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter".*[9]

Furthermore, the tribunal explicitly stated that regarding the legal validity and criminality of crimes against peace it referred to and relied entirely on the reasoning presented in the Nuremberg judgment, rather than "to open the door to controversy by way of conflicting interpretations" in such fundamentally important questions of law.[10]

9 Judgment of the International Military Tribunal for the Far East, in: R. John Pritchard/Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-two Volumes*, New York: 1981, Vol. 20 (The Judgment, Part A, Chapter II, The Law, (a) Jurisdiction of the Tribunal), pp. 48435-48436.

10 *Ibid.*, Judgment, pp. 48437-48439.

As indicated previously, some judges were uncomfortable with this approach taken by the majority. The most famous dissenting opinion was written by the Indian Judge Pal, who took a defiant position towards almost all findings made by the majority judgment. He thought that aggressive war had not become punishable under international law and that conspiracy did not constitute a recognized category of offense in international law; therefore all charges pertaining to crimes against peace fell beyond the scope of jurisdiction of the tribunal.

The above-mentioned arguments of the defense attorneys and Judge Pal formed the argumentative basis for most critics of the Tokyo trial in the years after the tribunal. One of the most famous among them was the law professor Kenzo Takayanagi, who was also a member of the defense counsel at the trial. He pointed out the legal weaknesses of the tribunal and regarded the trial as a form of victors' justice which could only have a negative precedential impact. He compared the prosecutions' view that punishment of aggressive war "follows the needs of civilization and is a clear expression of the public conscience"[11] with the abolishment of the principle of legality in Nazi Germany as follows:

> *„As a matter of fact, such a vague principle when it actually operates in the administration of criminal justice is just as cruel and as oppressive as the penal doctrine which characterized the Third Reich".*[12]

On the other hand, it is interesting to note that the majority of contemporary academics and commentators in Japan expressed overall positive views of the Tokyo Trial, in spite of their awareness of the many legal short-comings of the tribunal. Leading criminal law scholars of the time such as Shigemitsu Dando held that the notion of crimes against peace (as well as crimes against humanity) could be regarded as rooting in the general principles of international law, which themselves

11 The Proceedings of the Tribunal in Open Session, in: R. John Pritchard/Sonia M. Zaide (eds.), *supra* note 9, Vol. 2 (The Case for the Prosecution), p. 435.

12 Kenzo Takayanagi, *The Tokio Trials and International Law: Answer to the Prosecution's Arguments on International Law Delivered at the International Military Tribunal for the Far East on 3 & 4 March 1948*, Tokyo: 1948, pp. 11-12.

could be perceived as a manifestation of natural law. Such manifest natural law could therefore be applicable as "positive law in the process of making".[13] Thus, these categories of crime were to some degree susceptible to doubts in the light of the principle of legality. However, in his view the strict application of this principle in international law in the same traditional understanding as in domestic criminal law was not feasible, even if this seemed desirable in principle. It would contradict the purpose of the principle of legality if it would be interpreted and used in order to protect those who abused the state's power: "In the sphere of international law, in particular the law concerning war crimes, this law by itself is constructed in order to restrict the unjust exercise of state power".[14] Therefore, in light of the ultimate protected legal value of world peace, some adjustments to this principle were necessary. Dando eventually established three purposes of punishment in international criminal law: (1) a general deterrent effect of preventing future wars of aggression, (2) a special deterrent (and retributive) effect vis-à-vis the individual perpetrator (who's apprehension prevents him from initiating another war and thus secures society), and (3) the ultimate purpose of realizing justice (and thus strengthening faith in the international rule of law).[15]

Similar views were also expressed by the very influential criminal law scholar Seiichiro Ono, who pointed out that the principle of legality was a fundamental principle of justice, but not the only principle of justice and by far not an absolute principle. He also – with view to the preceding Nuremberg Judgment – held that the legal grounds for individual criminal liability of leaders of an aggressive state under international law could be compared to the (generally accepted) legal

13 Shigemitsu Dando, *Senso hanzai no rironteki kaibo* (A Dogmatic Analysis of War Crimes), first published in: Choryu Vol. 1 Nr. 7 (1946); reprinted in: Keiho no kindaiteki tenkai (The Modern Development of Criminal Law), Tokyo: 1948; amended edition Tokyo: 1952, p. 172.

14 *Ibid*., p. 173.

15 *Ibid*., pp. 179 *et seq.*

concept of making representatives of juristic persons criminally responsible for certain offenses committed by the legal entity as such.[16]

The leading authority on international law in Japan at that time, professor Kisaburo Yokota, was also favorably disposed toward the Tokyo trial. In his assessment of the trial, he, in essence, emphasized the "revolutionary" importance of the trial for the future development of international law in what he regarded as a transitional period in which the traditional notion of "war crimes" (i.e., violations of *ius in bello* etc.) necessarily had to be re-adjusted in order to incorporate the planning and execution of a war of aggression (i.e., *ius contra bellum*).[17] With regards to the criminality of waging an aggressive war, he rejects the criticism concerning *ex post facto* law (i.e., the alleged retroactive punishment of crimes against peace) and argues as follows:

> *"The question is whether the act under consideration possesses a substantial criminal character, and whether there are any legitimate reasons for the act to be punished".*[18]

If there are sufficient substantial reasons, one should not ignore such substance on grounds of legal technicalities such as a purely formalistic understanding of the principle of legality. Thus, as long as the crime itself is manifested sufficiently (i.e. in international treaties renouncing war, in particular the Kellog-Briand Pact of 1928), the punishment in its character as a concrete sanction for a specific illegal act does not necessarily have to be stipulated *a priori*.[19]

16 Seiichiro Ono, *Nyurunberugu-hanketsu no horitsu kenkai* (The Legal Conclusions of the Nuremberg Judgment), Horitsu Shinpo Nr. 734 (1946), pp. 38-40.

17 Kisaburo Yokota, *Senso hanzai-ron* (A Treatise on War Crimes), Tokyo: 1947, pp. 3 *et seq*., 130 *et seq*.

18 *Ibid.*, p. 5 (preface).

19 *Ibid.*, pp. 131, 136 *et seq*.

Several years after the tribunal, Yokota again held that "the character of aggressive war as an international crime has been established beyond doubt (…)."[20]

Overall, the views and arguments put forward by these first scholars of the Tokyo trial can be summed up as follows. Against the background of democratizing reforms under the Allied Occupation, the general view of the trial was positive and optimistic; the trial was regarded as an "important step forward". The legal concept of crimes against peace was seen as justified or even necessary and also legitimate on legal grounds. The principle of legality was re-conceptualized in order to advance the higher cause of justice and dismiss a narrow, formal or technical understanding of legality.

2. The Post-Occupation Time (1950s to 1970s)

In the decades after the end of the American occupation,[21] the Tokyo trial, however, gradually faded away as subject of legal debate in Japan. Among the Japanese people, general apathy towards the trial increased. In the light of the Vietnam War and the reported atrocities there, disillusionment spread among the academics. The developments of realpolitik in the Cold War era provided a fertile field for critics of the trial, who saw themselves confirmed in their view that the tribunal was essentially a one-sided victors' justice imposed on the vanquished nation. Accompanying this kind of criticism, a new self-perception of the Japanese as victims of the war took hold in the public debates to some degree (i.e., through the memories of the Allied air raids on cities such as Tokyo and the dropping of the atomic bomb on Hiroshima and Nagasaki).

20 Kisaburo Yokota, *War as an International Crime*, in: Grundprobleme des Internationalen Rechts. Festschrift für Jean Spiropoulos, Bonn: 1957, p. 460.

21 The American military occupation ended with the San Francisco Peace Treaty, which came into effect in 1952 and restored Japan's sovereignty.

The Tokyo trial and its legal problems completely disappeared from the memory and focus of research of criminal law scholars (even those who had initially conveyed positive assessments of the trial, such as Dando), whereas international law scholars became reluctant to conduct research on such a politically mined field of law.

3. From the 1980s to today

After decades of scholarly neglect, a revival of interest among academics towards the Tokyo trial took place in the early 1980s. Until then, the tribunal had, in sum, either been ignored in general or debated emotionally (and ideologically) among a rather limited circle of academics concentrating on the veracity of the tribunal's historical record, i.e. whether Japan conducted aggressive wars and committed war crimes or not. During the 1980s, however, attempts to overcome this kind of dualisms in the (often than not irreconcilable) debate and to re-investigate the Tokyo trial from a broader perspective started to emerge. Unlike the majority of the early trial analysts, who – as we have seen – had evaluated the trial positively, and the trial critics, who rejected the tribunal as a pseudo-legal farce, this new post-war generation of scholars and today's young researchers focus on the trial's "universal" significance or the general lessons that could be learned from it.

In this renaissance of studies on the Tokyo trial, at first historians played a central part, drawing on a large number of newly available trial-related records. They introduced new aspects in the debate on the Tokyo trial by shedding light on historical facts which the trial had overlooked or which had been omitted for political reasons, such as the biological war-fare unit 731 or the so-called "comfort women" who were recruited as sex slaves by the Japanese military in the Asian countries occupied by Japan, along with the problem of the Emperor's culpability. In essence, they criticized the tribunal for its historical selectivity and its failure to

establish accountability for some of the gravest Japanese war crimes; thus, the Tokyo trial is perceived as being insufficient or even an obstruction to coming to terms with the past.[22]

The most recent generation of scholars – interestingly, mainly female researchers educated abroad such as the historian Yuma Totani and the political scientist Madoka Futamura – , however, again attempts to re-assess the legal significance of the Tokyo trial. This re-assessment takes place in the light of the quantum jump-like progress in the field of international criminal justice that occurred in the years following the end of the Cold War, leading up to the establishment of the two *ad hoc*-tribunals of the United Nations for the former Yugoslavia and Rwanda and ultimately to the ICC. These researchers (again, mostly historians, not legal scholars), in sum, attempt a reappraisal in particular of the findings of the Tokyo tribunal regarding the legal doctrine of individual responsibility for crimes against peace. In their view, the prohibition of aggressive war in modern international law and the – at that time still only nominal – inclusion of the crime of aggression in the jurisdiction of the ICC[23] in order to punish individual perpetrators reaffirms and underlines the long-term legal significance of the trial on the way to furthering international rule of law.[24]

In my opinion, such kind of reappraisal is correct in its assessment that today's order of international criminal law to some extent resembles the initial aims and ambitions of the Tokyo trial at its outset and confirms some legal findings of the judgment. However, such an assessment reveals the tendency of resorting to a

22 See for instance Kentaro Awaya (with NHK reporters), *Tokyo Saiban he no Michi* (The Path to the Tokyo Trial) [Publishment accompanying a documentary series of the Japanese public broadcasting corporation NHK under the same title], Tokyo: 1994, p. 212; Kentaro Awaya, *The Tokyo Trials and the BC Class Trials*, in: Marxen, Klaus / Miyazawa, Koichi / Werle, Gerhard (eds.), *Der Umgang mit Kriegs- und Besatzungsunrecht in Japan und Deutschland*, Berlin 2001, pp. 39 *et seq*.

23 *Cf.* former Paragraph 2 of Article 5 of the Rome Statute, now deleted in accordance with RC/Res.6, Annex I, of 11 June 2010.

24 See Totani, Tokyo War Crimes Trial, *supra* note 7, p. 4 *et* pp. 259 *et seq*. See also – for a slightly less affirmative view – Futamura, War Crimes Tribunals, *supra* note 3, pp. 13 *et seq*., 147 *et seq.*

largely result-oriented method of argumentation, as it is not always able to provide sufficient proof of a causal impact of the Tokyo judgment on the establishment and further development of specific legal institutes of modern international criminal law. On the other hand, it is of course appropriate to say that the Tokyo trial, along with its Nuremberg counterpart, has contributed to codifying new legal principles and constitutes the starting point of the international criminal justice system.

In this context it also seems noteworthy that the recent reappraisal of the trial, although primarily conducted by a young generation of Japanese scholars,[25] was – due to their affiliation with American and British universities – initially publicized entirely in English and thus took place completely outside of Japan (with so far only very limited domestic repercussions). In a strict sense, it may even be inappropriate to describe this debate as a "Japanese" debate.

V. Concluding Remarks

In conclusion, perhaps the most notable characteristic of Japan's (scholarly and general) debate about the Tokyo trial and crimes against peace is the contradictory (and binary) way in which the significance (or futility) of the trial has been discussed in the past six decades. Looking back upon this debate, the most surprising finding is that some of the most perceptive assessments were publicized by legal scholars during or shortly after the trial. The legal reasoning and perspectives adopted by this first generation of scholars anticipated the long-term significance of the new legal concepts applied by the tribunal. With regards to crimes against peace, no convictions for this crime (or the crime of aggression) have so far taken place after Nuremberg and Tokyo. Thus, these scholars may

25 Outside of Japan, some detailed legal deductions can also be found in the recent analysis of the tribunal by Neil Boister/Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford: 2008.

have been "over-optimistic" about the future progress of prosecuting aggressive war, but they correctly assessed the contribution of the Tokyo trial to the general development of criminalizing aggressive war under international law and to the emerging international justice system.

It should, however, not be overlooked that while such assessments of the first generation of commentators have "generally stood up to the test of time, they have found virtually no place in public remembrance of the Tokyo trial"[26] and are almost forgotten today, even among legal academics. Instead, criticism pertaining to victors' justice has influenced the Japanese postwar debates more decisively and has prevented the legal legacy of the trial from taking firm roots in Japan. It seems to me not inappropriate to say that this constitutes a major quandary of the Tokyo trial and its perception in Japan up to this day.

It goes without saying that this debate forms the background for and will influence (to some degree) the future discussions in Japan regarding the Kampala compromise on the crime of aggression – a topic that will be expounded upon later today in a separate session.

26 Totani, Tokyo War Crimes Trial, *supra* note 7, p. 261.

Beitrag von Prof. Dr. Thomas Weigend: "In general a principle of justice" The Debate about the Principle of Legality and the "Crime against Peace" in the Wake of the IMT Judgement of Nuremberg

More than 60 years after the judgment of the International Military Tribunal against the leading German war criminals, it is difficult for us to understand the impact the judgment of Nuremberg had on the contemporaries. Most likely, many Germans felt relieved that the men who had brought destruction and shame over their country were sentenced to death or to lengthy prison terms. Justice had finally been done; and the proverbial man on the street may not have been terribly interested in what legal headings were used to achieve that result.

In a sense, that attitude may well have been justified: As long as they were in power, the National-Socialist leaders convicted by the Nuremberg tribunal had cared about the law only to the extent that it provided conventional instruments for achieving their nefarious policies. In the eyes of many observers, it must have bordered on cynicism for the defense to advance legal arguments against the conviction of their clients. And yet, some of the charges brought against the defendants created difficult legal questions, and the defense, although successful only with respect to three defendants, can certainly not be faulted for bringing these problems to the attention of the tribunal.

The charge of war crimes did not raise much legal controversy since it could be based on customary international law. Crimes against humanity were a novel concept, but the argument could be made that these crimes were but an application of general rules common to all civilized nations. The charge of preparing and wa-

ging a war of aggression or in violation of international treaties, with its ancillary forms of conspiracy and complicity, clearly was more problematic.

After the close of the Nuremberg trial, writers speculated why the United States and the Soviet Union had been adamant in including aggressive war in the London charter and in fact made the Crime against Peace one of the main issues at Nuremberg, even though they could easily have foreseen that this crime was bound to raise the objection that it had not existed in international law (or, for that matter, in national law) at the time when the defendants initiated the Second World War. Perhaps the best explanation is that given by Jonathan Bush: "Criminal aggression provided a … label, a way of thinking about what was widely felt to be the big issue, the war."[1] There may have been the feeling that bringing the issue of waging war before a court of law was the only feasible alternative to summarily executing those regarded as responsible for triggering the tragedy that had cost so many millions of lives.[2]

Contrary to the wishes of the Prosecution, the IMT limited the reach of the concept of conspiracy to commit the Crime against Peace to those defendants who were knowingly involved in activities "not too far removed from the time of decision and of action"[3], and on that basis acquitted 14 out of 22 defendants whom the prosecution had charged with conspiracy.[4] Similarly, the Tribunal convicted of preparing for or waging a war of aggression only those defendants who

1 *Jonathan A. Bush*, The „Supreme … Crime" And Its Origins: The Lost Legislative History Of The Crime Of Aggressive War, 102 Columbia Law Review 102 (2002), 2324 at 2364.

2 Cf. *Hans Ehard*, Der Nürnberger Prozeß gegen die Hauptkriegsverbrecher und das Völkerrecht, SJZ 1948, Sp. 353, 364; *Henry L. Stimson*, The Nuremberg Trial: Landmark in Law, Foreign Affairs 25 (1947), 179-180

3 International Military Tribunal, Case against Hermann Wilhelm Göring et al., in Trial of the Major War Criminals before the International Military Tribunal, vol. I, 1947, at 225.

4 The persons convicted of conspiracy to wage a war of of aggression were military leaders Göring, Keitel, Raeder and Jodl, party leaders Hess and Rosenberg, and foreign ministers von Neurath and Ribbentrop.

contributed to the initiation of the war in an important and "aggressive" role.[5] Through this limitation, the Tribunal drew precise contours of the crime of aggression. It avoided the risk of using the Crime against Peace as a dragnet to catch everybody actively involved with National-Socialist policies.

In the following remarks, I will concentrate on the echo that the IMT judgment against the main war criminals has found in legal circles. Somewhat surprisingly, the initial reaction of German jurists to the judgment of 1946 was muted. *Susanne Jung*, who has written a comprehensive analysis of the legal problems of the Nuremberg trials, explains this phenomenon by the fact that German lawyers active at the time were either occupied with more pressing problems, such as the legal situation of Germany after the occupation, or were personally involved in the criminal trials against NS leaders and therefore hesitated to publish their views. It was, moreover, psychologically difficult to find fault with the Nuremberg judgment on what to many must seem petty or technical legal grounds, when the trial had unveiled atrocities of a magnitude that few people could even have imagined.[6]

The main legal issue that troubled critics of the judgment was the principle *nullum crimen sine lege*, and it was obviously the Crime against Peace, which had never before even been discussed in a criminal court, that raised the greatest concern.

Vagueness of the offense description was one aspect of the principle of legality that was cited by critics of the London charter and the ensuing judgment of the IMT: *Hans-Heinrich Jescheck*, in his monumental monograph on the responsibility of state organs under international criminal law, emphasized that criminal law provisions must under all circumstances be precise so that they can fulfill their

5 Cf. *Hans Ehard*, Der Nürnberger Prozeß gegen die Hauptkriegsverbrecher und das Völkerrecht, SJZ 1948, Sp. 353, 364; *Henry L. Stimson*, The Nuremberg Trial: Landmark in Law, Foreign Affairs 25 (1947), 179-180.

6 See *Susanne Jung*, Die Rechtsprobleme der Nürnberger Prozesse, dargestellt am Verfahren gegen Friedrich Flick, 1992, 151.

educative function[7], and he – as well as other German writers[8] – found the wording of Article 6 IMT Charter lacking in that regard. The offense descriptions, *Jescheck* claimed, were reminiscent of the Soviet legislative method of simply listing key words rather than describing the forbidden act.[9]

But this was a rather technical issue compared with the main fault *Jescheck* and others found with the Crime against Peace: that it had simply not existed at the time of the acts in question, which were committed between 1937 and 1941. Any application of Article 6 (a) of the London Charter therefore was bound to violate the prohibition of *ex post facto* criminal punishment.[10] Undoubtedly, there were examples of past aggressors who had suffered after having been overpowered by their opponents; they were either summarily killed or, as in the case of Napoleon I, banished as a disturber of international peace.[11] But never before had any leader of an aggressor country been convicted of a criminal offense for waging war.

Justice Robert Jackson, the chief prosecutor at Nuremberg on behalf of the United States, in 1946 indirectly acknowledged the novelty of the crime of aggression but contended that "when representatives of the four nations ... set their signatures to the Agreement of August 8, 1945 in London, the old order, by which all war was legal, visibly passed away. I think it already had passed away and that the London Agreement only recognized an evolution that already had been consummated."[12] The obvious tension in Justice Jackson's statement – did the "old order" pass away in London, or had it passed away before? – was indeed the crux of the

7 *Hans-Heinrich Jescheck*, Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht, 1952, 234-235.

8 Cf. *Georg Dahm*, Zur Problematik des Völkerstrafrechts, 1956, 57; *Hans Leonhardt,* The Nuremberg Trial: A Legal Analysis, Review of Politics 11 (1949), 449, 453.

9 *Jescheck* (note 7), 235.

10 See, e.g., *Dahm* (note 8), 58; *George A. Finch,* The Nuremberg Trial and International Law, 41 American Journal of International Law 41 (1947), 20, 28; *Jescheck* (note 7), 241-242.

11 Cf. *Jescheck* (note 7), 30-33; *Leonhardt* (note 8), 454-456.

12 *Robert Jackson*, Foreword, in: *Sheldon Glueck*, The Nuremberg Trial and Aggressive War, 1946, p. x.

matter. It is one thing to say that the Allies took advantage, in 1945, of a favorable climate for creating a novel offense of international criminal law, with application to future cases of aggression;[13] but it is quite another thing to contend that this offense had already been the law in the late 1930s, when the National-Socialist leaders developed their plans to subjugate – by force, if needed – Austria, Czechoslovakia, and Poland.

The International Military Tribunal approached this issue in an ambivalent fashion. In a famous passage, the judges claimed that "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."[14] Importantly, the occupational powers' right to legislate was supposed to include the authority to make *retroactive* criminal law. The Tribunal based this authority on the (questionable) assertion that "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice"[15].

But the judges obviously were not completely satisfied with this allegation of raw occupational power.[16] They therefore went on to explain that "the Charter is not an arbitrary exercise of power on the part of the victorious Nations, but … is the expression of international law existing at the time of its creation."[17] It is this claim that gave rise to a spirited debate, not only in Germany but also in the United States.

13 This is the interpretation give to the events by *Jescheck* (note 7), 179-180; see also *Leo Gross,* The Criminality of Aggressive War, American Political Science Review 41 (1947), 205, 220.

14 IMT Judgment (note 3), 218.

15 IMT Judgment (note 3), 219.

16 One argument against the foundation of the Nuremberg judgment on occupation law is the fact that Art. 6 of the London Charter asserted the IMT's jurisdiction "for the trial and punishment of the major war criminals of the European Axis countries" and thus went well beyond occupied Germany. See *F.B. Schick,* The Nuremberg Trial and the International Law of the Future, American Journal of International Law 41 (1947), 770, 781.

17 IMT Judgment (note 3), 218.

There were those who simply referred to the "progressive" character of international law and claimed that customary law even before the Second World War had recognized the criminality of waging aggressive war.[18] One argument in point referred to Art. 227 of the Versailles Treaty of 1919, which had charged the German Kaiser Wilhelm II "for a supreme offence against international morality and the sanctity of treaties". Although Britain and France had meant to actually take Kaiser Wilhelm to trial for his part in starting the First World War, the United States and Japan successfully opposed this idea,[19] so that the "charge" in the peace treaty ended up as a mere moral condemnation, to be determined by a "special tribunal" which, as is well known, was never constituted. The "case" of Kaiser Wilhelm thus failed to establish an international crime in any juridical sense.[20]

To bolster its contention that the Crime against Peace had already been in existence, the IMT drew a parallel between the Crime against Peace and war crimes: The 1907 Hague Convention on the Law of Land Warfare, the Tribunal argued, nowhere declared that certain violations were crimes, and yet "for many years past … military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention"[21]. Why should it be different with the Crime against Peace, which was, as the judges wrote, "of much greater moment than a breach of one of the rules of the Hague Convention"[22]?

18 For a typical statement, see *Quincy Wright*, The Law of the Nuremberg Trial, American Journal of International Law 41 (1947), 38, 59.

19 See *Susanne Jung*, Die Rechtsprobleme der Nürnberger Prozesse, dargestellt am Verfahren gegen Friedrich Flick, 1992, 141-142 with references.

20 Art. 227 (3) Versailles Treaty did not in any way speak of the possibility of imposing criminal punishment but provided that "in its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed." See also *Wilhelm Grewe*, Referat: Über das Völkerrecht des Nürnberger Prozesses, in: Stuttgarter Privatstudiengesellschaft (ed.), Nürnberg als Rechtsfrage, 1947, 7, 37-38; *William Schabas,* Origins of the Criminalization of Aggression: How crimes Against Peace Became the „Supreme International Crime", in: Mauro Politi und Giuseppe Nesi (eds.), The International Criminal Court and the Crime of Aggression, 2004, 17, 21.

21 IMT Judgment (note 3), 221.

22 IMT Judgment (note 3), 221.

The difference, as *Hans Kelsen* was quick to point out, lay in the fact that many states had adopted the war crimes named in the Hague Convention into their national legislation and had thereby declared them to be criminal offenses – something that no state had done with any prohibition of aggressive war that international law may have provided for.[23]

In another attempt to show that customary international law had recognized the criminality of waging aggressive war, the Tribunal cited resolutions and draft conventions of various international bodies presented in the years between the World Wars. These instruments had in common that they purported to prohibit the use of war as a means of resolving conflict between nations, and some explicitly called aggressive war an "international crime".[24] Yet most commentators, both in Germany[25] and the United States[26], rejected the Tribunal's attempt to infer the existence of customary law from what were essentially failed attempts to reach an agreement. In the 1920s and 1930s, these attempts foundered – as they were to do for many more years – on the impossibility to agree on a definition of aggressive war, coupled with the states' concern for their sovereignty.[27] Moreover, the designation of aggressive war as an "international crime" was never backed up by providing sanctions for individuals and was more likely a rhetorical device ex-

23 *Hans Kelsen,* Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? International Law Quarterly 1(1947), 153, 160-161; see also *Helmut Quaritsch*, Nachwort, in Helmut Quaritsch (ed.), Carl Schmitt: Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz „Nullum crimen, nulla poena sine lege", 1994, 125, 160-162.

24 IMT Judgment (note 3), 221-222. For a comprehesive list of such draft instruments, see *Glueck* (note 12), 27-33.

25 See *Dieter Haaß*, „Nulla poena sine lege" im nationalen und internationalen Recht, Diss. Heidelberg 1955, 15-18; *Horst Moltrecht,* Das strafrechtliche Rückwirkungsverbot im Völkerrecht unter besonderer Berücksichtigung des Londoner Statuts für den Internationalen Militärgerichtshof, Diss. Göttingen 1953, 114-117; *Paul Ratz,* Über die völkerrechtlichen Grundlagen des Londoner Statuts vom 8. August 1945 und des Kontrollratsgesetzes Nr. 10, Archiv des Völkerrechts 3 (1951-52), 275, 298-299.

26 See *Schick* (note 16), 784.

27 See *Jung* (note 19), 143-144.

pressing moral indignation than a serious attempt to establish individual criminal liability of politicians or military leaders.[28]

The cornerstone of the Tribunal's argument, as is well known, was the General Treaty for the Renunciation of War, better known as Briand Kellogg Pact. This international treaty, concluded in Paris in 1928, had been ratified by 63 nations, notably including Germany and Japan. In Article I of the Pact, the parties "solemnly declared" that they "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Article II stated that only pacific means were to be used for the resolution of conflicts. Nowhere did the Pact indicate what sanctions might apply if one party or its representatives failed to adhere to the renunciation of war except that, according to the Preamble, "any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty".

The IMT nevertheless relied on the Briand Kellogg Pact for its argument that the waging of aggressive war had been a crime under international law in the late 1930s. The judges declared: "After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing."[29]

This explanation proved to be less than persuasive. Critics in Germany and beyond pointed out the *non sequitur* in the IMT's argument: It may well have been true that war, at least for those states who had ratified the Pact, was "illegal in international law". But this proposition certainly did not prove that those who pre-

28 For a thorough analysis of the language of contemporary legal instruments, see *Gross* (note 13), 211-220.

29 IMT Judgment (note 3), 220.

pared or waged a war were "committing a crime in so doing", as the Tribunal had declared. Writers indicated several flaws in the Tribunal's reliance on the Briand Kelogg Pact: first, the Pact did not specifically deal with wars of aggression but renounced resort to *any* war (even though some states parties, such as the United States, specifically declared that the Pact did not restrict their right to self-defense); second, the Pact only concerned the legal obligations of states, not of individuals[30]; and third, the consequences of breaching the Pact were clearly limited to the loss of the benefits flowing from the Pact, that is, the protection from being subject to war-like military attacks. Neither the wording of the treaty nor its materials in any way suggested that criminal liability was envisaged for violating the duty to resolve conflicts peacefully.[31] If the nations that had concluded the Briand Kellogg Pact had indeed meant to attach such far-reaching, novel consequences to it, one would have expected them to stigmatize as criminal those acts of aggression that occurred after the conclusion of the Pact, such as Italy's assault on Abessinia or the occupation of parts of China by Japan. But no such reaction occurred.[32] *Carl Schmitt*, writing, in the summer of 1945, an expertise that was meant to be used for the defense of Friedrick Flick, stated that the Briand Kellogg Pact was a treaty without definitions, without sanctions and without institutions.[33] In a rare instance of agreement with *Carl Schmitt*, the eminent *Hans Kelsen*, in an article on the Nuremberg judgment published in 1947, explained the matter in vary similar terms: "To deduce individual criminal responsibility for a certain act from the mere fact that this act constitutes a violation of international law, to

30 *Dahm* (note 8), 48; *Finch* (note 10), 30, 33; *Jescheck* (note 7), 209-210; *Hans Kelsen*, The Rule against ex post facto Laws and the Prosecution of the Axis War Criminals, Judge Advocate Journal 1945, 8, 10; *Leonhardt* (note 8), 463.

31 *Glueck* (note 12), 21-22; *Gross* (note 13), 209-210; *Leonhardt* (note 8), 463-464; *Max Radin,* Justice at Nuremberg, Foreign Affairs 24 (1946), 369, 380 (claiming that "the moral disapproval of the world" was the sanction foreseen by the drafters of the Pact).

32 See *Hans Ehard*, Der Nürnberger Prozeß gegen die Hauptkriegsverbrecher und das Völkerrecht, 1948 Süddeutsche Juristenzeitung 1948, 353, 363-364; *Grewe* (note 20), 43.

33 *Carl Schmitt*, Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz „Nullum crimen, nulla poena sine lege" (Helmut Quaritsch, ed., 1994), 46.

identify the international illegality of an act … with its criminality, meaning individual criminal responsibility for it, is in contradiction with positive law and generally accepted principles of jurisprudence."[34]

Aware that the Briand Kellogg Pact did not provide for individual criminality, the Prosecution at Nuremberg had advanced a different argument to show that the Pact had nevertheless fundamentally changed the legal situation: If war as such had been declared to be illegal, then the killing, wounding and destruction incident to any war lost its legal protection, so that anybody involved in these acts could be punished as an ordinary criminal for murder, mayhem or destruction of property. Or, as *Robert Jackson*, with characteristic rhetorical flourish, put it in his opening speech: "The very minimum legal consequences of the treaties making aggressive wars illegal is to strip those who incite or wage them from every defence the law ever gave, and to leave war-makers subject to judgment by usually accepted principles of the law of crime."[35]

Again, the fallacy of this argument was quickly detected, among others, by *Hans Kelsen*. He explained that the lack of criminality of killings, woundings etc. in a war is not based on any rule of international law but that *national* laws exempt these acts from their criminal laws, regardless of whether the military action in question was *bellum iustum* or the state had waged an aggressive war in violation of international law.[36]

34 *Kelsen* (note 23), 156.

35 Opening Speech by Mr. Justice Robert Jackson, in: The Trials of German Major War Criminals by the International Military Tribunal sitting at Nuremberg Germany, Opening Speeches of the Chief Prosecutors, London 1946, 39. Robert Jackson's opening speech can also be found on http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/. The argument may first have been introduced into the considerations of the United States side by William Chanler in his correspondence with Sheldon Glueck, and was later approved by President Franklin D. Roosevelt; for details see *Bush* (note 1), 2363, 2403, 2415. For a similar argument of a German lawyer, see *Otto Küster,* Koreferat, in: Stuttgarter Privatstudiengesellschaft (ed.), Nürnberg als Rechtsfrage, 1947, 70, 83.

36 *Kelsen* (note 23), 157.

As a preliminary conclusion, we are bound to state that the IMT had failed to convince the legal community of the proposition that an international crime of aggression existed at the time when the defendants acted. But there was yet the primary, more radical line of argument that the Tribunal had advanced: that it was not bound by the prohibition of creating criminal law *ex post facto*, because this prohibition was no more than "in general a principle of justice"[37] – a principle, as one must infer, that permitted exceptions.

The basis of this argument lies in the distinction between domestic criminal law and international law: only domestic criminal law, the supporters of the IMT argued, is bound by the principle *nullum crimen sine lege praevia*, whereas international law grows in an organic, unregulated fashion and therefore cannot be determined by rigid rules.[38] Some authors drew a parallel between international law and the common law,[39] others found the supremacy of British parliament to be closer to the way international treaties create international law without being bound by fixed principles[40]. *Herbert Wechsler*, who was to become the leading American criminal lawyer of his generation, in 1947 also made an eloquent plea for recognizing the "otherness" of international criminal law: "To be sure, we would demand a more explicit authorization for punishment in domestic law, for we have adopted for the protection of individuals a prophylactic principle absolutely forbidding retroactivity ... International society, being less stable, can afford less luxury. We admit that in other respects. Why should we deny it here?"[41]

37 IMT Judgment (note 3), 219.

38 The IMT expressed this idea thus: "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."; IMT Judgment (note 3), 221.

39 See, e.g., *Glueck* (note 12), 89; *Henry L. Stimson*, The Nuremberg Trial: Landmark in Law, Foreign Affairs 25 (1947), 180, 185 ("All case law grows by new decisions, and where those new decisions match the conscience of the community, they are law as truly as the law of murder.").

40 *Gross* (note 13), 222-224.

Yet there were others who took the position that *nullum crimen sine lege* had indeed become a general rule of law recognized by all civilized nations, and could therefore not be neglected when trying an individual before an international tribunal.[42] Writing in 1994, German public law professor *Helmut Quaritsch* suggested that respect for the prohibition of retroactive criminal law is particularly important in the context of armed conflicts: the vanquished stands before the victor defenseless, he writes; to deny him the protection of *nullum crimen sine lege* means to deliver him to the mercy of the victor, who can arbitrarily define new crimes and fix sentences for their violation.[43] Finally, it has correctly been pointed out that international law may well permit retroactivity in general, but that different rules ought to apply as soon as international law creates criminal offenses: At the end of the Nuremberg deliberations stood a gallows, wrote *Eberhard Schlepple* in 1948, and not a conference table for the peaceful agreement on improved methods of international cooperation.[44]

In this debate, the IMT avoided taking a clear position beyond the single sentence claiming *nullum crimen* to be a mere "principle of justice". If, then, exceptions were possible, the discussion shifted to the question on what grounds such exceptions might be justified. One argument raised in this context referred to the fact that German legislation had in 1935 restricted the reach of the *nullum crimen* principle, and that the National-Socialist leaders tried in Nuremberg certainly had

41 *Herbert Wechsler*, The Issues of the Nuremberg Trial, Political Science Quarterly 62 (1947), 11, 25. See also *Stefan Glaser*, La Charte du Tribunal de Nuremberg et les nouveaux principes de droit international, Schweizerische Zeitschrift für Strafrecht 63 (1948), 23; further examples are cited in *Gerhard Hoffmann*, Strafrechtliche Verantwortung im Völkerrecht, 1962, 142-143; *Jung* (note 19), 147.

42 *Leonhardt* (note 8), 469-470; *Moltrecht* (note 25), 89-90 (showing that the prohibition of *ex post facto* criminal law was recognized even in common law countries); *Quaritsch* (note 23), 164-168; see also *Larry May*, Aggression and Crimes against Peace, 2008, 153 (asserting that "the principle of legality" is a nonderogable principle in international law).

43 *Quaritsch* (note 23), 169. See also *Dahm* (note 8), 61 (warning that any intervention in violation of international law, any act of state organs in the Cold War might retroactively be defined as criminal).

44 *Eberhard Schlepple*, Das Verbrechen gegen den Frieden und seine Bestrafung, 1983 (written in 1948), 83.

never been champions of a strict interpretation of criminal laws as long as those laws were not applied to themselves.[45] *Robert Jackson* in his opening speech at Nuremberg put this argument with snide sarcasm: "It may be said that this is new law, not authoritatively declared at the time [the defendants] did the acts it condemns, and that this declaration of the law has taken them by surprise. I cannot, of course, deny that these men are surprised that this is the law; they really are surprised that there is any such thing as law. These defendants did not rely on any law at all. Their program ignored and defied all law."[46] The consensus was, however, that the IMT was correct in not stooping to the defendant's low standards – even those who defy the law must be adjudicated in accordance with the law.[47]

Another argument against the applicability of *nullum crimen sine lege* in the concrete case started from the assumption that the prohibition of *ex post facto* criminal laws refers only to conduct that comports with common morality or, as common lawyers tend to say, conduct that is not *malum in se*. If the actor knows that he is doing something that is forbidden, so the argument continues, he has no reason to complain about retroactive criminalisation, for he has taken the risk of punishment.[48] On this premise, *Hans Kelsen* argued that "at the time the Briand-Kellogg Pact and certain non-aggression Pacts were violated by the Axis powers, the conviction that an aggressive war is a crime was so generally recognized by the public opinion of the world, that subsequent international agreements providing individual punishment for these violations of International Law were certainly not unforeseeable".[49] In response, German jurists questioned the premise on which this argument rested. The *nullum crimen* barrier could be overcome

45 See, e.g., *Küster* (note 35), 85-86.

46 *Jackson* (note 35), 37.

47 *Ehard* (note 32), 361; *Grewe* (note 20), 16.

48 See IMT Judgment (note 3), 219: "To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong …".

49 *Kelsen* (note 30), 10. See also *Glueck* (note 12), 84.

only if the actor could have known that his conduct was in fact *punishable* under the law, they argued; the fact that the conduct in question was immoral or *deserving* of punishment was insufficient.[50]

Finally, there was the view that convicting the major war criminals was simply more important, as a matter of justice, than adhering to the principle *nullum crimen sine lege*. Again citing *Hans Kelsen*: "Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force … To punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions."[51] Or, as the Tribunal put it, after stating that the defendant must have known that attacking neighboring countries was wrong, "so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished".[52]

This may indeed be the heart of the matter. However hard the judges of the Tribunal tried to establish a basis in prior customary law for the convictions for waging a war of aggression, their efforts did not convince the scientific community; and critical reactions were by no means limited to German authors. In the late 1940s, there was widespread consensus among commentators that the judges at Nuremberg had cut a precedent out of whole cloth. In the years immediately preceding the outbreak of World War II, there existed no international convention and no custom based on an *opinio iuris* to the effect that individuals who planned or initiated a war of aggression were to be held personally liable under international

50 *Ehard* (note 32), 362; *Grewe* (note 20), 45; *Jescheck* (note 7), 147. See also *Schick* (note 16), 782 ("International law in existence at the time … knew of no obligation forbidding nationals of a sovereign state to plan or perform acts which, reviewed retrospectively by the victor, may be considered as having lead to an illegal war.").

51 *Kelsen* (note 23), 165. See also *Finch* (note 10), 35 (even the convictions for the Crime against Peace "may be unquestionably approved as morally justifiable political acts").

52 IMT Judgment (note 3), 219.

criminal law. The London charter created new law, and the IMT applied that law *ex post facto* to defendants who certainly knew that their acts were immoral and violated international law, but who had no reason to believe that they committed a crime in any conventional legal sense. In that sense, the Nuremberg trial and its outcome, as far as it related to the Crime against Peace, went against the principle *nullum crimen sine lege*, which had, in varying formulations, been understood by all civilized nations to guarantee an individual impunity if his acts were not regarded as criminal at the time when he acted.

Two strategies were employed to defend the Tribunal's judgment. The first strategy was to extol the enormity of the crimes committed or ordered by the leaders of the National-Socialist regime, and to argue that it would have violated anyone's sense of justice if the Tribunal would have set them free.[53] The persuasiveness of that argument hinges on the assumption that there is something like "natural" justice distinct from justice based on the applicable law. It is understandable that people, after finding that the jurists of the Third Reich had managed to cloak even the worst excesses in the coat of statutes and ordinances, had lost any trust in the magic of positive law and searched for more stable grounds on which justice could be built; hence recourse to ideas of natural law was popular among many German jurists at the time. But whatever the general validity of that renaissance of natural law theories, recourse to "natural" ideas of justice is inapposite when they are used to push aside a defendant's protest that positive law fails to provide a sufficient legal basis for his conviction. Whatever one may think of the pre-positive *limits* of any legislature's authority to create law, the need for a legal basis for a criminal conviction cannot be replaced by the court's view of what *should* be punishable under principles of "natural" justice.[54]

53 See *May* (note 42), 148 ("What made the Nazi case stand out was the scale and viciousness with which it was fought, not that it was a case of aggression."). By contrast, *Radin* (note 31), 382, held that there would be little or no public support for convicting the leaders of the *Wehrmacht* had they not also committed war crimes and crimes against humanity.

54 A similar debate occurred some 50 years after Nuremberg, when GDR border guards tried for homicide claimed that domestic law in force at the time authorized them to use deadly force

That leaves the second strategy of justification: to acknowledge that Nuremberg made new law and applied it retroactively and to rely on future practice to vindicate the "Nuremberg revolution". This is an unconventional approach that appeals to history rather than law to show the correctness of a judgment. But even under historical aspects, there have been serious objections to justification through posteriority: Since the IMT was designed as a one-time court, it was unable to set any precedent in a strict sense.[55] The formal recognition of the "Nuremberg principles" by the General Assembly of the United Nations had no legal force, and neither the United Nations nor any other international legal body managed to produce a legally binding instrument establishing the criminality of waging aggressive war.[56]

That left national practice with the onus of making true the promise of Nuremberg that aggressors should be punished. *Robert Jackson* in his report to the President on the Nuremberg trial declared that "the four nations, through their prosecutors and through their representatives on the Tribunal, have enunciated standards of conduct . . . by which the Germans have been condemned" and which "will become the condemnation of any nation that is faithless to them."[57] That statement placed a heavy burden of responsibility on national courts. As *Philip Jessup* put it, with clairvoyance , in 1947: "Inaction by the whole society of nations from now on would constitute a repudiation of the [Nuremberg] precedent ... It would constitute an assertion that aggressive war is not a crime and

against persons who attempted to cross the border to the West. Their argument based on *nullum crimen* may have received short thrift in the relevant decisions of the *Bundesgerichtshof* and the *Bundesverfassungsgericht*. But even if one thinks that the authorization for shooting contained in GDR law could be disregarded because of its incompatibility with relevant international law, these cases differ from the IMT judgment in that the Nuremberg defendants were convicted of a Crime against Peace that did not exist when they acted.

55 *Ehard* (note 32), 366; *Schick* (note 16), 791.

56 See *Dahm* (note 8), 66; *Jescheck* (note 7), 188-189 (pointing out that the Soviet Union made sure that the IMT judgment did not generate general principles of international law).

57 Final report to the President from Supreme Court Justice Robert H. Jackson, in *Prosecution of Major Nazi War Criminals, 15 Department of State Bulletin,* (October 27, 1946).

that the individual who is guilty of endangering the international public repose is not to be treated as a criminal."[58]

In the decades that followed, there was no lack of incidents which arguably met even the narrowest definition of the Crime against Peace, including aggressive action of the Soviet Union as well as the United States during the years of the Cold War. Yet, after Nuremberg, the crime of aggression was never charged in any court of the world. Justice *Jackson*'s words proved to be rhetorical flourish rather than an announcement of actual policy.[59] The fact remained that a tribunal consisting of members of the victorious nations had, in a singular effort, adjudicated the leaders of the vanquished nation for starting the war, and there had been no follow-up on this "principle" of Nuremberg.[60] Writing in 1994, *Helmut Quaritsch* concluded that the judgments of Nuremberg and Tokyo, far from being landmarks of the law, remained singular events in the history of international law, without precedent and without consequence.[61] *Quaritsch* claims that there was no successful revolution that could have healed the violations of law that occurred in Nuremberg.[62]

It is difficult to find fault with that negative assessment, at least as matters stood in the beginning of the 1990s. But the winds may have changed. The adoption of

58 *Philip Jessup,* The Crime of Aggression and the Future of International Law, Political Science Quarterly 62 (1947), 1, 4. For similar statements, see *Stimson* (note 39), 189; *Wechsler* (note 41), 26. See also *Ehard* (note 32), 365 (conceding that it may have been necessary to go beyond applicable law in order to achieve "higher justice", but claiming that the new norms established in Nuremberg must then be applied to the strong as well as the weak).

59 *Schlepple* (note 44), 93-94.

60 See *Jescheck*'s acerbic conclusion, „It can hardly be called a welcome development of state practice that the winner of a war should have the right to adjudicate the leading organs of the vanquished state in an extraordinary court, applying extraordinary law." (note 7, 415; my translation). For a similar assessment, see *Kelsen* (note 23), 170 (the prohibition of waging aggressive war turned out to be applicable only by victors against leaders of the vanquished party); see also *Bush* (note 1), 2328 ("… the notion of Crimes against Peace had been made the centerpiece of Nuremberg … and afterward was hailed by international lawyers, completely buried in practice, and studied to death by inconclusive drafting committees and advocacy groups.").

61 *Quaritsch* (note 23), 218-220.

62 *Quaritsch* (note 23), 220.

the crime of aggression in the Rome Statute in 1998, and the international agreement on the definition of that crime in the Review Conference of Kampala in 2010 may well have laid a firm foundation for an international jurisdiction over the Crime against Peace – the foundation that had been missing for the decades since Nuremberg. If the process set in motion in Rome and Kampala succeeds; if the International Criminal Court is granted the power to sit in judgment over those who prepare or wage aggressive wars; and if the ICC or domestic courts make use of that authority even where the aggressor is a powerful nation – then, and only then could we say that the seeds sown in Nuremberg have finally come to fruition. If waging aggressive war in violation of the principles of international law is effectively outlawed and those responsible for starting the war are personally made criminally liable, then a judgment that troubled criminal lawyers by effectively suspending the principle *nullum crimen sine lege* may eventually be seen as a courageous step toward making the world a more peaceful planet.

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