Speech delivered by Michael G. Karnavas, ADC-ICTY President at:

Nuremberg - 60 Years After: the Beginning and Development of International Criminal Justice.

Joint Conference

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Excellencies,

Ladies and Gentlemen,

I would like to thank the German Section of the International Commission of Jurists along with the other organizers for the invitation to address you at this important conference on the legacy of the Nuremberg trials – 60 Years After.

The title of this program fittingly reflects the essence of that for which the Nuremberg trials will be remembered and for which humanity as a whole is most indebted: the Beginning and Development of International Criminal Justice.

The legacy of Nuremberg, however, is not entirely free of criticism. Any reflection on Nuremberg must acknowledge both the crucial first steps, as well as the errors in the process. This first step, however, was no baby step, it was a giant leap: not only putting international law in the forefront of international relations, but also setting in motion a shift from non-judicial retribution to an independent and judicial establishment of individual criminal responsibility. Indeed, Nuremberg paved the way for both international and national prosecutions of violations of international humanitarian law.

60 years after the Nuremberg trials I stand before you as the spiritual descendant of the Defence Counsel who played such an important role in the Nuremberg genesis. As such, I would like to take my few minutes to invite you to reflect on some areas that merit consideration, or re-consideration, by the international community as matters of policy and judicial debate. Although

we have learned important theoretical lessons from Nuremberg, the international community – at both the judicial and the political level – has difficulty applying them in practice.

Telford Taylor, one of the prosecutors at Nuremberg, after some 40 years of distance and reflection, recounts in his memoirs: The Anatomy of the Nuremberg Trials, some of the difficulties defence counsel faced in those trials. If one were to poll the defence counsel before the *ad hoc* international tribunals, General Taylor's observations of inequality of equality of arms, lack of certainty in the application of the procedure, lack of certainty in the law, would all be echoed today.

Perhaps the most controversial inheritance of the Nuremberg trials from the defence point ofview, is the so called "common plan" doctrine, based on the concept of Criminal Conspiracy as it was known and applied in the Common Law legal tradition, particularly in the United States.

Initially, the intention for introducing this principle was to enable the prosecution to target not only the highest ranking German leaders but also the Nazi groups and organizations. It was envisioned that the accused would be charged with both the commission of crimes and conspiracy to commit them. Thus, upon a finding of guilt of one or more of the Nazi groups or organizations, individual members of those groups or organizations could be brought before occupational courts, where the only proof necessary for conviction of any particular accused would be his or her membership.

The use of Conspiracy as a substantive crime and in the manner in which some of the occupying powers wanted to use it, was met, at best, with skepticism by those coming from the Civil Law tradition. What ultimately emerged was Article 6 of the Nuremberg Charter: criminalizing *Conspiracy to Commit a Crime Against Peace,* while excluding as a substantive crime *Conspiracy to Commit War Crimes or Crimes Against Humanity.*

The introduction of this precept quickly gave rise to the criticism that its application would lead to manifestations of guilt by association. Not only was conspiracy foreign to the continental criminal law system, but, as has been noted, it was perceived as malleable, with its application subject to the whims of aggressive prosecutorial strategies. However, a sober analysis of the judgments at Nuremberg shows that the Judges applied the doctrine of Common Plan quite narrowly.

In its very first case, *Tadić,* the ICTY embraced the Nuremberg Common Plan doctrine, proclaiming, rather boldly, that it was part of customary international law. Over the years, the ICTY Prosecution has advocated the use of this doctrine which is now known as Joint Criminal Enterprise – or by its acronym JCE –in an overly expansive manner; continuously attempting to widen the scope of Joint Criminal Enterprise to secure more convictions. Regrettably, the *ad hoc* Tribunals have failed to follow the guidance of Nuremberg to narrowly interpret this doctrine.

The principal of joint responsibility, as it is applied today, is not, as claimed, merely a mode of liability, rather, it is virtually indistinguishable from the separate substantive crime rejected by Nuremberg. This not only poses enormous problems to the Defence in defending an accused

alleged to be a member of a JCE, but further leads to the public perception that the prosecution is engaged in an exercise of establishing guilt by association, giving rise to the risk of miscarriages of justice – spreading stain on a massive and indiscriminate scale, if you will!

Another of the enduring legacies of Nuremberg which can be seen today at the *ad hoc* tribunals and, to a lesser extent at the ICC, is the application of the adversarial process in investigating and trying cases. Though not bound by rigid rules of evidence, the rules of procedure adopted in Nuremberg provided flexibility in the introduction of evidence, particularly documentary evidence. Indeed, it is fair to say that Nuremberg was the hybrid tribunal archetype, mixing elements of both major legal traditions: the Common Law and the Civil Law.

While the Defence at Nuremberg were unquestionably handicapped during the pre-trial and trial phases of the trials, for the most part, the procedure adopted proved to be fair. Nearly 50 years after Nuremberg, its procedure would serve as the model for the two ad hoc tribunals: the ICTY and ICTR.

Unlike in Nuremberg, however, the judge-made Rules of Procedure and Evidence at the *ad hoc* tribunals, particularly at the ICTY, have been in a constant state of flux since their inception. Indeed, the changes in the rules have been so extensive, that the procedure has been transformed to such extent that many participants and observers are concerned that the changes transgress upon both the letter and spirit of the Statutes of these institutions. Moreover, the differences in practice – that is in the application of the rules by the various Trial Chambers, are creating differences in the fairness of the trials from one courtroom to the next, resulting in unintended

and very unfortunate consequences: the serendipity of the bench results in various degrees of fairness, and because of the different ethnic groups involved in the various trials, the unintended unfortunate perception is that there is a correlation between inconsistent application of the discretionary aspects of the rules and ethnicity.

Regrettably, the end results of these trials, I fear, are likely to be viewed with skepticism and cynicism, detracting from the legacy of the Tribunal in promoting fairness in the trial process to all accused.

Here again one must ask whether the lessons of Nuremberg have been learned: if the process is perceived to be less than fair, will the results, however well-grounded in the weight of the evidence, be accepted as legitimate and just?

For all one hears about the flaws of Nuremberg, absent are complaints about the independence of the judges. This, perhaps, is one of the hallmarks of Nuremberg which deserves to be recognized and celebrated. When considering the ravages of the war, the nature and extent of the crimes committed, and the trials commencing only a year after the end of the war, not to mention the initial call by Churchill and others for summary executions, the independence of the judiciary at Nuremberg stands as a testament to humanity that: might is not right ... but ... that right is might, which can only be achieved by fair and impartial judges, independent of external pressures.

Concerning this exemplary legacy of Nuremberg, I would be remiss if I failed to mention that today, at the *ad hoc* tribunals, trials are being conducted under the shadow of the completion

strategy: The UN Security Council which established these tribunals under Chapter 7 of the UN Charter, has expressed a view that all trials must end by 2008, with at least one permanent member going so far as to announce that it would veto any initiatives to extend the tribunal's lifespan beyond this arbitrary deadline. This is of great concern to we who are entrusted with the heavy responsibility of defending accused before these international criminal tribunals.

As one defence counsel recently noted in an oral submission, *"the focus at trial is moving away from the quest for the truth and has shifted to what appears to be more of an exercise to meet deadlines set outside of the Tribunal."*

Whether the judges at the *ad hoc* tribunals will continue to succumb to these external pressures by serving economic and political interests, at the expense of serving justice, remains to be seen. Let us hope that as the *ad hoc* tribunals navigate the final narrows of the completion strategy, the judges will reflect back, as we are doing here at this conference. Nuremberg is where it all began. The experiences and results of Nuremberg have much to teach us. We must learn from both the achievements and errors of those pioneers, be they judges, prosecutors or defence counsel, who set out to develop international criminal justice, for which humanity is much indebted.

Thank you!