

Claus Kreß | Tabasom Djourabi-Asadabadi | Anthea Forsten (Eds.)

In Honour of Benjamin B. Ferencz

Ceremony at the Occasion of the Award of an Honorary Doctorate to
Benjamin B. Ferencz by the Law Faculty of the University of Cologne



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INSTITUTE FOR
INTERNATIONAL PEACE
AND SECURITY LAW



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“The conscience of humanity is the foundation of all law.”

*Benjamin B. Ferencz,
Einsatzgruppen Case: Opening Statement for Prosecution,
Nuremberg 1947*

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Introduction

Claus Kreß

Late in 2020, Stephan Hobe, my esteemed colleague from the Faculty, called me. He had just completed reading Benjamin B. Ferencz' recently published "Parting Words. 9 Lessons for a Remarkable Life" and he was thrilled. What is more, he had a splendid idea to share: Cologne Law School, he thought, should honour Ben's unique achievements by awarding him an honorary doctorate. Would it not be fitting, he asked me, that a German Law Faculty would do so and, more in particular, the Law School of the University of Cologne, the history of which is, through its former members Hans Kelsen, Hermann Jahrreiß and Carl Schmitt connected, though in most strikingly different forms, with the founding Nuremberg precedent of international criminal justice?

I could not agree more with Stephan and the same was true for our esteemed colleague Angelika Nußberger with whom we shared the plan just a little later. Not at all to our surprise, but much to our joy, the Law Faculty of the University of Cologne reacted enthusiastically and unanimously decided in accordance with our suggestion. Thankfully, also our Rektor, Axel Freimuth, immediately signaled us his entire support.

When I turned to Ben to ask him whether he would accept our award, I was hopeful and yet a little nervous. For, I was perfectly aware of the fact that it was rather about Ben giving us the privilege to become part of our college than us offering an honour to him. Not to mention Ben's already shining list of awards, distinctions and honours. But characteristically, Ben responded in the greatest kindness and modesty – and, so fortunately for us in Cologne, he responded positively.

We were under no illusion that a ceremony in Ben's presence was no option. While Ben's good health at the age of 100 (!) was stunning, long-distance travelling had obviously become cumbersome for him. And needless to add: we were still in the midst of a global pandemic. But we thought it imperative not to let pass this special occasion to pay tribute to Ben. Beyond that tribute, we considered it befitting and in Ben's spirit to also reflect on the dark times of our faculty and university history. These dark times include, as it should be duly emphasized in connection with Ben's life and work, the deeply sad fact of Hans Kelsen's dismissal

from the university right after the Nazis had come to power. This was the background of our decision to embark on the adventure of a digital ceremony in honour of Ben, in which the memory of Hans Kelsen should play an important part.

We cannot thank enough Donald Ferencz, Ben's son, for all his help to make the ceremony of 15 February 2021 happen and for representing his father at the occasion. Very shortly before the ceremony was scheduled to take place, Don called me to let me know that his father had decided that, whatever the difficulties, he wished to convey a message to us and, most importantly, to our students. This was certainly not an opportunity to be missed and so I almost immediately met with Ben for a digital conversation. The display of parts of Ben's observations during this conversation no doubt constituted the absolute highlight of the ceremony.

We could experience another memorable moment after the ceremony: Many of our students had attended the ceremony and listened to Ben's words directed to them. These words would resonate, as it has so often been the case when Ben met with the youth. Cologne's law students' association chose to thank Ben and sent him a video message after the event. This message is so heartwarming and it tells us so much about Ben's inspirational force that we have included it in this documentation.

In order to allow readers with (awakened) interest, but without too much knowledge, especially in international law, to learn a little more about Ben's life and work than was said in the speeches made at the ceremony we have, with the kind permission of Cambridge University Press, added a reprint of a fairly recent chapter by Ben. In this essay, Ben takes his readers on a fascinating journey through the main passages of his momentous life and, in doing so, he offers them, in the words of Stephan Hobe's Laudatio "the sum of his wisdom".

With this documentation, we seek to treasure a moment which will remain memorable both for the Law Faculty and the University of Cologne. Through this volume, we also wish to share this moment with all those interested in Ben who could not attend the ceremony. May the pages that follow give to our readers a vivid idea of Benjamin B. Ferencz' truly exceptional life and work.

The numerous guests of honour, who followed our invitation and attended the ceremony, are mentioned in my subsequent opening words to the ceremony. Let me therefore take this introduction only to extend my very warm thanks to Stephan Hobe and Angelika Nußberger for their wonderful co-operation in the lead-up to the ceremony, to Irmgard Blomenkemper and Tim Heckmann for their masterful technical support of the ceremony, to my team member Tabasom Djourabi-Asadabadi for

her most circumspective assistance in preparing the ceremony and, last but not least to Tabasom Djourabi-Asadabadi and to another member of my team, Anthea Forsen, for their dedicated and thoughtful collaboration in co-editing this volume.

Claus Kreß, in November 2021



Speeches at the Occasion of the Ceremony Honouring Benjamin B. Ferencz

Opening Remarks

Claus Kreß

Member of the Law Faculty of the University of Cologne

Magnifizenz,
dear Elisabeth, dear Scott,
dear Mr Lehrer, dear Professor Lehner,
dear Dr Frank,
dear Dr Wasum-Rainer, dear Dr Koch, dear Dr Bertele,
dear Mr Rackwitz and dear Dr Dittrich,
Spectabilis,
dear Faculty,
and above all, dear Don,

This is a special moment for Cologne University as it is for its Faculty of Law. Today, we have come together in honour of Benjamin Ferencz, in order to celebrate his Cologne honorary doctorate. It would have been splendid if we could have come together in person at this happy occasion, with Ben at the centre to inspire our students. But Ben's advanced age of 100 years – I repeat: 100 years – does not make it possible for him to be with us today. And the pandemic requires us to gather in digital form.

Yet, we shall hear from Ben in the course of this ceremony through a recorded conversation which I have had with him a few days ago. We are also very grateful to you, dear Don, for giving us the pleasure and honour of your distinguished company today and for doing that also on behalf of your father. Donald Ferencz is himself a lawyer. He has been accompanying the work of his father for decades and he has made his own important contributions to the cause of international justice. For example, he is the convenor of the Global Institute for the Prevention of Aggression. Thank you so much for being here today, Don.

A word of gratitude to our other guests of honour: May I begin with Elisabeth Kaul. The last time, you were here in the university, Elisabeth, we celebrated the Cologne honorary doctorate of your husband Judge Hans-Peter Kaul, a dear friend of Ben. Sadly, Judge Kaul has departed much too early. We think of him, too, today and feel honoured by your presence, Elisabeth.

It is wonderful to have you with us today, Scott. Professor Scott Shapiro is a distinguished colleague from Yale Law School. A few years ago, he delivered the memorable inaugural Hans Kelsen Memorial Lecture on International Peace and Security Law here in Cologne. I shall return to this lecture at a later point of this ceremony.

It is a precious and much appreciated gesture that you, Mr Lehrer, and you Mr Lehner, have accepted our invitation to take part in this ceremony. Abraham Lehrer is Vice-President of the Central Council of Jews in Germany and President of the Jewish Community of Cologne. Professor Lehner is member of the Board of the Jewish Community in Munich and Bavaria. Both Mr Lehrer and Mr Lehner are children of survivors of the Holocaust. Thank you both so much for giving us the privilege of your company today.

It is also a wonderful signal that Germany's Federal Prosecutor General has immediately accepted our invitation to pay tribute to Benjamin Ferencz through his presence. Thank you, Dr Frank, for being with us today.

Dr Christoph Eick, the Legal Adviser of the German Government, had also immediately accepted our invitation to join us. Unfortunately, he has been called for consultations with the incoming US Legal Adviser just for this very hour so that he had to send his regrets. We are all the more grateful that Dr Joachim Bertele, the Deputy Legal Adviser, had also answered favourably to our invitation. Germany's diplomacy has been maintaining a relationship of friendship with Benjamin Ferencz since decades. These bonds were cherished and nurtured also when Susanne Wasum-Rainer and Michael Koch were the Government's Legal Advisers. Today, Dr Wasum-Rainer is Germany's Ambassador in Israel, and Dr Koch is Germany's Ambassador to the Holy See. Thank you, Ambassadors, for being with us this afternoon.

I also salute you, Mr Rackwitz and Dr Dittrich. Klaus Rackwitz and Viviane Dittrich are director and deputy director of the International Nuremberg Principles Academy. The Academy's mission includes preserving the legacy of the Principles resulting from the Nuremberg trials. Needless to say that Ben has been central to the Academy's work and that he has repeatedly delivered charismatic addresses to Academy audiences.

It is good to know that my dear colleagues from the faculty, Angelika Nußberger and Stephan Hobe, are also with us here today. Stephan, it was your splendid idea that has brought us together today – and Angelika you have enthusiastically supported the initiative from the outset.

Let me now pass the floor to the Rektor of the University of Cologne, Professor Axel Freimuth, for his address. Magnificenz, you have the floor.

Rektor's Address

*Axel Freimuth
Rektor of the University of Cologne*

Venerable guests of honour
Professor Donald Ferencz,
Ambassador Dr Wasum-Rainer,
Dr Frank,
Mr Lehrer and Professor Lehner,
Dr Eick, Mr Rackwitz and Ms Dittrich,
dear Ms Kaul,
dear Professor Shapiro
dear Dean Preis,
dear Professors Hobe, Kreß, and Nußberger,
dear guests,
and especially: dear honorary doctor of University of Cologne, dear colleague, dear Ben Ferencz,

A few months ago, on 21 November 2020, you shared with us your wisdom and conveyed to us a deeply felt message about justice and peace. You moved us with your words – with the words of someone who has lived through a torn century. It was the 75th anniversary of the beginning of the Nuremberg trial, an evening in the midst of the pandemic, an important event for Germany. The ceremony took place in the famous courtroom 600 in Nuremberg. Right at the beginning, you addressed the public in a short video recorded in your present home in Florida.

Your message was transmitted to all those watching the ceremony on TV. You captivated the audience. You did so, not only because you were the only eye-witness present of what had happened during this darkest period in German history, during this age of hatred and death. It was also because you managed to show the way forward, the way that leads out of hell and helps to start anew. You explained to us all what it means to draw lessons from the past, to seek justice for the future. You are the last surviving American prosecutor at Nuremberg. You were the chief prosecutor in the Einsatzgruppen case involving the most heinous crimes.

During the Nazi regime, crimes were also committed in academia. Our University, the University of Cologne, was the first University in Germany that carried out the “Gleichschaltung”. It was responsible for withdrawing academic titles from those who had earned them, most often simply just because they were Jews. As in international criminal law, it is not really possible to undo what has been done. But, at the very least, we could apologize and give back what had been taken away arbitrarily. We are conscious that we could not really repair the damage, especially as many of those offended had already died. But we followed your example and tried our best to restore justice.

If it cannot be done in a perfect manner, it is better to do it in an imperfect manner. It is better than not trying at all. Here at University of Cologne today, we are proud of forming an open-minded and internationally oriented academic community. For me it is very important to stress how crucial the international relations of the University are. We would miss something very important, were we not inspired by guests from abroad, by those who come and share their experience and ideas with us, stay in contact, help us, and reflect with us. Fortunately, we have many guests. Some of our guests are so close to our hearts that we want to include them forever in our community. We want them to be “one of us”.

The honorary doctorate is the symbol for this close academic friendship. Our university feels honored to have an impressive circle of such academic friends. They are all excellent researchers. Some of them, like Laszlo Solyom, were statesmen influential in bringing democracy to their home countries. Others were persecuted in Germany and had to leave. Yet, they were so gracious as to find their way back and renew friendship and exchange. One example is the philosopher and physicist Adolf Grünbaum who received the honorary doctorate in 2013. Now, you are one of them. And even in this illustrious circle you stand out in many ways. You played a role in world history and world politics at an age when others are still preparing for their exams. Based on all the suffering, and hardship, and crimes you had seen, you had a clear vision about what you wanted in life. You made “justice” your aim – and not only justice, but also prevention of injustice, prevention of war. You paved the way for a new understanding of peace and justice both in your scholarly writings and through advising those in power. And you had the chance of witnessing a whole century with its ups and downs. You saw many generations growing, and you accompanied and still accompany them with your advice.

Dear Ben Ferencz,
it is a great honour for the University of Cologne that you have accepted to be “our” honorary doctor, to be one of us. We all still remember the

impressive “laudatio” you delivered in our ceremonial hall to praise your friend and colleague Hans-Peter Kaul, who unfortunately passed away some years ago. I am glad that his widow, Elisabeth Kaul, is with us today.

Today, dear Ben Ferencz, you cannot be here. The current circumstances do not permit travelling. Your son Don Ferencz kindly represents you in our virtual meeting – warm regards to Don Ferencz and many thanks for making this ceremony happen!

Dear honorary doctor Ben Ferencz,
let me end by thanking you and wishing you all the best. As the Rektor of the University of Cologne, I want to emphasize that this is a very special day for our university. Even if only virtually, let me now symbolically repeat and celebrate the hand-over to you of the certificate for the honorary doctorate. I am doing so with a deep feeling of gratitude and happiness.

Congratulations, and thank you!

Reference:

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Dean's Address

Ulrich Preis

Dean of the Law Faculty of the University of Cologne

Magnifizenz,
dear guests of honour,
dear faculty members,
and above all, dear Mr Ferencz,

We are most grateful to you, Mr Ferencz, that you have so generously agreed to be with us today when we wish to pay tribute to your father, Benjamin Ferencz. Let me be clear right at the outset: Benjamin Ferencz' honorary doctorate constitutes a very important moment in the history of our Faculty.

The name "Benjamin Ferencz" provides sufficient reason for this statement: Dr Benjamin Ferencz' almost life-long contribution to international justice can only be called stellar. The Rektor has already alluded to this celebrated fact and our colleague Stephan Hobe will remind us of Dr Ferencz' tremendous achievements in a minute. But there is also a reason embedded in the history of our Faculty which makes Benjamin Ferencz' honorary doctorate a very important moment for us: As we all know, Benjamin Ferencz is the last surviving Nuremberg prosecutor. He acted as the US Chief Prosecutor in the Einsatzgruppen case on which we shall be hearing more later.

It is a less known fact, and very understandably so, that the history of the Cologne School of Law is also specially connected with Nuremberg. A few years ago, our Faculty member Claus Kreß had invited Professor Scott Shapiro, one of our guests of honour today, to address this connection more in detail here in Cologne. And Professor Shapiro did so in his impressive Inaugural Hans Kelsen Memorial Lecture on International Peace and Security. Let me hand over the floor to Professor Kreß so that he can remind us of some core elements of Professor Shapiro's Cologne speech.

Claus Kreß

Thank you very much, Spectabilis.

The story, my distinguished colleague and friend Scott Shapiro told us includes the sad fact that the Nazis drove Professor Hans Kelsen out of Cologne University because of his Jewish origin. Professor Hans Kelsen, the legal theorist, constitutional and international lawyer of world-wide renown, would then help the US government with the drafting of the London Charter which became the legal basis for the Nuremberg Trial. The story, Scott told us, also includes the sad fact that Professor Carl Schmitt was the only member of Cologne Law School who did not sign the Faculty's letter of protest against Professor Hans Kelsen's dismissal from office. The same Professor Schmitt who would engage in egregious anti-semitism and who considered the prohibition of aggressive war through the Briand-Kellog Pact an alarming fact, rather than a much to be hoped for breakthrough towards an international law against war. And Scott's story included the role at Nuremberg of Professor Hans Kelsen's successor, Professor Hermann Jährreiß.

In Nuremberg, Professor Jährreiß acted as a member of the defence team of the major German war criminal, General Jodl. In a well-known speech, delivered on behalf of the entire Nuremberg defence, Professor Jährreiß presented the argument that convicting a German accused person for a crime against peace would violate the principle of legality. Scott suspects, with good reason, that in making his argument, Professor Jährreiß followed a line of reasoning that had been set out before by Professor Schmitt. Professor Shapiro's magnificent Hans Kelsen Memorial Lecture ended on the note that Professor Jährreiß later became Rektor of Cologne University. To be sure, the fact that he defended at Nuremberg did not, as such, preclude him from that office. The right to defence in criminal proceedings is fundamental and the victorious powers deserve praise for guaranteeing that right also in the case of the German defendants at Nuremberg.

There is thus nothing wrong with Professor Jährreiß having acted as a defence lawyer at Nuremberg. He was even praised by Telford Taylor, the US Chief Prosecutor for the subsequent Nuremberg trials, for his eloquent performance in Court – and I strongly suspect that Benjamin Ferencz would have displayed the same sense of procedural fairness, if asked. Yet, the masterful chronology of Professor Shapiro's lecture contained an important implicit question directed to us in Cologne and to our Faculty in particular. The question is whether Professor Jährreiß' service as Rektor of Cologne University should remain Cologne's last visible major connection with Nuremberg.

We believe it should not: Fortunately, we have left behind us the legal debate about Nuremberg and the principle of legality. And even more

fortunately, Germany as a country, after many decades of rejection or at least skepticism, has eventually come to terms with Nuremberg. Perhaps most fortunately, the official Germany has become a supporter of the idea of international criminal justice.

And Benjamin Ferencz had his share in bringing about this change of mind. Not through loud public statements, but silently, together with his friend, the late Hans-Peter Kaul. May it be recalled at this ceremonial occasion that we as a Faculty have paid tribute to Judge Kaul's tireless work on international criminal justice through the award of an honorary doctorate more than a decade ago. At this point, I wish to hand back the floor to the Dean.

Ulrich Preis

Thank you, Claus, for this reminder.

It is in view of this historic background that we believe that there is a special reason for us to honour Dr Benjamin Ferencz' stellar contribution to international justice here at Cologne Law School: The Nuremberg Defence has made its argument. Already at Nuremberg, it has not prevailed. The honour we have bestowed on Benjamin Ferencz implies our hope that his historic Nuremberg engagement and the legacy of his subsequent work building on the Nuremberg Principles will prevail also in the long run. Much remains to be done to that effect even after the establishment of the first permanent international criminal court in legal history.

For our Faculty, the inclusion of Dr Benjamin Ferencz in the fine college of its honorary doctors, will provide a most precious and lasting encouragement to continue to offer our scholarly contribution in support of his great vision of international justice.

Please, Mr Ferencz, do kindly convey to your father how grateful and how privileged we feel that he has accepted the honour we wished to offer him.

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Laudatio

Stephan Hobe

Member of the Law Faculty of the University of Cologne

Rector Magnificus,
Spectabilis,
Dear Donald Ferencz,
Dear Ms Kaul,
Dear Professor Shapiro,
Dear Dr Frank,
Dear Dr Eick and Dr Bertele,
Dear Dr Wasum-Rainer,
Dear Dr Koch,
Dear Mr Lehrer,
Dear Professor Lehner,
Dear Mr Rackwitz and dear Dr Dittrich,
Dear colleagues from the Faculty of Law
Dear students,
Dear spectators,
and last, but certainly not least,
Dear Dr Ferencz!

If I may, this early, already start with your new full title; let me begin by saying how honored we are that you have accepted our invitation to award you an honorary doctoral degree in recognition of your lifelong engagement for justice.

More than a century ago you were born into a Jewish family in what at the time was Hungary, and what after the Treaty of Trianon became Romania. Sharing the fate of so many Jews, approximately a century ago you had to leave your home with your family for the United States of America. There, you lived the life of immigrants, as so many in the United States. You settled with your parents in the Lower East Side in “Hell’s Kitchen” in Manhattan – as I have read, this was not at all easy and was characterized by bitter poverty. But thanks to your great intellect and determination, you managed to not only be successful at school, but to later also excel in Harvard Law School.

Before Harvard, you studied crime prevention at the City College of New York, and your criminal law exam was such that you were awarded a scholarship for Harvard. There, you studied with Roscoe Pound and did research with Sheldon Glueck, who at the time was writing a book on war crimes. Those two individuals were not only eminent personalities, but Mr. Glueck must have obviously also awakened your special interest in the area of war crimes and their prevention and punishment.

After graduating from Harvard, you joined the US Army. In 1945, you were transferred to the headquarters of General Patton and, already then, you were given the opportunity to get firsthand experience in the field of war crimes. You became a witness to the horrors of Buchenwald, Flossenbuerg, Mauthausen and other concentration camps. Only a few weeks after you were honorably discharged from military duty as a Sergeant, you became a member of the Nuremberg prosecution team of Telford Taylor. And after having married your “childhood sweetheart” Gertrude in 1946, you went back to Europe, first for a short honeymoon and then on duty. Later you became chief prosecutor in the so-called “Einsatzgruppen Case” in which all 22 accused men were convicted. We will look into this in more detail a bit later.

After the Nuremberg Trials you stayed in Germany, together with your wife, who sadly passed away a year ago at the age of 99 after 73 years of a very happy marriage. And in the aftermath of Nuremberg, you were instrumental in paving the way for the Reparation Agreement between Israel and West Germany of 1952 and the first German Restitution Law of 1953. In 1956 the family – Gertrude, yourself and by then four children – went back to New York, and you founded a law firm together with Telford Taylor. But it seems you had to go back to other practical work of a lawyer.

From the 1970s on, you started working on the next important task: The establishment of the International Criminal Court. This became reality in 1998 with the adoption of the Rome Statute for the International Criminal Court. It is an ongoing tragedy that your own country has so many difficulties with the ICC that has not dared to ratify the Statute to this day. But let us stop here. What we have heard so far is more than a person can achieve in a lifetime. Of course, Dr Ferencz has had the fortune of very robust health. Reaching the great age of 100 years is something entirely extraordinary. But let's think beyond that.

Your vita is a long life in service of international justice. And this is the reason why we are so humbled and why we all bow in appreciation of your personality and of your tremendous professional achievements.

Dr Ferencz – if I am allowed to admit that – you are also my personal hero. On a personal note: 20 years ago, as a general international lawyer,

I did intensive research into international criminal law – it was the time of the adoption of the Rome Statute on the International Criminal Court. This research brought me back to the Nuremberg trials. I focused particularly on the Einsatzgruppen Case and the systematic mass killings of Jews and Gypsies through the so-called “Einsatzgruppen zur Säuberung der besetzten Gebiete von marxistischen Volksverrättern und anderen Staatsfeinden” (Intervention groups for the elimination of the occupied territories from Marxist betrayers and other enemies of the State). In these terrible events, an estimated 600.000 to 1 million people were killed. All 22 accused men were convicted, and finally 4 of them were executed. For my research 20 years ago, the questions of the “compulsion to obey orders” and the one of the “putative self-defence” as arguments of the perpetrators who portrayed themselves as “victims” and their defence were of eminent interest. We all know how the Rome Statute has dealt with them. And your straightforward analysis in this respect as chief prosecutor in 1947/48 not only impressed me most during my research. Most of all, it allowed for this new perspective and enables us today to speak frankly of the ICC Statute as a real legal breakthrough.

You achieved much, much more than most people and in particular law professors can achieve in a lifetime. But what impresses me, and I am sure impresses all of us, the most is that Benjamin Ferencz remained a very humble personality. Recently, when interviewed at the occasion of 75 years of the Nuremberg Trial, you said the following: “A human is not genuinely bad – but the circumstances that he/she is thrown into, may force him or her to do terrible and even inhumane things.” And you explained how it can be that people use their position to commit crimes against other human beings. This in no way goes to say that you justified this criminal behavior. But you very correctly pointed out that there are many temptations to which the human nature can be exposed to.

It is very often that I feel very similar. I am particularly very grateful of never having been forced to stand the test of being really politically brave under a real dictatorship, be it fascist or communist, a dictatorship which with its ways “invites”, or rather forces humans to make decisions that are simply inhumane. Yes – I believe you are right – the lesson we must learn is that there is nothing more valuable than human life and dignity, and for this matter, there is nothing more important for our societies than a democracy and governments under the rule of law. Law should govern, not dictatorship. Unfortunately, more than 75 years after the Holocaust, this still remains a very pressing problem. But this is also my personal motive for being active in international law – namely to help ensure that the rule of law governs international relations instead of the use of force.

Dr Ferencz, you are my personal hero also because you have seen the horror called Holocaust, and yet you have not become embittered. Hans-Peter Kaul – a dear friend of yours and the first German judge at the International Criminal Court to whom you paid tribute in a laudatio in 2008 during your first contact with our faculty when he was awarded an honorary doctor of the Cologne Law Faculty – has described you as a person with a good sense of humor. And your own conclusion as a lawyer that has seen so many inconceivably horrible situations has been: Let's build institutions that will enable us to overcome these situations. You were successful. And that is wonderful! I may, with your assumed permission, quote two statements of yours:

“Now let us look at the more positive things. The progress toward a world under the rule of law has been fantastic! We now have a truly International Criminal Court for the first time in human history.”

“The most important point of Nuremberg was the conclusion that aggressive war, which had been a national right throughout history, was henceforth going to be punished as an international crime.”

This shows, on the one hand, that Benjamin Ferencz has never given up in pursuing his goals. And that is exactly the reason why you were, on the one hand, the person who made major breakthroughs happen! On the other hand, you know well that the actual breakthrough against the crime of aggression was partly achieved only at the Review Conference of Kampala in 2010. My colleague Claus Kreß has told me about this fascinating conference which he had actively attended – and ever since, more of your dream has come close to becoming reality, although as we must admit that even today, it remains a dream and has not become complete reality. And you are right: It is strikingly true that the international punishment of the crime of aggression that has determined the normal course of international politics for centuries is nothing less than a change of paradigm in international politics and international law – and here, in my opinion, this big word “paradigm” is really justified.

Let me also mention, Ladies and Gentlemen, that Dr Ferencz is a prolific writer, having authored several books and a large number of scholarly articles. Starting in 1940 with “On Criminal Responsibility”, to 1985 “A Common Sense Guide to World Peace”, to 1999 “Telford Taylor: Pioneer of International Criminal Law” and “A prosecutors Personal Account – Nuremberg to Rome”, to mention just a few. To me, Dr Ferencz’ contribution to the monumental commentary on the crime of aggression as agreed in Kampala 2010 (edited by Claus Kreß and Stefan Barriga) in the Epilogue is the sum of this wisdom: “The Long Journey from Nuremberg to Kampala” reads itself as a summary of your lifetime achievement with

regard to the inclusion of the crime of aggression in the list of international crimes. Of particular interest for me is the section on “The mentality of Mass Murderers”, exemplified on the defenses in the Einsatzgruppen Trial, given *inter alia* by the head of the accused persons Dr Otto Ohlendorf in terms of “obeying only to superior orders, in self-defense against the Jews who would together with the communists undermine German rulership, and Gypsies who might help the enemies.” Although it was a great success in that all 22 accused persons were finally convicted, you also made it clear that there were about 3000 supporters whom one had decided to not prosecute.

Later in this chapter, you describe the “Road to Rome”. This wonderful account of the negotiations of the Kampala Conference reveals that you are a person of firm inner values, but also a realist with regard to government-to-government politics. Even after Kampala, we are not entirely “there” to integrate “aggression” as a crime into the list of other international crimes of the Rome Statute. Kampala is, so to speak, a new level of the compromise on the way to fully acknowledging aggression as an international crime that must be prosecuted under international law. And we should not forget, as you mention, that even after the crimes of the Holocaust, new crimes of a terrible size were committed in the Former Yugoslavia as well as in Ruanda, and, regrettably, also in other parts of the world.

Your conclusion seems to me like your legacy to future generations: “Peace requires more intensive efforts to ameliorate root causes of discontent that give rise to violence. Tolerance and willingness to compromise are indispensable norms that must be taught by every means and at every educational level. For their own self-interest and to protect the brave young people who do the fighting, nations must stop glorifying war. The prevailing ‘war ethic’ must be replaced by a ‘peace ethic’.”

Ladies and Gentlemen, here is a man, who has seen it all: genocide, crimes of aggression, crimes against humanity, and the disastrous consequences of the war of aggression waged by Hitler and his followers against many countries, a man who actively participated in the liberation of the concentration camps and the Einsatzgruppen Case in Nuremberg, sometimes called the most important mass murder trial ever. Just please try to imagine what all of this means!

One of my colleagues told me that she has put your portrait on top of her lecture scripts on International Criminal Law. What could be nicer than being constantly referred to and being recommended by others to young people who are looking for ideals and heroes.

Dear Dr Ferencz, dear Benjamin, today is your day! But, even more so, it is our day. It is our honor, as a German University, and as a Faculty of Law, to grant this highest academic honor to a person who through his courageous acts has made a great contribution to justice and with this has helped to free our country from the scourge of Nazism. For this, we are wholeheartedly grateful to you!

I am personally extremely indebted that I had the honor to give this speech. May I finally repeat that the Cologne Faculty of Law is of the opinion that Dr Benjamin Ferencz' lifelong engagement in international justice has given a splendid example for the maintenance for international justice. We bow to you and are extremely grateful for you having accepted our little token of appreciation.

Thank you very much!

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Benjamin B. Ferencz, Epilogue, in: Claus Kreß/Stefan Barriga (eds.), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2016), pp. 1501–1509.

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Personal Remarks

Claus Kreß

Member of the Law Faculty of the University of Cologne

Magnifizenz,
Spectabilis,
dear guests of honour,
dear Faculty,
and above all dear Don!

We will now soon have reached the climax of this ceremony – Benjamin Ferencz' words addressed to us. We shall hear from a conversation that I had the immense privilege and pleasure to have with Ben about a week ago. By introduction, Donald Ferencz will convey a message from Ben to us.

Before passing the floor to you, Don, for that happy purpose, please allow me to very briefly add a personal note to the fine addresses we have just heard. Among the many impressive facets of Ben's personality which have just been duly mentioned, there is one which I wish to highlight: It is Ben's power to inspire the youth. This power is essentially based on two things: his charisma and his love for the young people, at least for those young people with idealism.

In his recent book, whose title “Parting Words” I believe, Don, we should continue rejecting, there is a passage which tells you a lot about Ben. I wish to cite it to you:

“I hope my story might be of some inspiration to others, and it certainly can be. But one person's story is not enough to keep that belief burning, and a person who looks like you, sounds like you, is from the same place you come from, will likely be worth more to you.

Seek out those people and their stories and fall back on them when your ambitions seem doubtful, or challenges have presented themselves. Struggling toward your hopes and dreams – whatever they may be – can make you feel like you're treading water out at sea.

Building up a network of stories that prove others like you have done it before can help you see that there are foundations beneath you so tall, it's as if you are standing on the battlement of a castle.

And when you become a person who does the impossible, share your story widely so that others who look at you and sound like you can believe in themselves, too.”

Ben has been acting in this spirit. Over more than twenty years, I have been observing Ben working behind and on the scenes of international negotiations. He has given advice to countless decision-makers, he has submitted or worked on countless drafts and has addressed countless highest-ranking audiences. It should therefore come as no surprise that he has always been busy. Actually, to the question how he is, he has only recently responded: “I am busy like hell”.

Yet, Ben has never been too short of time to spare a few moments for a conversation with a young student of law. And no more than a few moments are necessary for him to set fire at such an occasion, that is, to enflame the passion of a young lawyer for getting ready to take up the candle from him, Ben, to carry it further. There are many great international lawyers around the globe, scholars, politicians, State officials or activists who feel Ben’s continuing inspiration in their work. I am one of those scholars. Ben was an important adviser to Germany’s delegation at the Rome Conference on the establishment for the International Criminal Court. Although I was the most junior member of the delegation, Ben spared some moments with me, showed respect as he has invariably been doing, and so I got a sense for his exceptional charisma. Over the course of the years to follow, the few moments have grown into many and the exchange with Ben has become a crucial source of inspiration for me, one that I now try to share with my students. Over all these years, Ben has become a fatherly friend and an important teacher. This is why this important moment for my Faculty is also a very precious one for me personally. I should be grateful, Don, if you would include this personal note in the report about this short ceremony that I am sure you will pass on to your father.

But before so reporting, dear Don, the floor is now yours to convey Ben’s message to us.

Reference:

Benjamin Ferencz with Nadia Khomani, Parting Words. 9 Lessons for a Remarkable Life (sphere 2020).

Acceptance Speech

Donald Ferencz

Convenor of the Global Institute for the Prevention of Aggression

Magnifizenz,
Spectabilis,
Dear Elisabeth,
Dear guests of honour,
Dear Faculty and especially dear students!

As Claus has said before, we shall be hearing my father in a moment. Before we do that, I consider it a joyful privilege to be able to convey a few words of gratitude to all of you here today on behalf of my father. The following reply – though spoken by me – should be understood as coming directly from him.

Before conveying my thanks to all concerned for the very kind and prestigious award of an honorary doctorate from the University of Cologne, I should like to express my regret that I am not in a position to join you today. As some of you will know, I expect to very soon begin my 102nd year, and I'm relying more these days on my son, Don, who is well-known to a number of you, to assist with such pleasant duties.

I should like to begin by offering my sincere greetings to the Rektor, to the Dean, and to the Faculty of the University of Cologne, including my friend Professor Claus Kreß, and to all the honoured guests, including my very dear friend, Elisabeth Kaul as well as the distinguished representatives of the International Nuremberg Principles Academy, with whom I've had the privilege of working over the years. I'd like to also recognize and to thank my son, Don, for his assistance on this special day and for working closely with Professor Kreß in helping to finalize the necessary details. It is with very fond remembrance that I recall the last time I was in Cologne, to honour our very dear and very dearly missed friend, Judge Hans-Peter Kaul. It gives me particular pleasure to know that Elisabeth Kaul is able to join us today.

We've been poignantly reminded this afternoon of an important transition – both for the University of Cologne itself and for Germany as a nation – from the very dark days of discrimination and persecution to

considerably brighter days of leadership in advancing the rule of law. I am thankful that others may find inspiration in the lessons of my own life as to what can be accomplished in one very full lifetime. But as we all know, much work yet remains to be done, and perseverance will surely be a key ingredient in any future successes. This is why, as I've said many times, we must be prepared to never give up.

To receive an honorary degree from the hands of those responsible for training up the next generation of torch-bearers is deeply gratifying.

I thank you all and wish each of you the very best for the future.



Selected Passages from a Conversation between Benjamin B. Ferencz and Claus Kreß

This is a transcription of parts of a conversation between Claus Kreß and Benjamin B. Ferencz. The conversation was recorded and parts of it were presented during the digital ceremony in honour of Benjamin B. Ferencz. Minor editing was done to simplify the reading flow.

“From Romania to Harvard”

Benjamin B. Ferencz: And then you say, what can I do? I'm just one person. *Nonsense!* No one could be less a person than me. I was a little baby born in a country where there were victims of the persecution of the Jews. My sister was born in the same bed I was a year and a half before me. She was a Hungarian. I was a Romanian. Most of the people there were anti-Semitic. So, we decided the best thing to do is leave the country and go to America, the land of opportunity. And so we went to America, the land of promise, and we lived in a cellar because my father could only get a job as a janitor even trained to make handmade shoes. But they told him that in New York they don't have any handmade shoes. They could do more with the machines. So, my father was lucky to get a job as a janitor in “Hell's Kitchen”. It was called “Hell's Kitchen” because it came pretty close to hell, a high-density crime area. And that's where my memories began.

I was picked in my grade school by my eighth-grade teacher, Mrs. Connnelly. She called my parents and said, “This boy is a gifted boy.” My mother who was with me looked at me. I looked at her. I didn't get any gifts. We didn't know what she was talking about. Mrs. Connnelly said, “He should go to college.” We didn't know anybody who ever went to college. That was another world. And my teacher said, “Well, if he goes to Townsend Harris High School – that is the only one of its kind in New York – and if he passes the courses, which are on a college-level he will automatically be admitted to a city college. It won't cost anything. It's free.” I said, “If it's free, I'll take one.” And then I went to Townsend Harris which of course didn't admit any girls. And I went through that curriculum, although I didn't understand most of it. But what was interest-

ing, I understood. And I went to city college and I thought, well, one of my relatives had said that I would make a very good lawyer or a good crook. I didn't want to be a crook and I turned that down right away. I thought well, what is it, *a lawyer*? I didn't know any lawyers. And I asked others, "Well, which is the best law school? Is it in Brooklyn?" *No, it's not Brooklyn, it's Harvard.* "Oh, Harvard? OK, I go to Harvard." And you know what? They accepted me and they gave me a complete scholarship.

"Five Battle Stars and a Case at Nuremberg"

Benjamin B. Ferencz: I got five battle stars when I was honorably discharged as a sergeant of Infantry in World War II and I asked, "What is this about?" And they asked me, "You landed on the beaches of Normandy?" Yes. "You went through the Maginot line?" Yes. "You went through the Siegfried line?" Yes. "You crossed the Rhine at Remagen?" Yes. "You were there for the final battle of the Bulge." Yes. "That's why we gave you five battle stars." Well, not many people got five and I was damn lucky. I was there and on top of that, I saw all the horrors in concentration camps. That was my job to get in there quickly before they destroyed the evidence, before the SS had gotten out and present the proof and then was able to put them together so that I did some various remarkable things. I persuaded the Nurembergers to give me a special trial for the Einsatzgruppen. They said, "Well, OK, then you'll do it." And I did it. And I rested my case in two days. So, I have been there in ways that have had a traumatic effect on me and I can't stop trying to stop war-making because war is really horrible.

"Defining Aggression and Establishing the International Criminal Court"

Benjamin B. Ferencz: And it's changing and it's changing for the good. We [addressing Claus Kreß] worked together on defining aggression. That was a big problem. You're going to say you can't go to war. War is aggression. It's a crime. So, I discussed it with some college professors. And as law school professors – what do you do on aggression? And I wrote a two-volume book, "Defining International Aggression". Well, that's a diversion. We needed a court. Well, I worked for years to build the court and then we had it, an International Criminal Court.

*“On the Fragility of the International Rule of Law and a Message to the
Students of the University of Cologne”*

Benjamin B. Ferencz: I am satisfied with the progress. I am aware of the difficulties. Many people believe the only thing that is important is power: “If you have the power, use it. If you don’t like what a country is doing destroy them.” The ex-president of the United States – when he made the first address of the United States to the United Nations – addressed his comments to the president of North Korea and he said, “If you threaten us or any of our allies, we will totally destroy you.” I was listening to it and I said, “Mr President, are you crazy?” How do you totally destroy a country? You do it like the Einsatzgruppen, line them up in front of bridges and machinegun them all? Is that how you totally destroy a country? What do you talk about? He said that they had threatened us. They may have threatened us, but that is still no justification. This “argument” was raised in the Einsatzgruppen Trial as well. The lead defendant, Otto Ohlendorf, said, “Hitler told us the Russians were coming and he knew more than I did about that. So, I wouldn’t challenge it, and he said the Russians are not going to be bound by any rules, so we don’t have to be bound by any rules. Kill them all.” They did the best they could to kill them all. The judges said, “Putative self-defense – which is the argument you are making – is no defense.” Where would the world be if you could go out and kill your neighbour because he has a gun and you think he’s threatening you and you’ll kill his relatives and you kill other people – which we’re doing: The ex-president of the United States – I accused him in the New York Times – sent his military and he said, “Go, we have a very bad guy over there. He’s from another country, Iran, and he is going straight to Iraq. He is a general. He is a big threat to us. I want you to take him out.” It was not understood to be taken out for a walk and taken out for a beer. It was understood to take him out and kill him without any trial because the former president had decided that he would be a threat to our country. “Kill him”, and they did. And I said that this reminds me of what the defendants said in the Einsatzgruppen Trial. They knew the Russians were coming, and the Russians were their enemies. And they said, “Whenever you catch them, kill them all.” And they killed hundreds of thousands of prisoners of the war. And we said, “No, it’s a crime.” And the Americans – I’m proud to say – stood up for the principles of justice. But there were some Americans who thought that nobody was looking and killed them [German prisoners]. No trial. No finding of guilt. And just because you [addressing the former president of the United States] are the president and you believe somebody is a threat to the country...well, you might

be right, but you have to give him a chance to say it's peace. Himmler and Goering sat in the trial. Hitler didn't want to and committed suicide. But we never said, "Go and kill them." The world is still in the wrong mood. Most of what it does undermines the rule of law. So, I ask the young people: Do you prefer a world where the head of state – or any guy thinking he doesn't like the other guy and he is a threat to his interests – just sends guys out to kill him? Do you want that world?

Claus Kreß: If you now wish to share a message with our students, please go ahead.

Benjamin B. Ferencz: Oh, I have a very clear message, *never give up!* It keeps me going for one hundred and one years. It's a very serious problem and it's costing a tremendous amount of money today to carry out the current policies which are glorified. And they are absolutely stupid. And it will take students to wake up and say to the "kids", "That's enough. Do you want to have a big dispute? Settle it." There are differences of opinion. They will continue to be differences of opinion. But when it comes to differences of opinion, which run the risk of annihilating the whole country and the whole planet and all people, that's not an option.

So, my advice to young people is don't be intimidated by old ideas. Times have changed and the capacity to kill has changed. It has reached a point where many nations have the capacity to cut off the electrical grid on planet earth. That means all the water stops running and all the lights go out. And I asked the general who provided this to me in confidence fifteen or twenty years ago, "How long would it take to kill everybody?" And he said, "Well, I'm not aware of any studies on the subject yet, but I believe it would depend upon how much water you had. If you had water, you probably could survive for a week." How nice, you probably could survive for a week if you had water. If you didn't have water, you just won't know what hit you. It would make the nuclear weapons look like child's play. Nuclear weapons – in my judgment – are obsolete. They are not going to fight nuclear war. They are going to fight cyberspace war. And when I was discussing this twenty years ago in secret – now it's no longer a secret, there are books written about cyberspace – the problem was that everybody was getting it. The Russians could do it. The Chinese could do it. The Germans could do it.

What do you do now? You have to change your way of thinking about fundamental things about life and death. Do you want peace? Then war is no longer a tolerable option. And when they want to cut off the airspace or cut off the water in any space, there are certain limits to what is acceptable and permissible. War is not one of them. And the use of armed force has got to be curtailed. Settle your disputes by peaceful means only, which

incidentally is required by the United Nations Charta. You may have a more peaceful world. I've done my share but the rest is up to you. The need is for three basic things: We need new laws to prohibit more crimes against humanity, we need courts to determine if the laws have been violated and we need a system of effective enforcement. We don't have that at all today. We have no enforcement. The idea of national sovereignty gives a sovereign the right to decide what's best for this country. The result is: You have one president who believes you better kill the other one because we got the power. And he may be voted in and may be voted out, but we have not yet developed a system of effective enforcement of "morality" – if I simplify it. And the result is that you have crimes against humanity being committed every day in many countries. And we have no technique for dealing with it. At least, we are beginning to publicize it.

But so, that's the world in which you live. It's an unfinished job. I'm hanging around here for one hundred and one years. Come on kids, take over! It's your turn. And it's not only your turn, it's your life.



A Letter from Jonas B. Schäfer and Hannah Schulze
Zurmussen on behalf of the Association of Law Students of
the University of Cologne to Benjamin B. Ferencz

Dear Ben,

We would like to begin by congratulating you on the honorary doctorate recently awarded to you by the faculty of law of the university of cologne. It is more than well-deserved and it was a great pleasure hearing from you through your son Don as well as via your video message.

Now, there is no need to reprise what was expressed in the many great speeches held at the ceremony. Just know, that we unequivocally agree. Allow us, however, to express some thoughts not only from our perspective as a part of our faculty, but more importantly as students, as the younger generation you so often address directly.

Many of us already knew about you from our history lessons in school, from documentaries, your books and of course our classes at university. We could not have been more excited when we learned about the plans for you to be awarded an honorary doctorate and of course we cast our votes unanimously in favour of it.

We would actually go as far as to say that awarding this doctorate is more of an honour for us, now having you connected to our university and faculty. Again, the plethora of reasons we are so proud of this cannot possibly be included here in full. Not least since all of us are impressed by you in our very own ways.

Although, one common factor surely is that often history is just something we read about in books. We learn about the facts, the dates. We talk about the evils and crimes of war, but many of us never fully come to understand what all this actually means. We are young, so perhaps this is excusable. In the end we are lucky enough never to have experienced war.

But witnessing people like you, your passion and strength that despite your impressive age radiate to this day, gives us a chance to comprehend much more than our textbooks would ever allow us to. It gives us an idea of what it took to fight that evil, which makes it so much more tangible. It also instils in us a sense of responsibility to be on the lookout and fight that darkness wherever we see it.

Studying law is indisputably tough. Some of us might be in it for the money, spending nights at the kitchen table, aiming only at securing a well-paying, respectable position in a major law firm. But certainly, most of us do not see it that way. And yet, we ever so often find ourselves at that table, buried in our textbooks, wondering why – if not for the money – we are doing this to ourselves. Being sleepless at night and stressed out at day.

The answer to that we find in you, Ben. It is the notion that law is a powerful tool in the hands of the right people. That it can certainly be more than just setting up contracts for money, that it might even be a way to create peace and find real justice and reconciliation. This is what keeps us going because it gives us a much-needed sense of direction and shows us what kind of lawyers we want to be one day.

You are a great role model to many of us. And while few, likely none of us, will achieve what you have achieved, we all try to carry that torch you gave us as best as we can. With all these sparks carrying your vision of law and world peace into the future, we will surely be able to keep the fire you lit burning bright and hopefully ignite new flames of our own.

Now all that is left for us to do, is to thank you in the name of all students and especially in the name of the student body at the University of Cologne. Thank you for your work, for what you have achieved for world history and for international law.

But most of all, thank you for being our role model. We wish you all the best.



Epilogue

Benjamin B. Ferencz

*Reprint of the Epilogue by Benjamin B. Ferencz, as originally published in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2016), pp. 1501 – 1519.*

“The Long Journey to Kampala – A Personal Memoir”

The crime of aggression has been meticulously dissected and analysed in this comprehensive tome by an array of eminent international legal scholars who have viewed the past, present and uncertain future in considerable detail. Having spent a lifetime seeking a path to a more humane world, I have been invited, in my 94th year, to sketch ‘the big picture’ together with biographical insights that might illuminate the panorama and reveal the origins and reach of my current thinking about aggression and world peace.

1. A Brief Biographical Sketch

My earliest recollections begin in ‘Hell’s Kitchen’, a dense crime area in New York City. My penniless young parents had fled from Romania with their two infants to avoid persecution and poverty. My father found work as the janitor of a tenement house and we lived in the cellar. I was educated in free public schools. Crime prevention was my chosen career path and I won a scholarship at the Harvard law school for my exam on criminal law.

When the United States went to war against Japan and Germany in 1941, I was completing my first year of legal studies. Everyone I knew rushed to volunteer for military service. My small height and my alien origin were temporary barriers. Professor Sheldon Glueck, Harvard’s renowned criminologist, was writing a book dealing with aggression and war crimes. He hired me as a research assistant. Upon receiving my law degree in 1943, I enlisted in the US army as a Private. In December of that

year, the prestigious Journal of Criminal Law and Criminology published my article on the 'Rehabilitation of Army Offenders'. It identified me as a Corporal in an anti-aircraft battalion.

In due course, General George Patton's armored tanks raced across occupied France and into Germany. Reports were received that German mobs were murdering downed allied flyers. To my surprise, I was ordered to report to Patton's Judge Advocate section where I was informed that they had been directed to set up a War Crimes Branch and my name had been forwarded from Washington.

My new assignment required me to investigate atrocities and prepare dossiers for criminal trials. It was vital to proceed to the scenes as quickly as possible lest the evidence be destroyed. What I saw and felt cannot adequately be described in words. I saw disinterred bodies of murdered airmen who had been captured and killed by enraged German mobs. I followed Patton's tanks into Buchenwald, Flossenbergs, Mauthausen and a host of other concentration camps where helpless civilians were being beaten and worked to death. The dead and dying covered the ground. Skeletons that had once been vibrant humans were stacked around the crematorium like cordwood waiting to be burned. Their melted body fat could be turned into soap and their bones used as fertilizer instead of manure. On occasion, I also witnessed vengeful inmates seize fleeing SS guards and beat them mercilessly or roast them slowly in the ovens. No one can ever convince me that wars can ever be glorious. I had peered into Hell.

My reports served as a basis for now-forgotten war crimes trials by US Military Commissions that took place in the liberated concentration camp at Dachau shortly after the war ended in May 1945. The crime of aggression was not an issue. Any resemblance to normal criminal proceedings was minimal. Summary death sentences imposed on Nazi concentration camp commanders and guards were plentiful. My only desire was to get home as quickly as possible and never again return to Germany.

By that time the victorious Allies were preparing for a highly-publicized quadripartite International Military Tribunal (IMT) to try major German war criminals in Nuremberg. When Robert Jackson, the American prosecutor, made his now-famous opening statement to the IMT on 21 November 1945, I was en route back to America. On the day after Christmas I was honourably discharged as a Sergeant of Infantry and awarded five battle stars for not having been killed or wounded. Not all wounds are visible. The trauma of my wartime experiences has never left me.

I returned to the US with about ten million other veterans looking for a job. Soon thereafter, the War Department invited me to Washington

for an interview. I was offered a commission as an army Colonel to do essentially what I had been doing as a Sergeant. I declined. Life in the military did not appeal to me. The offer was sweetened to allow me to retain civilian status with Colonel's privileges and the right to quit whenever I wished. It was an offer I could not refuse. I promptly married my childhood sweetheart and planned to take full advantage of my new rank, with its elevated prerogatives, to enjoy a brief honeymoon in Europe. Ten years later, we returned to the States. No one could have anticipated what happened during that decade.

2. *The Biggest Murder Trial*

At the Pentagon I met Colonel Telford Taylor, a Harvard law graduate with a record of distinguished public service. He was on Jackson's staff and had been appointed by President Truman to direct a dozen subsequent proceedings in Nuremberg as a follow up on the IMT trial. The new American prosecutions were designed to reveal how a broad spectrum of German society had made it possible for Hitler's aggressions and crimes against humanity to occur. Taylor hired me to help with his new assignment.

Taylor was promoted to General and head of the 'Office of the Chief of Counsel for War Crimes' (OCCWC). He sent me to Berlin to scour official Nazi archives for evidence against leading suspects. A staff of about fifty researchers combed through tons of captured records in the ruins of the German capital. We discovered an incredible cache of top-secret reports describing events that would seem incredible to a rational human mind. Top-secret dispatches from the Eastern front detailed the cold-blooded murder of millions of innocent men, women and children. Special killing squads, given the non-descript title of *Einsatzgruppen* (Action Groups, EG) and totalling about three thousand men, were assigned to 'eliminate' (a euphemism for 'kill') all Jews, Gypsies and others suspected of being current or future enemies of Germany. The chronicles contained names of officers in charge and the body count of the victims who had been systematically exterminated like vermin, in fulfilment of Nazi racial doctrines.

After I had tabulated over a million murders, I flew down to Nuremberg and urged General Taylor to schedule a special trial against leaders of the EG killing squads. Taylor was hesitant; no such trial had been budgeted or approved by the Pentagon and no staff members were available. When I replied that I could handle it in addition to my other duties, he designated me the Chief Prosecutor of what was to be known as the

Einsatzgruppen case. On 29 September 1947, my opening statement made plain, with Taylor's approval, that vengeance was not our goal. The main charge was for crimes against humanity, including genocide and 'other inhumane acts committed against civilian populations'.¹

The victims had been murdered because they did not share the race or ideology of their executioners. I asserted the right of all human beings to live in peace and dignity regardless of race or creed. It was a 'plea of humanity to law'. Two days after the trial opened, relying solely on documentary evidence and without calling a single witness, the Prosecution rested its case. After about five months of attempted evasions, all twenty-two EG defendants were found guilty by the three American judges and thirteen were sentenced to death. The press called it the 'biggest murder trial in history'. I was then twenty-seven years old and it was my first case.²

3. The Mentality of Mass Murderers

If aggression and crimes against humanity are to be averted one must understand the mentality of mass murderers. The *Einsatzgruppen* defendants had been selected on the basis of their rank and education. The number put on trial was limited by the rather absurd consideration that there were only twenty-two seats in the dock. The accused included many with doctorates and six were SS Generals. Had Germany not been at war they would probably have led normal lives. They were all well-educated men who considered themselves patriots.

The lead defendant, SS Major-General Dr Otto Ohlendorf, had legal training and was the father of five children. He admitted that the unit under his command had executed about ninety thousand Jewish men, women and children. He argued that he was only obeying superior orders. Hitler had secret information that Russia planned to attack Germany. According to Ohlendorf, the Germans were legally authorized to act in self-defence to avert the anticipated assault. It was known, said Ohlendorf,

1 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg Oktober 1946 – April 1949, Vol. IV: "The Einsatzgruppen-Case", "The Rusha Case" (15 vols., Washington, DC: US Government Printing Office), 15.

2 My second case was in my ninety-second year. On August 25th, 2011, I accepted the invitation of the then Prosecutor of the International Criminal Court, Luis Moreno Ocampo, to make the closing statement in the ICC's historic first case, the conviction of Thomas Lubanga Dyilo.

that Jews supported the communists and therefore they had to be killed. Naturally, their children had to die too, he reasoned, in order to avoid future vengeance. Gypsies had to be killed because they could not be trusted and might aid the enemy. It was all so necessary, clear and simple – according to Dr Ohlendorf – who stated that he would do the same again under similar circumstances.

The putative ‘self-defense’ or ‘necessity’ argument, seeking to justify pre-emptive attacks on several countries that, in fact, posed no imminent threat to Germany, was firmly rejected in a detailed 176-page opinion by the three American judges. They were amazed by ‘the manner in which the aggressive war conducted by Germany against Russia was treated by the defense as if it were the other way around.’ The tribunal unanimously held that the anticipatory self-defence argument was ‘untenable as being opposed to all facts, all logic and all law.’³ I remembered Jackson’s opening statement at the IMT: ‘We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.’ It is regrettable that arguments which did not save Ohlendorf from the gallows still stain the international landscape today.

Neither the perpetrator nor the victim can be relied on for an objective determination of when an enemy attack is so imminent that pre-emption is justified. Only an impartial court bound to take all the circumstances into account should be the judge. The impartial court that sentenced Ohlendorf to hang noted that crimes against humanity ‘can only come within the purview of the basic code of humanity because the State involved, owing to indifference, impotence or complicity, has been unable or has refused to halt the crimes and punish the criminals.’⁴ If a nation fails in its duty to protect humanity by law, an international court must step in. That conclusion reappeared when the principle of ‘complementarity’ was adopted by the International Criminal Court (Court) in Rome fifty years later.

As the Germans and the Japanese learned to their sorrow, loyalty to country – or any other cause however admirable – can never be an acceptable justification for genocide or crimes against humanity. Everyone must be presumed to intend, and be responsible for, the foreseeable consequences of his deliberate deeds. Patriotism cannot erase the evil intent or *mens rea* that is inherent in knowingly and deliberately slaughtering large numbers of innocent people – whether in war or peace. Whether the crime

3 Trials of War Criminals, *supra* note 2, 466, 470.

4 Trials of War Criminals, *supra* note 2, 208.

is called ‘aggression’ or ‘crimes against peace’, or anything else, is not decisive. Common sense dictates that inhumane acts of such enormity must also be condemned as crimes against humanity. My opening statement in the *Einsatzgruppen* trial warned: ‘If these men be immune then law has lost its meaning and man must live in fear.’⁵

After several higher US military authorities rejected their appeals, an unrepentant Ohlendorf was hanged on 7 June 1951. Three other EG commanders suffered the same fate. The remainder were sentenced to long prison terms. The other approximately three thousand EG accomplices, who surely aided and abetted and were part of the Nazi common plan and design for mass murder, were never tried. In 1958, as an act of ‘clemency’ all US trials in Germany were halted and war criminals convicted by the US were freed. There is little doubt that the premature release of convicted war criminals was influenced by cold-war political considerations. It was a sad day for those who believed in the rule of law.

In 1950, US forces intervened in a gruelling civil war between rival political factions in Korea. A similar intervention took place later in Vietnam. Neither Congress nor the United Nations authorized these presumably well-intentioned wars. Many denounced the US for its aggressions, which cost the lives of countless Americans and displaced millions of terrified civilians. Atrocities committed by US troops brought shame upon their country. Young people everywhere were filled with rage and desperation. What was declared in principle at Nuremberg was repudiated in practice. On the fields of battle, the voice of the law was not heard. Ignoring or bending the law backwards to accommodate political goals is self-destructive and achieves nothing. Similar conflicts in Iraq and efforts to shape other countries to our own image have produced only more blood and tears.

4. *Reparations to Victims*

The Rome Statute authorizes the Court (article 75) to establish principles for ‘restitution, compensation and rehabilitation’ to victims of crimes within its jurisdiction. ‘The crime of aggression’ is listed as one of the four

5 This sentence was quoted fifty years later by the late Professor Antonio Cassese when he made his first Report to the UN General Assembly and Security Council as a President of the ICTY in 1997 (General Assembly, 52nd session, 18 September 1997, A/52/375, S/1997/729), citing Trials of War Criminals, *supra* note 2, 53. We shared the prestigious Erasmus prize in The Hague on 13 November 2009.

‘Crimes within the jurisdiction of the Court’ (article 5). Compensating victims of any of the four core crimes is important for reconciliation as well as justice. Reparation and rehabilitating individual victims of aggressive war presents a very daunting challenge. A brief review of my personal experiences with this problem, starting in the ruins of a divided Germany in 1948, might be enlightening.

In 1947, US Military Government restitution laws decreed that properties of Nazi victims that had been confiscated or ‘aryanized’ could be reclaimed. Unclaimed Jewish assets were presumed to be heirless and could be acquired by a charitable successor organization mandated to use proceeds to benefit survivors of persecution. A consortium of leading Jewish charities persuaded me to take on the unprecedented assignment. In August 1948, I designated myself the Director-General of the Jewish Restitution Successor Organization (JRSO) and hoped the task would soon be completed. The difficulties turned out to be unimaginable.

The sponsors were unwilling to risk funds for administrative costs. Germany’s currency had been devalued, properties had been bombed, repairs had been made, mortgages had been discharged, valuations had changed, new owners insisted they had paid fair value. Good faith acquirers screamed they had helped Jews to escape. Disputed claims had to be adjudicated by frequently hostile German agencies and courts. There was the imminent threat that Soviet troops would sweep over Germany and seize all private properties. Concentration camp survivors were desperate. Speed was of the essence. Over 300 hastily-employed JRSO clerks, typists and investigators raced to file over 163,000 claims for restitution to beat the deadline at the end of 1948.

The return of private and organisational properties was only the beginning. Post-war Germany was defeated, devastated and destitute. In 1951, West German Chancellor Konrad Adenauer acknowledged that, unspeakable crimes were perpetrated in the name of the German people, and this imposes upon them the obligation to make moral and material amends.⁶ Special German indemnification laws had to be enacted. The consent of all political parties was vital. The lead negotiating partner for claimants was the Conference on Jewish Material Claims Against Germany (Claims Conference), an amalgam of leading Jewish organizations that paralleled the JRSO. I served as counsel to the team that met German delegates for long highly-tense secret negotiations in The Hague. On 10 September

6 Konrad Adenauer, in speech before the Bundestag, 27 May 1951. See http://www.auswaertiges-amt.de/EN/Aussenpolitik/InternatRecht/Entschaedigung_node.html.

1952, a ‘Reparations Treaty’ between West Germany, the new State of Israel and the Claims Conference was concluded.⁷

Victims of Nazi persecution submitted over one million personal injury claims – Jews and non-Jews alike. A small army of German bureaucrats had to evaluate the applications from claimants scattered all over the world. I directed legal aid offices with a staff of about a thousand people in nineteen countries where survivors had found refuge. In due course it became clear that settling claims would take very many more years than I wanted to remain in Germany. In 1956 I returned home with my wife and our four children, born in Nuremberg.

By that time the total cost of compensating Hitler’s victims had exceeded fifty-billion dollars and was rising. How obstacles were overcome is too long a story to be told here.⁸ Fifty years later, compensation payments, which victims felt were ‘too little and too late’, were still being settled by Germany. In a comprehensive study by the UN in 1993, Rapporteur Theo von Boven concluded: ‘It is obvious that gross violations of human rights ... on a massive scale, are by their very nature irreparable’.⁹ My personal conclusion is that the only satisfactory solution to the problem of having to compensate victims of war crimes is to avoid war-making itself.

5. *The Search for World Peace*

Once again, I found myself in New York looking for a job. Successful law firms wanted to know what clients I could bring. I had none. I was also unwilling to accept fees from Holocaust survivors. My private practice of law was limited and uninspiring. Telford Taylor and I became law partners. After a few years, he accepted a professorship at Columbia University and later at Cardozo Law School in New York.

US military interventions in Korea and Vietnam had ignored the lessons of Nuremberg. Confronted with reports of aggression and unpunished atrocities perpetrated by US troops, I recalled the writings of the American

7 The treaty was signed by German Chancellor Adenauer, Israel Foreign Minister Moshe Sharett and Nahum Goldman President of the Claims Conference – who signed with the fountain pen my wife had given me for good luck when I finished Harvard Law School and went off to war in 1943.

8 See C. Guschler, *Schuld und Schulden: Die Politik der Wiedergutmachung für NS-Verfolgte seit 1945* (Göttingen: Wallstein, 2005), pp. 474, 539.

9 Commission on Human Rights, Final Report submitted by Mr. Theo van Boven, 2 July 1993, E/CN/SUB.2/1993/8, 53.

revolutionary Tom Paine, who died near my home in New Rochelle. He wrote that the duty of a patriot is not to follow his country, right or wrong, but to uphold it when it was right and try to correct it when it has gone astray. I decided to fold up my limited legal practice and dedicate myself to seeking a more tranquil and humane world through the rule of law.

My pen became my weapon for peace. I obtained access to UN libraries and meetings and buried myself studying past efforts. In 1946, the UN General Assembly had affirmed the Nuremberg principles and called for a Code of International Crimes and an International Criminal Court. Special Committees were repeatedly assigned to define aggression as part of the anticipated Code. Those who opposed controls argued that, until aggression was defined there could be no Code, and without a Code there was no need for a Court. Thus, they were all linked together and deliberately put into a deep freeze by the Cold War.

Interest in war crimes trials diminished as ideological tensions between the US and USSR increased. Partners in war became adversaries in peace. The lessons that far-sighted legal visionaries tried to teach the world at Nuremberg, and later at Tokyo and elsewhere, seemed to have been forgotten as powerful nations went back to killing as usual. They asserted ancient sovereign prerogatives to decide for themselves whenever force should be used to protect their national interests. The world pays dearly, in lives and treasure, for the short-sighted intransigence of powerful political leaders. It was twenty-nine years later, after the Vietnam War was receding, that the ice began to melt.

Over the years I had appealed to UN delegates and written many articles urging compromise solutions. Some called me ‘Mr. Aggression’. A UN Committee finally reached a consensus definition in 1974 replete with ambiguities.¹⁰ The Chairman, Bengt Broms of Sweden, invited me to come down from the balcony and stand with the group for the official photo. I was the only person in the room who was not being paid to be there. My two-volume book on ‘Defining International Aggression – the Search for World Peace’ appeared in 1975. Four more volumes followed: ‘An International Criminal Court’ and ‘Enforcing International Law’. These tomes were my notebooks documenting man’s efforts to replace the law

¹⁰ General Assembly ‘Definition of Aggression’, 14 December 1974, GA Res. 3314 (XXIX). See B. Ferencz, ‘The UN Consensus Definition of Aggression: Sieve or Substance’, *The International Journal of Law and Economics*, 10 (1975), 701–724, available online at <http://www.benferencz.org/index.php?id=4&article=30>.

of force by the force of law. ‘New Legal Foundations for Global Survival’ summarized my thinking in 1994. It was generously hailed by UN Secretary-General Kofi Annan as a remarkable work that could ‘further the cause of the United Nations and its aims of peace and justice.’¹¹

6. *The Road to Rome*

Equivocating lawyers are very skilful at finding detailed objections to conclusions they wish to avoid. The questions ‘Who is the aggressor?’ and ‘Who decides?’ had stymied the League of Nations after World War One. The truth is that, even after World War Two, powerful states and particularly the Permanent Members of the Security Council remained unwilling to yield their powers and privileges to any untried tribunals. They found problems for every solution.

The International Law Commission’s Draft Code of Crimes was finally completed in 1996 endorsing the Nuremberg definition of aggression. It thereby opened the way to further work on establishing an international court. Preparatory Committees laboured hard and long and by 1998, plenipotentiaries from more than one hundred nations were ready to meet in Rome to seek reconciliation of more than a thousand points of disagreement. The key problems still revolved around how aggression was to be defined and who would decide whether the crime had occurred.

Before the official opening of the Rome Conference in June 1998, I was invited to address the delegates. Speaking for those who could not speak – the silent victims – I admitted that my only authorisation came from my heart. I recalled that, after Nuremberg, waging war ceased to be a national right but had become an international crime. I urged them to end equivocation and rely on Court prosecutors and judges to interpret any vague clauses. I warned that excluding aggression would grant immunity to malevolent leaders and would cost the world dearly.

Under the politically powerful influence of a conservative Senate Foreign Relations Committee and the Pentagon, the unspoken US policy and strategy seemed clear: oppose any international court that might try Americans. If that fails, delete aggression as a punishable crime. If that also fails, insist on a new definition of aggression that guarantees Security

11 Personal letter 24 June 1997. My books as well as articles, lectures and films are available free of charge on the internet courtesy of the Audio/Visual program of the UN Legal Division, see <http://www.un.org/law AVL/>.

Council control. In any case, postpone further action on the issues as long as possible and boycott the Court. The American public was lulled into inaction by patriotic slogans and pretensions that their UN representatives were merely seeking greater clarity to protect US vital interests and military personnel.¹²

Despite official US opposition, and its disingenuous arguments, on 17 July 1998 the overwhelming majority of States voted by wild ovation of 120 in favour and 7 against to create an ICC with aggression listed as a crime. However, a decisive compromise stipulated that aggression charges could only be activated if a new definition of that crime was agreed upon and other vital hurdles were also surmounted. Punishment for aggression remained in limbo. Further consideration of amendments was postponed for at least 7 years to allow new committees to seek new compromises. It was twelve years after Rome that the ICC Review Conference finally convened in Kampala, Uganda in the summer of 2010. US policy had not changed. The insistence on consensus in Kampala in effect meant that everyone would have the power to veto anything.

7. What Really Happened at Kampala

On the Sunday evening before the Review Conference there was a gala dinner for the assembled Ambassadors and highest UN officials. I was invited to make a filmed keynote address.¹³ In a rather frank and impassioned appeal, I urged the delegates to honour the Nuremberg Principles by going forward and not backward. I warned there could be no war without atrocities and continued immunity for aggressors would encourage rather than deter the crimes we were seeking to prevent. I suggested that the use of armed force in violation of the UN Charter should be made punishable by international and domestic criminal tribunals as crimes against humanity. If ‘aggression’ was not alleged, no prior Security Council consent would be required. The reaction to the speech was quite

12 US policy softened during the Presidency of Barack Obama, who sent representatives to ICC meetings and acknowledged a moral responsibility and security interest in preventing mass atrocities through international criminal justice, see J. R. Crook, ‘US Official Describes US Policy Toward International Criminal Court’, American Journal of International law 106 (2012), 384–386.

13 Cinema for Peace Foundation, Berlin, ‘Special Evening on Justice’ Kampala 2010, available online at <http://www.benferencz.org/index.php?id=5&media=22>.

enthusiastic, yet the final action taken at the Conference left much to be desired.

There can be no doubt that in many respects the compromises reached at Kampala have been significant and noteworthy. Aggression remains confirmed as a crime and there is a new consensus definition included in the Statute. After Kampala, no one can persuasively repeat the canard that aggression has not been defined and hence cannot be punished.

Nevertheless, the desire for consensus embraced ambiguities that invite future debates. Whether non-ratifying States Parties may be bound by the aggression amendments remains contentious. Opt-out options continue to be controversial. The 1974 consensus definition was incorporated by reference in the 2010 amendments, thereby enabling arguments to be made that the exculpatory clauses and Security Council powers sealed in the earlier formulation must also be respected.¹⁴ Some ambiguities were clarified by ‘Understandings’, skilfully negotiated by Professor Claus Kreß, to avoid complete stalemate. The most noteworthy compromise was the confirmation that aggression, to be punishable, must be a ‘manifest’ violation of the Charter, as determined by three more – rather imprecise – hurdles of ‘character, gravity and scale’. The hurried acceptance of these additional obstacles enabled the delegates to go forward.

The earliest date mentioned for possible Court action on the crime of aggression – after 1 January 2017 – was an optical illusion. Setting a minimum but no maximum or firm date is hortatory but not mandatory. A host of additional requirements, such as thirty ratifications and a minimum of two-thirds approval by the Assembly of State Parties, must also be met before the Court can act on the crime of aggression. The illusion of unanimity cloaked the reality of stalemate on key issues.

The fact that the Conference did not fail completely was due in large part to the skill and persistence of its Chairman, Ambassador Christian Wenaweser and his Deputy, Ambassador Zeid Ra’ad Zeid Al-Hussein of Jordan. Despite shortcomings, it is hoped that those present in Kampala who agreed to the changes ‘by consensus’ will soon ratify their own decisions. To do less would be to repudiate them and condemn the Kampala effort as a charade.

14 See *B. Ferencz, supra* note 11, ‘The UN Consensus Definition of Aggression’, 701, available online at <http://www.benferencz.org/index.php?id=4&article=30>.

8. Aggression as a Crime Against Humanity

On 6 June 1945, Robert Jackson reported to President Truman that the legal position of the US in prosecuting German war criminals would be ‘based on the common sense of justice ... We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.’¹⁵ After a perfectly fair trial, the Nuremberg judges recognized aggression as ‘the supreme international crime’.

Rome and Kampala were important stepping stones in the evolution of international law; but as far as punishing aggression was concerned, Jackson’s warning about not being hamstrung by ‘sterile legalisms’ was ignored.

We must learn from the past if we hope to master the future. Progress in enabling the International Criminal Court to prosecute individuals for ‘the crime of aggression’ has been, and will likely continue to be, a very long and difficult process. A better way must be found to end the stalemate that has been so long persistent. It is prudent, and essential, therefore to seek parallel or new fallback measures to end the dangerous impunity gap that still exists. Even sceptics and cynics should recognize that, if the use of armed force can be deterred to only a small extent, the achievement would surely be worthwhile. Do not expect a perfect or easy solution, but doing nothing to hasten desired change is not a productive option.

It should be recalled that isolationist sentiments in America prevented the US from joining the League of Nations after the First World War. When the UN Charter was signed in 1945, those who had borne the heaviest burdens of the victory understandably insisted upon maintaining control over future measures to secure the peace. The UN Security Council (Council) was empowered to determine the existence of ‘any act of aggression’ and the steps ‘to maintain or restore international peace and security.’ (Article 39). Substantive Council decisions required affirmative votes from all five self-appointed permanent members (US, USSR, UK, France and China). The veto right was a political necessity in 1945, without which the US, and others, would not have been able to join the UN. During the last 68 years, there has been no indication that the permanent members were ready to give up any of their basic Charter privileges and obligations.

¹⁵ Report to the President by Mr. Robert Jackson, 6 June 1945, International Conference on Military Trials, London, 1945, Sec. IV.

Whether it is fair or not, practical international enforcement relating to the crime of aggression may unavoidably be linked to the UN Security Council. Unfortunately, for various political reasons, the Council has not succeeded in achieving the UN's primary goals of saving 'succeeding generations from the scourge of war' and ensuring 'that armed force shall not be used save in the common interest' (Preamble). As a result, many smaller nations, particularly those that did not exist when the Charter was drafted, are understandably reluctant to trust their own security to an ineffective Council. These hesitations, doubts and failures resonated during the many years of unsuccessful efforts to define the crime of aggression. The tactic of finding a problem for every solution and blaming inaction on the inability to agree on a definition was a convenient subterfuge to maintain the status quo.

If, in reality, aggression had not been defined, of course it would have been unfair to convict any perpetrator. But where the elements of the crime had been adequately set forth in past decisions, proclamations and common sense, it would have been unfair to allow arch-criminals to escape because of the disingenuous argument that the crime had not been defined. The vital ingredient that was really lacking was the political will of a few major powers that persisted in their refusal to accept rational international controls over the irrational and inhumane use of military force.

Every good lawyer can find new ambiguities to block what his client, or his government, does not want to accept. In fact, aggression had been adequately defined by the Nuremberg tribunals, the International Law Commission, the 1974 consensus definition and a host of legal commentators. Nevertheless, Kampala finally produced a new consensus definition on 12 June 2010. It should be ratified despite its numerous imperfections. Something is better than nothing.

Jurists will now be aided by the *Travaux Préparatoires of the Crime of Aggression* by Kreß and Barriga on which to base sound and fair decisions. Judges should be allowed to judge. Masses of innocent people were killed while diplomats and academics argued and quibbled about 'sterile legalisms'. The definition of aggression has been debated for over sixty-five years. It is high time to move on to another approach. Enough is enough!

As long as the definition of aggression was being debated, little effort was made to find another route or simpler way to stop the atrocity of illegal war-making itself. There is no need to wait for all of the hurdles blocking prosecutions for 'aggression' to be overcome. If the Court door to punishing the 'crime of aggression' is closed, those who prefer law to war

must seek and find another entrance. The primary goal now is to end the existing impunity for the crime of aggression.¹⁶ The sooner the better!

The use of armed force that is not in self-defence and has not been approved by the Security Council, is a clear violation of the UN Charter. The Council has been vested with responsibility for determining whether aggression by a State has occurred. Such a prerequisite does not exist, regarding any other of the core crimes. On the contrary, crimes against humanity do not require any Security Council involvement. The decision rests with the Court, no strings attached.

Since modern weapons of war are unpredictably variable, the listings of illustrative ‘Crimes against humanity’ often contain a residual catch-all clause to cover ‘other inhumane acts’, which resemble ‘murder’, ‘enslavement’, and similar abominations on the prohibited list. It is hard to imagine anything that could be a more ‘inhumane act’ than the illegal use of military might in the form of a systematic attack knowing that it will kill massive numbers of innocent people. It is both logic and law that perpetrators are presumed to intend the consequences normally foreseeable ‘in the ordinary course of events’ (article 30, Rome Statute). Charging aggressors with crimes against humanity – instead of waiting indefinitely for ‘aggression’ to become actionable – would be a more effective way to warn tyrants everywhere that their days of immunity are over.

It should be noted particularly that punishment for ‘crimes against humanity’ requires no new definition and no prior Security Council consent or involvement. Like genocide, humanity crimes are also immune from statutory time limitations. Many pre-eminent jurists point out that ‘crimes against humanity’ are already punishable as universal or ‘customary crimes’ from which there can be no derogation.¹⁷ For over a hundred years, going back to the Hague Peace Conferences starting in 1899, it has been indisputable that ‘the human person remains under the protection of the principles of humanity and the dictates of the public conscience.’ What distinguished crimes against humanity was that their magnitude and offensiveness shocked the human conscience and thereby constitutes a crime against all of humanity.¹⁸

16 B. Ferencz, ‘Ending Impunity for the Crime of Aggression’, *Case Western Journal of International Law*, 41 (2009), 281–290.

17 See for example writings of Professors Bassiouni, Scharf, Schabas, Kreß and Cassese. To restrict prosecutions, some domestic laws stipulate that only the crimes listed in their criminal codes can be prosecuted in their courts.

18 See B. Ferencz, ‘The Nuremberg Principles and the Gulf War’, *St. John’s Law Review*, 66 (1992), 711–732, at 713.

To be sure, the laws of humanity must apply equally to all nations, groups and individuals. They apply in times of war or peace or regional conflict. It can be left to independent jurists, carefully selected on the basis of qualifications, region and gender, to decide if the accused is guilty of 'crimes against humanity' within the meaning of the ratified Rome Statute, which incorporates the Kampala amendments. It is a much easier road to travel than the blocked and hazardous terrain that has shielded perpetrators of 'the crime of aggression' for too long. It is high time for the common sense voice of humanity to be heard and respected.

Admittedly, the way people think about strongly-held traditions cannot easily be altered. The mind cannot be changed until the heart is changed. We have seen that the complete absence of remorse by those responsible for the slaughter of masses of innocent people, who had done them no harm and whom they did not even know, remains a frightening reality. Fear that cherished values are being threatened makes murderers out of otherwise decent people – regardless of nationality. Nothing can stop a person who is ready to sacrifice his life for ideals valued more than life itself. We have yet to learn that we cannot kill an ideology with a gun. The rule of law offers a peaceful way to deter uncontrollable violence.

We need young leaders who are prepared to think 'outside the box' and courageous enough to act for the general welfare. Law must not remain helpless to bring the worst criminals to justice. It is a disgrace to the so-called 'civilized world' that – after the Nazi Holocaust – genocide was possible in Rwanda and similar mass slaughters continue to this day. Silence in the face of evil is a form of complicity. Pious declarations without implementation are not good enough. Those leaders, who are responsible for the use of armed force, knowing that it will kill large numbers of civilians, must be held to personal account. Whether it be called 'war crimes', 'genocide', 'crimes against humanity', or its original title 'crimes against peace', should not be decisive. Criminality should be determined by the facts of the offense and not by deliberately ambiguous nomenclature. Noted English Barrister Geoffrey Robertson QC hit the nail on the head: 'Planning or waging a war of aggression is a crime against humanity...'!¹⁹

As long as the International Criminal Court remains blocked and cannot activate its jurisdiction over the crime of aggression, the same basic facts that would constitute the aggression crime should now be chargeable,

19 G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin, 1999), p. 269.

by the Court and national courts, as a ‘crime against humanity’. Every accused is entitled to the presumption of innocence and a fair trial but the possibility of conviction would surely have an electrifying deterrent effect throughout the world. Therein lies the key to opening the lock on the courthouse door.

9. Priority of National Courts

The 1948 Universal Declaration of Human Rights sets the desired standard. It recognizes that the inherent dignity and ‘inalienable rights of all members of the human family is the foundation for freedom, justice and peace in the world’. The preamble to the Rome Statute requires States to take measures at the national level to ensure that the listed crimes do not go unpunished. The Court’s complementary jurisdiction was never intended to replace States’ primary obligations.

In addition to ratifying the Kampala amendments, what is needed now is a vigorous campaign – led by the Court and civil society – urging more national legislatures to incorporate the Rome Statute, or equivalent, into their national criminal codes. Many countries all over the world have already started to do so, as evidenced by detailed reports of many learned authors included in this comprehensive Commentary. No further commentary is required here. It may be noted that the number of national courts that are already trying international criminal law offenders for crimes against humanity has been authoritatively described as ‘nothing short of amazing’.²⁰ A twenty-four page study by the US Library of Congress in 2010 described the provisions in national legislation or penal codes of about fifty countries that made crimes against humanity punishable locally.²¹ Uniformity is desirable but not essential, since needs and opportunity will vary in different communities. There has been a gradual awakening of

20 J. Rikhof, ‘Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity’ in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010), pp. 7–81, at 80 and *passim*. See also M.C. Bassiouni (ed.), ‘Special Issue: Accountability for International Crimes and Serious Violations of Fundamental Rights’, *Law and Contemporary Problems* 59 (1996), 1–347.

21 See the ‘Law Library of Congress Multinational Report Crimes Against Humanity Statutes and Criminal Code’ prepared by the Foreign Law Specialists and Legal Research Analysts of the Law Library of Congress, April 2010, available online at http://www.loc.gov/law/help/crimes-humanity_MULTI_RPT_final.pdf.

the human conscience. The enactment and enforcement of humanitarian law and the criminalisation of the illegal use of force are the foundation stones for a more humane world order governed by the rule of law.

To be sure, nations are not likely to try their own leaders for either aggression or crimes against humanity. However, 'regime change' against tyrants has become more frequent in recent years. The deterrent effect of national courts enforcing national human rights obligations should not be underestimated. A recent example is the 10 May 2013 conviction by a Guatemalan court of their former Dictator Rios Montt for the crime of genocide and other crimes against humanity. UN High Commissioner for Human Rights, 'Navi' Pillay, welcomed the judgment as one 'of monumental importance at the international as well as the national level.'²² Notwithstanding the cloud that has been raised by the almost immediate reversal of this decision by Guatemala's High Court, the case remains significant and is being closely watched by the international justice community.²³

Although regional economic and social disparities slow the march of progress, we must, and will, find means and methods to make humanitarian ideals more universally acceptable and available. Short-term thinking that may have been tolerable in ancient times is too hazardous for acceptance in the cyberspace age. New generations must try to persuade old decision-makers that planetary thinking is now imperative. Today, sovereignty belongs not to a monarch but to the people. In this interdependent world, the notion of absolute State sovereignty is absolutely obsolete. The future belongs to those who are capable of thinking universally and acting locally.

As noted at Nuremberg, the law does not and cannot remain static. The clear trend has been to expand the area of humanitarian protection for both military and civilian populations.²⁴ Surely, every accused is entitled to a fair trial as mandated by the Rome Statute. But, as Jackson noted, that does not call for the abandonment of common sense. The primary goal is

22 As reported by the United Nations News Centre, 13 May 2013, available online at <http://www.un.org/apps/news/story.asp?NewsID=44884#.UfFEO0ZwaM8>.

23 For a summary of the status of the legal proceedings against Rios Montt, see Open Society Justice Initiative account by *Emi MacLean*, 'Guatemala's Rios Montt Genocide Prosecution: The Legal Disarray Continues', 18 June 2013, available online at <http://www.opensocietyfoundations.org/voices/guatemala-rios-montt-genocide-prosecution-legal-disarray-continues>.

24 See *E. La Haye*, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008).

to protect the victims of crime and not to encourage more crime. To do less is to increase criminality at the expense of law-abiding society. Law can only be effective if it is respected and accepted by the community it is expected to serve. It must be left to competent and independent judges to take all the facts into consideration and to do what is just and seen to be just. That is what law is all about.

10. Concluding Thoughts

Failure to enforce law undermines law itself. The original UN Charter plan for comprehensive disarmament and an independent military force was never given a chance. Most nations do not feel obliged to protect the weak unless it is in their own self-interest. In desperation, those who fear their values are threatened strike back with whatever terror weapons they have. As long as militants – whether individuals, groups or nations – insist that they alone can determine the legality of their actions, their military power is not a safeguard but a menace. Vengeance begets vengeance. War-making – the illegal use of armed force – is the biggest atrocity of all but it can only be curbed rationally by peaceful means. Unauthorized humanitarian interventions may be morally legitimate but it is not up to the protagonists to decide whether they are lawful. An illegal use of force does not automatically become lawful because it is done with good intentions. Courts and prosecutors are required to take all relevant facts and circumstances into account. Despite understandable provocations, assassinations and the torture of suspects should have no place in lawful societies. Let so-called ‘terrorists’ have their day in court. Ranting by fanatics will not be persuasive to rational minds but will, in time, be repulsed by public revulsion. As long as society does not provide enforceable international laws that bind everyone equally, and independent institutions empowered to settle vital disputes by impartial and peaceful means, forceful means will remain inevitable.

Courts alone cannot solve all social problems. Peace requires more intensive efforts to ameliorate root causes of discontent that give rise to violence. Tolerance and willingness to compromise are indispensable norms that must be taught by every means and at every educational level. For their own self-interest, and to protect the brave young people who do the fighting, nations must stop glorifying war. The prevailing ‘war ethic’ must be replaced by a ‘peace ethic’.

Hope is the engine that drives human endeavour. Hope provides the energy to do all the difficult things that must be done to establish a more

humane and peaceful planet. From the perspective of one who has witnessed the evolutionary progress for a lifetime, I am convinced that if humankind is to survive, the illegal use of armed force, whether it is labelled aggression, a crime against peace or anything else, must be contained and deterred by the rule of law. Even at the risk of some miscarriages of justice, law is always better than war, which inevitably destroys countless innocent lives. The only victor in war is Death.

I am encouraged by the awareness that progress toward humanitarian law during my lifetime has been phenomenal. I recall when going to war was hailed as a legal path to power and glory. Colonialism, racial discrimination and exploitation of women were the rule. There was no such thing as international criminal law. Human rights law did not exist. Today, aggressors and those who trample illegally on human life are on notice that they may have to explain their behaviour to a national or international court of law. Deterrence is more important than conviction. Equity, morality and common sense should always be part of our evolving law.

New communication networks beyond human imagination are now globally widespread. What was ridiculed as 'reaching for the moon', has become reality. We must harness the explosive power of public opinion to counteract the devastating power of uncontrollable military might.

The profound historical, philosophical and legal essays contained in this *Magnum Opus* commentary reflect the enormous advances made and some of the difficult legal problems that still remain. Hopefully, the wisdom of the learned contributors will help illuminate the path of new torchbearers, who will see the light of a more humane world.

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“Never give up, never give up, never give up!”

Benjamin B. Ferencz

