

INTERNATIONAL LAW ASSOCIATION PANEL DISCUSSION ON “THE HOLOCAUST AS CATALYST FOR INTERNATIONAL JUSTICE”

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I first wish to thank Prof. Nunes, Director of the Institute on the Holocaust and the Law and Moderator of this panel, for the opportunity to serve on this distinguished panel. I serve as General Counsel of the American Gathering of Jewish Holocaust Survivors. Benjamin Mead, its Chairman, was originally to have served on this panel, but was unable to because of a conflict. I represent an extraordinary group of people – Survivors of the Holocaust. They have two imperatives, one to bear witness and the other to preserve memory.

The murder of an individual is, of course, a crime. The murder of a *people* under the euphemisms of “Final Solution” or “ethnic cleansing” should elicit broader accountability, prosecution and punishment. Survivors, more than others, recognize that while the murder of an individual is a crime against family and state, the murder of a people is, what we have come to refer to as, a “crime against humanity.” If the Final Solution was not sufficiently unfathomable, at the end of the war, Survivors, trying to return to their homes, continued to be killed by the thousands. The “final” solution was not quite *that* final, while the suffering and losses continued.

Prof. Peter Longerich of the Holocaust Educational Trust in London suggests that “a dispute over the genesis of the Final Solution involves finding answers, not only to questions of when and where, but also ultimately, why?” These questions are integral to the judicial process. But they are questions that the survivors alone live with *each and every day* of their lives. What likewise comes to mind is Eichman’s statement, also expressed by Josef Stalin, that “the death of an individual is a tragedy – the death of a million...a statistic.” Add that to Hitler’s statement in the early 30’s that “after all, who now speaks of the Armenians?” and the Final Solution and later genocides become more foreseeable.

As lawyers, we recognize the importance of “choice of forum” decisions. Forum played a determinative role in the outcome of post-World War II prosecutions, involving military tribunals, courts in East and West Germany and trials in other countries, the most important of which remains the Eichman trial addressing crimes against humanity, later serving as a model for the Rwanda trials and International Criminal Court.

The results in each forum are telling. The Nuremberg trials in particular, on which my co-panelist, Benjamin Ferenz, will speak in greater detail and with pre-eminent knowledge, were compelling and cathartic. Tragically however, there were too few convictions due to lack of prosecutors, judges, facilities and funding.

Statistics involving post-war prosecutions by East and West Germany are distressing. Fully 80% of the judges in post-war Germany were former members of the Nazi party. Their appointments originated in the late 1800's under the authoritarian Bismark government. They retained their civil service positions through the liberal Weimar Democratic Republic and subsequent Nazi regime which benefited from a supportive judiciary already in place. This, among other reasons, contributed to the relative ease and speed with which the legal and legislative systems collapsed. Judges, lawyers and legislators, who should otherwise have served as a buffer, simply *folded*, permitting the Final Solution to proceed for the most part unopposed.

Between 1963 and 1967, approximately 300 war crimes cases were pending in the Berlin prosecutor's office. Almost every one was eventually dismissed on statute of limitations defenses.

Every survivor bears witness. But bearing witness in a prosecution is different from personally remembering, which carries with it a different responsibility. How many war crime prosecutions failed to lead to convictions because the survivor/witness was simply unable to recount and relive that which remains unthinkable?

Immediately after World War II, many were arrested, fewer were prosecuted, fewer yet were found guilty and even fewer were actually punished. After punishment, more often than not, those convicted had their sentences reduced or commuted – a process, as we know, tragically continuing to this very day. How unimaginable that must be to the survivors who committed no crime and continue to suffer in part for the remainder of their lives, with no prospect of *their* suffering being commuted? Abe Foxman of the Anti-Defamation League suggests that the best an international tribunal can hope for is “symbolic justice” since actual justice in the face of any genocide, is arguably unachievable. Survivors are often asked about the subject of forgiveness. Most express a much stronger preference for justice, recognizing at the same time the impossibility of it ever being fully or even substantially realized, especially at this late date.

In closing, Prof. Yehuda Bauer, a renowned Israeli Holocaust scholar suggests that, in the Post-Holocaust era, three commandments should be added to the original ten: (1) Thou shalt not be a perpetrator; (2) Thou shalt not be a

victim; and finally and perhaps most importantly - (3) Thou shalt not be a bystander.

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