

## Epilogue: A Nuremberg Prosecutor's Summation Regarding the Illegal Use of Armed Force

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Benjamin B. Ferencz\*

It was the hope of the Nuremberg Tribunals that the rule of law might serve to deter future wars and prevent crimes against humanity. As a member of the US Armed Forces, fresh out of Harvard Law School, I entered several Nazi concentration camps as they were being liberated. My assignment was to gather evidence of the incredible atrocities committed during the Hitler regime. The horrors I personally witnessed led to an unshakable determination to try to prevent such abominations in the future.

When the war was over, I returned to Germany to assist in subsequent Nuremberg proceedings. I became Chief Prosecutor in what was referred to as “the biggest murder trial in human history,” the prosecution of twenty-two Einsatzgruppen officers. All twenty-two high-ranking defendants—many with doctoral degrees—were convicted of deliberately slaughtering over a million men, women, and children.<sup>1</sup> They were killed because they did not share the race, religion, or ideology of their executioners. I appealed for a new rule of law that would prevent future genocides and protect the human rights of all people everywhere, regardless of race or creed. It was my first case. I was 27 years old.

The most significant outcome of the Nuremberg Trials was the affirmation that aggressive war, which had previously been hailed as a sovereign right, was punishable as the supreme international crime. In 1946, the first General Assembly of the United Nations appointed committees to formulate a code of international crimes, including the crime of aggression, and to lay the foundation for an International Criminal Court to try leading offenders.<sup>2</sup> Yet reaching agreement on the definition of aggression became a major obstacle.

A consensus definition, replete with loopholes and exculpations, was reached in 1974.<sup>3</sup> Major powers were not prepared to have any outside body restrain their perceived sovereign right to use force. The 1974 definition was brushed aside as non-binding. After countless sessions of hundreds of lawyers and delegates, a

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\* Former Nuremberg War Crimes Prosecutor.

<sup>1</sup> “*The Biggest Murder Trial in History*”, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007155> (last visited Mar. 15, 2017).

<sup>2</sup> Yeun-Li Liang, *The Establishment of an International Criminal Jurisdiction: The First Phase*, 46 AM. J. INT’L L. 73 (1952).

<sup>3</sup> Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

new consensus definition was finally reached in Kampala in 2010.<sup>4</sup> In order to reach agreement, it was stipulated that the offense could not be actionable before 2017 at the earliest, and only after a number of ratifications and other hurdles had been overcome.<sup>5</sup> Whether and when the major powers will be willing to accept accountability for the illegal use of force remains in legal limbo. The persistent obstacles over the last seventy years are more political than legal.

Some national leaders seem more concerned with protecting their power than their people. Fanatic followers seek to guard their religion, territory, or economy by every means. The original UN Charter peace plan requiring disarmament, an international military force, and an unbiased Security Council, was never given a chance. Those who were victors in war returned to being adversaries in peace. The rule of law was placed back into the ice bucket of the cold war. Since there was no independent judiciary capable of enforcing its decisions, militants willing to kill and die for their particular cause continued to rely on force by every available means. The voice of Nuremberg was not heard.

Nuremberg posited that crime is committed by individuals and that law must apply equally to everyone—including those who sit in judgment. If law is designed to protect large and varied constituencies, it must be interpreted broadly rather than narrowly. If punishing the crime of aggression remains blocked by overblown legal obstacles, a new legal path must be found to condemn what has been properly described as “the supreme international crime.” If the courtroom door remains locked, another entry must be found to protect the public interest. Massive abominations, such as rape, torture, and murder—which occur in every war—are already recognized as punishable crimes against humanity.<sup>6</sup> Surely, if one murder could qualify as a crime against humanity, the illegal use of armed force, in the knowledge that thousands of innocents will be killed, deserves at least equal condemnation.

The widely-hailed 1948 UN Universal Declaration of Human Rights proclaims that everyone has the right to life. Since it expresses the fundamental hopes of people everywhere, illegal war-making, which inevitably takes countless human lives, should be recognized as an inhumane act punishable universally in both national and international courts. Leading planners and perpetrators of such crimes against humanity should be held to account in a court of law whenever and wherever they may be apprehended. Furthermore, it is axiomatic that those who cause illegal damage should also be held accountable to compensate and mitigate the harm to the victims. These common-sense goals are all necessary steps toward making the Nuremberg legacy complete. Obviously, there is still a long way to go.

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<sup>4</sup> International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010).

<sup>5</sup> Rome Statute of the International Criminal Court arts. 15 *bis*, 15 *ter*, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010.

<sup>6</sup> Benjamin B. Ferencz, *The Illegal Use of Armed Force as a Crime Against Humanity*, 2 J. ON THE USE OF FORCE & INT’L L. 198, 195 (2015).

War has been glorified for centuries as the road to power and prestige. The rule of law applies not merely to governments and their agents. Under principles of universal jurisdiction, it should also bind groups and persons prepared to kill and die for their particular cause. Changing hearts and minds cannot be done quickly or easily. You cannot kill an ideology with a gun. It requires a more humane ideology that does not threaten any peaceful person. Tolerance and compassion must be taught on all levels. Compromise cannot be seen as cowardice. It is understandable that those with conservative inclinations are hesitant about yielding new powers to untried tribunals. Yet they fail to recognize that in this modern, cyber age, the use of military force is a far greater menace than a safeguard. Only peaceful means, as described in the UN Charter, are legally permissible. The money saved by outlawing war could provide funds to abate social conditions that give rise to the despair that ignites unrestrained hatred and violence.

It takes courage not to be discouraged. Despite difficulties and shortcomings, progress toward a more humane world governed by law and the search for justice has been remarkable. There has been an awakening of the human conscience. Consider, for example, the end of colonialism and slavery, the emancipation of women, legalization of same sex partnerships, and a host of other advances considered impossible only a few decades ago.

The Nuremberg trials represented the search for a more humane world governed by law. The creation of the International Criminal Court in 2002 was another great step forward. It must be seen as a prototype that will need support as it improves by experience. In 2012, I was invited to make the closing remarks as the ICC completed its first case. I was then 92 years old. The chart of progress in advancing the rule of law does not move in a straight line but gradually spirals upward. Today, humanitarian law is being taught in universities throughout the world.

New means of instant universal communication must gradually lead to the recognition that we are all inhabitants of one small planet and that we must share its resources so that all may live in peace and human dignity. Accountability for the illegal use of force is an indispensable prerequisite. No one should be immune. Nuremberg pointed the way. The genocide in Rwanda sounded a belated alarm. Subsequent criminal proceedings under Security Council mandate and national jurisdictions for similar crimes against humanity were moves in the right direction. What has been sadly lacking has been the effective enforcement of the declared goals and aspirations. That is the challenge facing all who believe in the rule of law. Perfection should not be expected. Only when accountability for the illegal use of force becomes widely accepted and enforced will the Nuremberg legacy be complete.



