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‘Law, Not War’: Ferencz’ 70-Year Fight for a More Just and Peaceful World

Federica D’Alessandra

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a More Just and Peaceful World**

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‘Law, Not War’: Ferencz’ 70-Year Fight for a More Just and Peaceful World

Federica D’Alessandra*

1. Introduction

The trials that took place after the end of World War II constitute a foundational moment for the international community. Not only did the Nuremberg, Tokyo, and subsequent trials sit at the birth of a new world order; they solidly marked the central role which international justice and accountability to the rule of law were going to play in that order.¹ Its vision was based on two essential pillars: (1) a system that could effectively facilitate peaceful relations among States; and (2) international laws and tribunals that would enforce them.

Commonly known for the ‘war crimes trials’, justice at Nuremberg was quintessentially about punishing aggressive war. As Cold War tensions arose, however, punishing the ‘supreme international crime’ was met with increasing resistance. Only a few faithful individuals never abandoned the goal, and their quest continues to draw awe and aspiration

* **Federica D’Alessandra** is a Visiting Scholar at Harvard Law School, where she focuses on international human rights law and policy, atrocity prevention, international criminal justice, ethics, and the law of armed conflict. She also currently serves as an Adviser to Dean Hempton’s One-Harvard Initiative for Sustainable Peace, and served as 2013–2016 Carr Center for Human Rights Policy Fellow at the Harvard Kennedy School. The author is grateful to Alina Crouch for her editorial assistance, and to Brianna Burt for her invaluable research and drafting. My profound gratitude also goes towards the editors for the opportunity of this contribution, and to all colleagues who have provided feedback and comments to this chapter, including the indefatigable Benjamin B. Ferencz himself. Errors would be mine. This paper is dedicated to the memory of another giant of international criminal law, Mahmoud Cherif Bassiouni. His passing in September of 2017 left a void that only our compassion towards others, and our deep commitment to human rights and the rule of law, can ever attempt to fill.

¹ Martha Minow, “A Lesson from Germany on eradicating a legacy of hate”, 29 September 2017, in *Boston Globe* (<http://www.legal-tools.org/doc/263cc7/>).

to this day.² Benjamin B. Ferencz, or 'Mr. Aggression' as he has sometimes been referred to in the corridors of the United Nations,³ has been a central figure in the fight to criminalize illegal war making. At the time of writing, he is the last living Nuremberg prosecutor, and one of its vision's most indefatigable advocates.

Ferencz' contributions to international law are not limited to his quest to criminalize the illegal use of force. As an international war crimes expert, a victims' lawyer, a human rights advocate and a philanthropist, Ferencz has led a career in international criminal law spanning over 70 years. From his first major role as the Chief Prosecutor of the landmark *Einsatzgruppen* trial, to his work "compensating Hitler's victims" and beyond,⁴ Ferencz has always pushed the international community to reconfirm its commitment to replacing the "rule of force with the rule of law".⁵ In the years following Nuremberg, and to this day, he has done so by advocating strongly for the establishment of a permanent international criminal tribunal that would have jurisdiction over the same crimes he tried in Nuremberg,⁶ and by insisting that the 'supreme international crime' remain a judiciable offense under international criminal law.⁷

This brief text attempts to highlight some of Ferencz' life work and advocacy.⁸ After providing a short biographical note, it traces several milestones in Ferencz' life and career, as well as discusses the lasting legacy and contributions of a man very much of his time, yet somehow always ahead of the curve.

² Rebecca F. Green, Federica D'Alessandra and Juan P. Calderon-Meza, "Accountability for the Illegal Use of Force – Will the Nuremberg Legacy Be Complete?", in *Harvard International Law Journal*, 2017, vol. 58, p. 2.

³ Tom Hofmann, *Benjamin Ferencz: Nuremberg Prosecutor and Peace Advocate*, McFarland and Company, 2014, p. 225.

⁴ Benjamin B. Ferencz and Ken Keyes Jr., "Compensating Hitler's Victims", in *Planethood: the Key to your Survival and Prosperity*, Vision Books, 1988, p. 19.

⁵ Rebecca F. Green, Federica D'Alessandra and Juan P. Calderon-Meza, "Accountability for the Illegal Use of Force – Will the Nuremberg Legacy Be Complete?", in *Harvard International Law Journal*, 2017, vol. 58, p. 2.

⁶ Benjamin B. Ferencz, *New Legal Foundations for Global Survival: Security Through the Security Council*, Oceana Publications, 1994, p. 295; *idem*, *An International Criminal Court: Step Toward World Peace*, Oceana Publications, 1980.

⁷ Benjamin B. Ferencz, *Defining International Aggression: The Search for World Peace*, Oceana Publications, 1975; *idem*, *Enforcing International Law: A Way To World Peace*, Oceana Publications, 1983, p. 479.

⁸ This paper has been written as a celebratory tribute to Ferencz' unique story, and does not constitute either a critical appraisal nor a comprehensive account of his work.

2. Introducing Benjamin B. Ferencz

A Jewish refugee from Hungary, Benjamin Berell Ferencz arrived to the United States (‘US’) as an infant. Identified as a ‘gifted boy’ at a young age, he was first sent to study crime prevention at the City College of New York, and then admitted to the Harvard Law School on a scholarship based on his criminal law examination, from which he graduated in 1943. During his time as a student, he worked as a research assistant for Harvard Law Professor Sheldon Glueck, who was authoring one of the most prominent works on the punishment of war criminals at the time.⁹

After graduation, Ferencz was enlisted as a Corporal in the US Army 115th AAA Gun Battalion in 1943. His debut to the European war theatre was the 1944 landings on Omaha Beach in Normandy. When orders to collect “evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled” arrived,¹⁰ he was assigned to the Judge Advocate Section of General Patton’s Third Army Headquarters.¹¹ After his service as investigator for the US Army dealing, among other issues, with trials by US Military Commissions, the liberation of concentration camps, and the looting of artwork by the Nazis, the Pentagon sent him back to Germany in 1946 to support Telford Taylor’s subsequent trials. In 1947, Ferencz was appointed Chief Prosecutor in Subsequent Trial No. 9, the *Einsatzgruppen Case*.

When the Nuremberg Military Tribunal closed in 1949, Ferencz became the Director General of the Jewish Restitution Successor Organization (‘JRSO’), dealing with the settlement of property claims, as well as the preservation of Jewish sacred burial sites. He also served as an expert advising the Claims Conference between Germany and Israel (officially “The Conference on Jewish Material Claims Against Germany”) as well as Director of its German offices, and then as the head of the United Restitution Organization that provided legal aid to needy claimants under the agreement reached during the Conference.¹²

⁹ Sheldon Glueck, *War Criminals and their Punishment*, Alfred A. Knopf, New York, 1944.

¹⁰ The Moscow Conference; October 1943: Statement on Atrocities (<http://www.legal-tools.org/doc/3c6e23/>).

¹¹ Olivier Beauvallet and Benjamin B. Ferencz, *Mémoires de Ben, Procureur à Nuremberg et Avocat de la Paix*, Michalon, 2012. In English, see Benjamin B. Ferencz, “Farewell Artillery, Hello General Patton”, in *Benny Stories*, available at www.benferencz.org.

¹² Benjamin B. Ferencz and Telford Taylor, *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation*, Harvard University Press, 1979, p. xvi.

In the 1970s, after having set up a firm in his home State of New York with friend and fellow-Nuremberg prosecutor Telford Taylor,¹³ at a time where “much of my practice revolved around weak cases that were morally justifiable”,¹⁴ Ferencz became a strenuous advocate inspired by the growing human rights movement. By the 1980s, he had become a prolific author, and by the 1990s he had morphed into a formidable patron and philanthropist for the causes of international justice and world peace.

Not only did Ferencz play a key role in advocating for the establishment of the International Criminal Court (he was, in fact, invited to deliver the closing arguments in the Court's very first case),¹⁵ he has played and continues to play a crucial advocacy and convening role for the class of scholars and diplomats who wish to complete the Nuremberg legacy by rendering aggression justiciable again before international and domestic criminal courts, in an effective manner. In his ninety-eighth year of age, Ferencz remains in fact active in the international justice field. Through his numerous speeches and writings, he continues to inspire and motivate young and seasoned scholars and practitioners alike. He keeps reminding us all of how far we have come since it all began in Nuremberg, and how far we still need to go before the vision that was then outlined can finally be achieved.

3. Accountability for Illegal War Making and the New World Order

To understand Ferencz' work, it is necessary to understand the ideas of his time. When Franklin Delano Roosevelt and Winston Churchill issued a policy statement on 14 August 1941 laying out the leaders' “hopes for a future world”, they envisioned a world in which nations would seek “no aggrandizement, territorial or other”, where people could live in freedom from fear and want, and where the use of militaristic force would be abandoned, and “aggressor nations” would be punished and disarmed.¹⁶ The historic statement, which came to be known as the Atlantic Charter, set forth the basis for the United Nations, as well as many other interna-

¹³ Benjamin B. Ferencz, *Telford Taylor: Pioneer of International Criminal Law*, in *Columbia Journal of Transnational Law*, 1998–1999, p. 661.

¹⁴ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Creative Approach Through Law Practice”, in *Benny Stories*, available at www.benferencz.org.

¹⁵ International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842 (<http://www.legal-tools.org/doc/677866/>).

¹⁶ The Atlantic Charter, 14 August 1941 (<http://www.legal-tools.org/doc/1c5069/>).

tional treaties and agreements that constellate the international legal order of the post-World War II period. A ‘New World Order’ so radically different that it would become the ‘photo negative’ of the ‘Old World Order’ which preceded World War II, where “states no longer have the right to conquer other states; waging aggressive war is a grave crime; gunboat diplomacy is no longer legitimate; and economic sanctions are not only legal, but the standard way in which international law is enforced”.¹⁷ Most importantly, the Charter laid out a *vision* of a new international order of international peace and security that, by improving and reforming the well-meaning but ineffective system embodied by the Leagues of Nations, could “save succeeding generations from the scourge of war”.¹⁸ Deterring and preventing future conflicts was thus an essential and non-negotiable condition. The use of international criminal justice to achieve this goal was nothing short of extraordinary.

Merely two decades before, the Treaty of Versailles had proposed the establishment of a “special tribunal” to prosecute William II of Hohenzollern’s “supreme offence against international morality and the sanctity of treaties”.¹⁹ The Treaty also proposed “to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war”.²⁰ At the time, however, the idea that victorious powers could demand that combatants be held criminally responsible for violations of the laws of war, not to mention that a head of State could ever be tried, was a novelty, and – as part of a diplomatic compromise – only 12 minor defendants were tried in Leipzig.²¹ Although the trials took place before German national authorities, they “were international in that they were dictated by treaty. Moreover, the judges applied the ‘laws and customs of war’, a body of law whose source was not national legislation”.²² When questioning just punishment for the authors of World War

¹⁷ “The Old World Order had rules governing conquest, criminal liability, gunboat diplomacy, and neutrality. The New World Order has rules for these too, except, they are precisely the opposite”, see Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, Simon and Schuster, 2017, p. xvii.

¹⁸ Charter of the United Nations, 24 October 1945, Preamble (<http://www.legal-tools.org/doc/6b3cd5/>).

¹⁹ Versailles Treaty, 28 June 1919, Article 227, Part VII (<http://www.legal-tools.org/doc/a64206/>).

²⁰ *Ibid.*, Article 228, Part VII.

²¹ Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, 2011, pp. 496–97.

²² William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, 2012, p. 8.

II, the Allied Powers could “never turn their backs on the precedent set at Versailles”.²³

Ten days after the unveiling of the Atlantic Charter, in a now famous broadcast, Winston Churchill promised to hold Nazi leaders accountable for “a combine of aggression, the like of which has never been known”, for the “crime without a name”, and to bring justice and civilization back to Europe, a continent “wrecked and trampled down by the mechanical weapons and barbaric fury of the Nazis”.²⁴ Churchill’s promise found resonance at the third Moscow Conference of 1943. Gathering from the Spiridonovka Palace and Moscow Kremlin, representatives of the United Kingdom, the United States, and the Soviet Union studied what was tactically and strategically needed to end the war with Germany and the Axis Powers, as well as how to deal peacefully with the problems of the post-War order. The outcome of the Conference was the Moscow Declaration, in which Allied powers set out, among other issues, including the future of international peace and security, what needed to be done about Nazi atrocities.²⁵

To comply with the needs of the Moscow Declaration on Atrocities, the US Army established the Judge Advocate General’s Department on 6 October 1944 to co-ordinate US activities with respect to investigation and prosecution of war crimes and criminals.²⁶ The War Crimes Branch, as it was known, was tasked with the investigation and the gathering of evidence related to war crimes committed in the European, Japanese, Philippines, and China war theatres.²⁷ On 8 August 1945, the Allies proceeded

²³ *Ibid.*, p. 9.

²⁴ Prime Minister Winston Churchill’s Broadcast to the World About the Meeting With President Roosevelt, 24 August 1941, available at <https://www.ibiblio.org/pha/timeline/410824awp.html>, last accessed on 23 December 2017.

²⁵ “Those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. [...] without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies”. See Avalon Law Project, Yale Law School, “The Moscow Conference; October 1943: Statement on Atrocities”, see *supra* note 10.

²⁶ National Archives, Records of the office of the Judge Advocate General (Army), “153.13 Records of the War Crimes Branch 1942-1957”, available at <https://www.archives.gov/research/guide-fed-records/groups/153.html#153.1>.

²⁷ Textual Records of the War Crimes Branch 1942–1957 (153.13): Prisoner-of-war investigation reports, 1943-47. Case files and dossiers for war crimes trials held by military commissions in China, the Far East Command, and the European and Mediterranean Thea-

to unveil the London Charter of the International Military Tribunal (‘IMT’) for the trial of major European war criminals.²⁸ The tribunal was officially seated in Berlin, but its only trial was held in Courtroom 600 in Nuremberg. A similar institution was created by decree by the American occupying power in Tokyo (the International Military Tribunal for the Far East) in 1946.²⁹ With the evidence collected by the Army’s War Crimes Branch and other allied forces, trials begun on 19 November 1945 and 29 April 1946 respectively. In its now legendary opening statement, US Chief Prosecutor at Nuremberg Robert Houghwout Jackson announced:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.³⁰

Many questions arose in the course of the proceedings that challenged the legal grounds on which the trials were being conducted. Criticism ranged from accusations of victors’ justice to questions of both substance and procedure.³¹ Each one of these criticisms however was dealt within the Courtroom. As the ‘New World Order’ was being established, the centrality of the rule of law and the criminality of illegal war making were indeed being carved as its fundamental pillars.

ters of Operations, 1944–49, with name indexes. General and administrative records pertaining to war crimes trials, 1944–49. Records of the United States Commissioner, United Nations War Crimes Commission, 1943–50. Records relating to European war crimes cases, 1944–50. Records relating to the International Military Tribunal for the Far East, 1946–48. Records relating to lesser Japanese war crimes trials, 1946–49. Case files of the Japanese Clemency and Parole Board for War Criminals, 1952–57, with index. Records relating to Philippine war crimes, 1942–47. Records relating to war crimes committed in the China Theater, 1945–48, in Records of the War Crimes Branch (153.13), Records of the office of the Judge Advocate General (Army), <https://www.archives.gov/research/guided-records/groups/153.html#153.1>.

²⁸ For the Agreement, see <http://www.legal-tools.org/doc/844f64/>; for the Charter, see <http://www.legal-tools.org/doc/64ffdd/>.

²⁹ See Special Proclamation to Establish an International Military Tribunal for the Far East (<http://www.legal-tools.org/doc/242328/>); for the Charter of the Tribunal, see <http://www.legal-tools.org/doc/a3c41c/>.

³⁰ “Second Day, Wednesday, 11/21/1945, Part 04”, in *Trial of the Major War Criminals before the International Military Tribunal*, vol. II, 14–30 November 1945, IMT, Nuremberg, 1947. pp. 98–102.

³¹ Heller, 2011, pp. 313–331, see *supra* note 21. Also see Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, pp. 109–119.

4. Control Council Law No. 10 and the Nuremberg Military Tribunals

It had originally been hoped that more than one international trial could be held before the IMT, but by 1946, that was no longer a possibility due to acerbating differences among the Allied powers. On 20 December 1945, the Allied Control Council issued Control Council Law No. 10, which empowered any of the powers occupying Germany to try suspected war criminals in their respective zones of authority.³² The US Army War Crimes Branch had already amassed an impressive collection of investigative records and files ready for prosecution. Similar investigative bodies by the French, the British, and the Russians had also yielded significant results.³³ There was no doubt that horrifyingly hideous crimes had been perpetrated on a massive scale throughout Europe. The prosecution of only of 21 Nazis was thus not satisfying. When the main trial ended and the IMT was adjourned, the American occupiers took over Courtroom 600 and, pursuant to Control Council Law No. 10, carried out 12 subsequent trials. Brigadier General Telford Taylor, who had previously served as assistant to Chief of Counsel Robert H. Jackson and US Prosecutor at the IMT's trial against Goering *et al.*, was appointed Chief of Counsel for the newly established Nuremberg Military Tribunals ('NMTs').³⁴ Under his direction, between 9 December 1946 and 13 April 1949, 12 more thematic trials took place that brought to the dock several more officials of various Reich ministries, physicians, generals, jurists, industrialists, as well as members of organizations declared criminal by the tribunal, including 24 high-ranking defendants from the infamous *Schutzstaffel* ('SS') *Einsatzgruppen*.³⁵

5. The Making of an International Prosecutor

By 1946, the War Crimes Branch had been attached to the Civil Affairs Division of the Army Staff (where it remained until 1949). Telford Taylor dispatched investigative teams all around Germany to collect decisive evidence relevant to the proceedings to be happening before the NMTs. By 1947, one of these investigative teams, headed by American lawyer Benjamin B. Ferencz, came across a nearly complete set of secret reports

³² Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (<http://www.legal-tools.org/doc/ffda62/>).

³³ Records of the War Crimes Branch, see *supra* note 27.

³⁴ Ferencz, 1998–1999, p. 661, see *supra* note 13.

³⁵ The Atlantic Charter: August 14, 1941, see *supra* note 16.

concerning special SS mobile killing units called *Einsatzgruppen* (roughly translated as Special Action Groups).³⁶ According to Ferencz himself, the reports described the *Einsatzgruppen* daily activities:

They were organized in four units ranging from about 500 to 800 men each. Their secret reports bore an innocuous title, which translated as “Report of Events in the Soviet Union.” The *Einsatzgruppen* (EG) Reports covered a period of about two years, starting immediately following the Wehrmacht’s assault against the Soviet Union on June 22, 1941. The EG Commanders reported in meticulous detail how many innocent civilians they had deliberately killed as part of Hitler’s “total war.” All Jews and Gypsies were marked for extermination, together with others who might be perceived as enemies or potential enemies of the Reich. On a little adding machine, I added up the numbers murdered. When I passed the figure of one million, I stopped adding. That was quite enough for me.³⁷

The records had been sent by the Gestapo office in Berlin to about a hundred Generals and other high-ranking officials of the Third Reich, many of who had continued to deny any criminality while standing trial in Nuremberg. Ferencz jumped on the first plane from Berlin and presented Taylor with the evidence he had encountered. He recalls that “Taylor, as Chief of Counsel, recognized the importance of the evidence”, but that because “the program for a limited number of prosecutions had been fixed and approved by the Pentagon” and “public support for German war crimes trials was on the wane”, “the prospect of getting additional appropriations for more lawyers or trials was bleak”.³⁸ Obstacles ranged from funding, to timing, to shortness of staff. Some of the defendants-to-be identified in the documents had already come to Taylor’s attention. For example, he had originally planned to prosecute Otto Ohlendorf with other SS Generals.³⁹ However, the evidence collected by Ferencz’ team detailed chillingly and methodically in nine million documents the horrifying acts of death and hate many other leaders of the *Einsatzgruppen* committed between May 1941 and July 1943.⁴⁰ Taylor was left with no

³⁶ Heller, 2011, pp. 71–72, see *supra* note 21.

³⁷ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “The Making of a Prosecutor”, in *Benny Stories*, available at www.benferencz.org.

³⁸ *Ibid.*

³⁹ First Trial, Program 2, as cited in Heller, 2011, p. 71, fn. 207, see *supra* note 21.

⁴⁰ Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945–1958*, New Books in History, 2010, pp. 77–79.

choice but to approve a separate trial for the special SS units.⁴¹ At the age of 27 years, with no previous trial experience, Ferencz was appointed Chief Prosecutor for the trial of the *Einsatzgruppen*. Few weeks later, between 15 and 22 September 1947, defendants were arraigned before Military Tribunal II-A (later renamed Tribunal II).⁴²

6. United States v. Otto Ohlendorf *et al.*

With an abundance of war criminals and not enough resources to try all deserving individuals, choosing the defendants for Trial No. 9 was no easy task. "Justice is always imperfect", as Ferencz would go on to say in his memoir.⁴³ Linkage evidence and existing custody were important factors in the selection, but so were education level and rank attained.⁴⁴ On 25 July 1947, 24 individuals were indicted on three counts of: (1) crimes against humanity, (2) war crimes, and (3) membership in organizations declared criminal by the IMT.⁴⁵ Genocide had been recognized as a crime under international law by the United Nations in 1946,⁴⁶ and by 1948, it was codified as an independent crime in the Convention on the Prevention and Punishment of the Crime of Genocide. At the time of the trial in 1947, however, the crime of genocide had not been included in the statute of the NMT. Although Ferencz could not charge it as such, in his mind there was little doubt that his 24 defendants were guilty of it:

The acts, conduct, plans, and enterprises charged in paragraph I of this count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nationals and ethnic groups by murderous extermination.⁴⁷

⁴¹ Heller, 2011, pp. 71–72, see *supra* note 21.

⁴² *United States of America v. Otto Ohlendorf et al.*, 15 September 1947, 8 April 1948 (<http://www.legal-tools.org/doc/74e839/>) ('*Ohlendorf Case*').

⁴³ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, "Preparing for Trial", in *Benny Stories*, available at www.benferencz.org.

⁴⁴ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, "The Making of a Prosecutor", in *Benny Stories*, available at www.benferencz.org.

⁴⁵ Control Council Law No. 10, Article II (1)(d). These were the SS, SD (Sicherheitsdienst des Reichsführers-SS), Gestapo, and the Leadership Corps of the Nazi Party. The indictment was filed initially on 3 July and then amended on 25 July 1947 to also include the defendants Steimle, Braune, Haensch, Strauch, Klingelhöfer and von Radetzky. See <http://www.legal-tools.org/doc/013a81/>. For an in-depth explanation of how this trial came into being, see Heller, 2011, p. 35, see *supra* note 21.

⁴⁶ United Nations General Assembly, The Crime of Genocide, resolution 96(I), 11 December 1946, UN doc. A/RES/96 (I) (<http://www.legal-tools.org/doc/f438af/>).

⁴⁷ *Ohlendorf Case*, Indictments, para. II, see *supra* note 45.

It was among the first times the word ‘genocide’ was used in a trial.

Principal and accessory liability⁴⁸ were charged for war crimes⁴⁹ and crimes against humanity.⁵⁰ Additionally, all defendants were charged with membership in the SS, the Sicherheitsdienst des Reichsführers-SS (as known as ‘SD’), and the Gestapo. The 24 defendants all pled not guilty.⁵¹ On 29 September 1947, Ferencz presented his now famous opening statement:

It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenseless men, women, and children. This was the tragic fulfillment of a program of intolerance and arrogance. Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by international penal action man’s right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law.⁵²

The trial ran from 29 September to 12 February 1948. The Prosecution rested its case in two days. The remainder of court proceedings was used for the defendants’ direct testimony.⁵³ The Tribunal rendered its judgment on 8–9 April 1948, finding 20 defendants guilty on all three counts and two guilty on count 3 alone.⁵⁴

⁴⁸ “Ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with, atrocities and offenses”: see *ibid.*, para. XI.

⁴⁹ Charged as violations of Articles 43 and 46 of the Regulations of the Hague Convention IV, the 1929 Prisoner-of-War Geneva Convention (precursor to the 1949 Geneva Convention III), the laws and customs of war, as well as the general principles of criminal law as derived from the criminal laws of all “civilized nations”, the internal penal laws of the countries in which such crimes were committed, and Article 11 of Control Council Law No. 10.

⁵⁰ Charged as persecution, murder, extermination, and other inhumane acts.

⁵¹ Otto Ohlendorf, Heinz Jost, Erich Naumann, Otto Rasch, Erwin Schultz, Franz Six, Paul Blobel, Walter Blume, Martin Sanderberg, Willi Seibert, Eugen Steimle, Ernst Biberstein, Werner Braune, Walter Haensch, Gustav Adolf Nosske, Adolf Ott, Eduard Strauch, Emil Hausmann, Waldermar Kingelhöfer, Lothar Fendler, Wademar von Radetzky, Felix Rhül, Heinz Schubert, Matthias Graf were named as defendants in Case No 9. See *Ohlendorf Case*.

⁵² Opening Statement of the Prosecution, see *ibid.*

⁵³ *Ohlendorf Case*, *ibid.*

⁵⁴ While 24 defendants had been indicted, only 22 were tried. Emil Hausmann had committed suicide in July 1947, and Otto Rasch was deemed too ill to stand trial. Fourteen men were sentenced to death by hanging, and remaining sentences ranged from ten years to life imprisonment. Of the 14 death sentences, only four were carried out on 7 June 1951. The others were commuted to prison terms of varying lengths in 1951. The head of

Contemporary observers have at times criticized the Nuremberg proceedings for falling short of today's fair trial standards.⁵⁵ Ferencz felt at the time that the proceedings had been conducted in compliance with "the traditional safeguards of Continental and American law".⁵⁶ Besides, as others have commented recently, it would be unfair to judge an event that occurred in the 1940s by the human rights standards that developed in the 1970s.⁵⁷ The trial, which has been referred to as the "biggest murder trial in history",⁵⁸ contributed to bringing to light the extraordinary suffering of millions of Jewish and other victims at the hand of one of the most vicious Nazi squads. It is hard to capture in words the egregiousness of the defendants' crimes. In its judgment, the tribunal concluded:

[The facts] are so beyond the experience of normal man and the range of man-made phenomena that only the most complete judicial inquiry, and the most exhaustive trial, could verify and confirm them. Although the principal accusation is murder, [...] the charge of purposeful homicide in this case reaches such fantastic proportions and surpasses such credible limits that believability must be bolstered with assurance a hundred times repeated. [...] A crime of such unprecedented brutality and of such inconceivable savagery that the mind rebels against its own thought image and the imagination staggers in the contemplation of a human degradation beyond the power of language to adequately portray. [...] The number of deaths resulting from the activities with which these defendants have been connected and which the prosecution has set at one million is but an abstract number. One cannot grasp the full cumulative terror of murder one million times repeated. It is only when this grotesque total is broken down into units capable of mental assimilation that one can understand the monstrousness of the things we are in this trial contemplating.

Einsatzkommando II, Eduard Strauch, who received a death sentence, was extradited to Belgium where he received a further death sentence. Only Matthias Graf was released with time served. In 1958, all convicts were released from prison. See United States Holocaust Memorial Museum, "Subsequent Nuremberg Proceedings, Case #9, The Einsatzgruppen Case", in *Holocaust Encyclopedia* available on the web site of the Holocaust Memorial Museum.

⁵⁵ Heller, 2011, pp. 313–331, see *supra* note 21.

⁵⁶ Benjamin B. Ferencz, "Nurnberg Trial Procedure and the Rights of the Accused", in *Journal of Criminal Law and Criminology*, 1948, vol. 39, no. 2, pp. 144–151.

⁵⁷ Schabas, 2012, see *supra* note 22.

⁵⁸ United States Holocaust Memorial Museum, "The Biggest Murder Trial in History", in *Holocaust Encyclopedia*, see *supra* note 54.

The trial left a profound mark on Ferencz’ young mind.⁵⁹ The ‘hope’ and ‘sorrow’ he summoned in his opening statement have remained the hallmarks of his work for the rest of his life.

7. A Victims’ Lawyer

The case of *United States v. Otto Ohlendorf et al.* is quite possibly Ferencz’ best known contribution to justice in the aftermath of World War II. His perhaps lesser-known yet equally ground-breaking work on compensation and restitution, however, is also very much deserving of attention. In addition to its impact on victims,⁶⁰ Ferencz’ work on restitution and compensation speaks at lengths of the man’s character, what he stood for at the beginning of his career, and in many ways what he continues to stand for at the time of writing.

Victims’ well-being has always been and continues to be one of Ferencz’ high priorities. From his numerous speeches to his own philanthropic work,⁶¹ Ferencz’ idea of the centrality of victims and the need for their redress, protection and empowerment has been a staple of his vision for justice and accountability.⁶² Disturbed by the horrors seen while liber-

⁵⁹ “I cannot stop. It’s a trauma”, confessed Ferencz in an interview; see Heikelina Verrijn Stuart and Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings*, Amsterdam University Press, 2009, p. 35.

⁶⁰ Such impact was considerable to each one of the receiving victim individually. Although no amount of reparations and compensation could have possibly remedied the horror inflicted on Holocaust and concentration camps survivors, in the grand scheme of ‘numbers’ Telford Taylor went on to say of Ferencz work: “Despite the ingenuity and tenacity of the campaign that Mr. Ferencz and his colleagues waged, its fruits were a miserable pittance – barely a token”, in Ferencz and Taylor, 1979, p. ix., see *supra* note 12. Ferencz himself expressed disappointment with the “Impossible Mission” of seeking fair compensation, see “The Sharks Who Got Away” and “A Medley of Disappointments”, in Ferencz and Taylor, 1979, pp. 155–181, see *supra* note 12; Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Seeking Fair Compensation: A Mission Impossible”, in *Benny Stories*, available at www.benferencz.org.

⁶¹ International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Decision on opening and closing statements, 22 May 2008, ICC-01/04-01/06 (<http://www.legal-tools.org/doc/5dcca6/>). See the following speeches by Benjamin B. Ferencz available at www.benferencz.org: Speech at Luis Moreno Ocampo swearing in ceremony, 16 June 2003; Remarks made at the opening of the ICC; Creating a Permanent International Criminal Court, Address to the UN on June 16, 1998; and Address to the Rome Conference Negotiating the Statute of the International Criminal Court.

⁶² United States Holocaust Memorial Museum, “Museum Launches Ferencz International Justice Initiative to Promote Accountability”, Fatou Bensouda, Remarks at the Launch of USHMM Ferencz International Justice Initiative, ASIL 2017 (available on the web site of the Museum). See also, The Trust Fund for Victims, “Ferencz Family’s Planethood Foundation Donates \$ 50,000 To Trust Fund For Victims” (on file with the author).

ating Nazi concentration camps (the images of which still haunt him to this day),⁶³ the poverty, as well as the sense of hopelessness and despair he knew survivors felt, Ferencz could not stop at bringing a handful of war criminals to trial.⁶⁴ Instead of returning home to New York upon trials completion, as he and his wife Gertrude had originally planned, Ferencz remained in Germany for much longer. Between 1948 and 1956, he served as the Director General of the JRSO, as an expert advising in the Diplomatic Conference that negotiated the Reparations Agreement between Israel and the Federal Republic of Germany (and Director of the Claims Conference offices in Germany), as well as Director of Operations for the United Restitution Organization.

Between 1946 and 1950, the Office of the Military Government of the United States (‘OMGUS’), which functioned as part of the US arm of the Allied Control Authority and administered the US zone of occupation, ran a restitution program through its Restitution and Reparations Branch to locate and return property looted by the Nazis during the War.⁶⁵ In some cases, property was located and returned to claimants. Some cases were dropped if OMGUS determined that property was destroyed or if OMGUS traced property to other Allied Sectors where the United States had no authority to retrieve it. If property could be retrieved but no rightful owners or heirs could be found, the assets could be claimed by a charitable organization pledging to use the proceeds to benefit survivors of persecution.⁶⁶ For this reason, a consortium of prominent Jewish organizations came together in June 1948 to form the JRSO. As mentioned before, Ferencz joined as their Director General in August of the same year.⁶⁷

Restitution procedures required the filing of detailed petitions by a fixed deadline (December 1948) to special agencies created to mediate the claims. If settlement failed, the action would be referred to chambers of the German judicial system, with access to the German appellate courts, although the final decision would be made in a US Court of Restitution

⁶³ Stuart and Simons, 2009, p. 35, see *supra* note 59.

⁶⁴ *Ibid.*

⁶⁵ For a detailed account of how the United States ran the restitution and reparation programmes, see Stuart Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*, Public Affairs, 2009.

⁶⁶ Military Government – Germany United States Area of Control: Law No. 59 (‘Property Control’), July 1949 (<http://www.legal-tools.org/doc/bae878/>). See also E.J. Cohn, ‘The Board of Review: A Novel Chapter in the Relations between Common Law and Civil Law’, *International & Law Comparative Law Quarterly*, 1955, pp. 492–507.

⁶⁷ Ferencz and Taylor, 1979, see *supra* note 12.

Appeals (later changed to a mixed court as German sovereignty was restored).⁶⁸ Thanks to a loan from the US share of occupation funds, obtained by the then military Governor and commander-in-chief of the US Forces in Europe, General Lucius Dubignon Clay, Ferencz built the JRSO from scratch, and in just few months was able to file over 163,000 restitution claims. All sort of claims previously owned by dissolved Jewish congregations (from cemeteries to sacred and religious objects), as well as looted art and property confiscated to individuals made their way into the filings.⁶⁹ Ferencz recalls that “wherever possible, JRSO lawyers would seek a quick cash settlement with the possessor of property subject to restitution”.⁷⁰ Desperate for cash to distribute to hundreds of thousands of survivors in need, the JRSO wanted the German state governments to acquire the claims from the JRSO, so that it could have the cash to meet the “dire humanitarian needs”, and the German governments themselves could “take their time and make whatever concessions to their citizens that they felt were equitable”.⁷¹ The first state government to agree to accept the arrangement was the State of Hesse, which paid the JRSO 25 million German Marks in cash. In his memoir, Ferencz recalls:

It was to be a solemn and momentous occasion, symbolic of a new relationship between Germany and the Jews. [...] Other States were expected to follow the example. [...] This would be the first time that any post-Hitler official was to enter into a settlement of claims with an organization representing the “world Jewry” that Hitler sought to destroy.⁷²

It was not, however, going to be the last one: in September 1952, the newly established Federal Republic of Germany announced its willingness to ‘make amends’, in the name of the German people, for what had been done to the Jewish people during the Holocaust. The origins of

⁶⁸ Benjamin B. Ferencz, “Review of Walter Schwartz, *Rückerstattung Nach Den Gesetzen Der Alliierten Mächte*”, in *American Journal of Comparative Law*, 1975, vol. 23, pp. 374–377.

⁶⁹ Office of the Military Government for Germany (United States), “Guide to the Papers of the Office of the Military Government; Restitution Claims: 1946–1950, AR 6304”, available at <http://digifindingaids.cjh.org/?pID=481383>, last accessed on 23 December 2017. See also Ferencz and Taylor, 1979, *supra* note 12; Ferencz, 1975, *supra* note 68; Beauvallet and Ferencz, 2012, *supra* note 11. In English, see Benjamin B. Ferencz, “Bulk Settlements for Property Claims”, in *Benny Stories*, available at www.benferencz.org.

⁷⁰ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Bulk Settlements for Property Claims”, in *Benny Stories*, see *supra* note 69.

⁷¹ *Ibid.*

⁷² *Ibid.*

this announcement can be traced to a now famous 1951 address to the Bundestag by then German Chancellor Konrad Adenauer:

Unspeakable crimes have been committed in the name of the German people, calling for moral and material indemnity [...] The Federal Government are prepared, jointly with representatives of Jewry and the State of Israel [...] to bring about a solution of the material indemnity problem, thus easing the way to the spiritual settlement of infinite suffering.⁷³

After a meeting convened in New York City by Nahum Goldmann, President of the World Jewish Congress, to which Ferencz was invited as an expert,⁷⁴ the Conference on Jewish Material Claims Against Germany (or 'Claims Conference' as it was known) was convened as a non-profit organization. Negotiations were convened to host talks between Adenauer and Israeli Foreign Minister Moshe Sharett. Public opinion was split back in Israel because many thought no financial amount could ever 'make amends' to what the Jewish people had suffered during the Holocaust. Yet, facing a deep economic crisis and in financial difficulty after the 1948 Arab-Israeli war, Israel Prime Minister David Ben-Gurion took the 'pragmatic' approach to the question and submitted a claim to the four Allied occupying powers for 1.5 billion USD.⁷⁵ The Reparations Agreement between Israel and the Federal Republic of Germany was signed in Luxembourg City Hall on 10 September 1952.⁷⁶ As an adviser to the Claims Conference, Ferencz participated to the solemn signing ceremony.⁷⁷ Following the Agreement, the United Restitution Organization was also established as a legal aid society to operate in co-ordination with the JRSO and the Claims Conference to provide survivors of the Holocaust, independently of their faiths, the possibility to seek legal remedy.⁷⁸ Alt-

⁷³ Juan Espindola Mata, *Transitional Justice After German Reunification: Exposing Unofficial Collaborators*, Cambridge University Press, 2015, p. 59.

⁷⁴ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, "A Treaty to Compensate Victims", in *Benny Stories*, available at www.benferencz.org.

⁷⁵ Shoah Resource Center, The International School for Holocaust Studies, "Reparations and Restitutions", available on the web site of Yad Vashem.

⁷⁶ Israel and Federal Republic of Germany Agreement, 10 September 1952 (<http://www.legal-tools.org/doc/2eb5a7/>).

⁷⁷ When Adenauer ran out of ink in his own pen, Ferencz handed him (via Goldmann) a pen that had been gifted to him by his wife. That 'historic' pen, as he defined it, is now part of the Ferencz archives at the US Holocaust Memorial Museum. See Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, "A Treaty to Compensate Victims", see *supra* note 74.

⁷⁸ Ferencz and Taylor, 1979, see *supra* note 12.

though the Agreement was at the time met with protests, the reparations paid by West Germany to Israel contributed to creating Israel’s vibrant economy, built its industry and infrastructure, and enabled hundreds of thousands of survivors and their heirs to reclaim property, as well as to obtain pensions and other services, some of which continue to this day.⁷⁹ In furtherance of the Agreement, Germany also passed a series of domestic laws that enabled individual restitution and compensation.⁸⁰

On 6 September 1952, about a year after his ‘amends’ announcement to the Bundestag, and just four days before the signing of the Agreement, in his address to the Christian Democratic Union Party Committee, Adenauer told his colleagues:

It is absolutely true that Germany, the Federal republic, does not have any legal obligations with regard to the Republic of Israel, but the Federal Republic does have great moral obligations. Even though we, and I am referring here to our circle, did not participate in the atrocities of National Socialism against the Jews, a considerable number of the German people did participate in them, and they not only actively participated, a certain percentage also got rich afterwards for their participation. We cannot ignore this fact.⁸¹

It was in this spirit that Ferencz and his colleagues took on German industrialists from IG Farben, Krupp, Siemens and Rheinmetall in the years following the commuting of their leaders’ sentences and the signing of the Reparations Agreement.⁸² Although none of the German reparations laws provided specific indemnity for forced labour, ‘extermination

⁷⁹ For a discussion of continued impact of the Reparations Agreement between Israel and West Germany, see Jesse Russell and Ronald Cohn, *Reparations Agreement Between Israel and West Germany*, 2012.

⁸⁰ *Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* (BEG) of 29 June 1956 (expired in 1969); *Bundesentschädigungsschlussgesetz* (BEG-SG) of September 14, 1965; *Gesetz zur Wiedergutmachung nationalsozialistischen Unrechts im öffentlichen Dienst* (BWGöD) of 11 May 1951; *Bundesgesetz zur Regelung der rückerstattungsrechtlichen Geldverbindlichkeiten des Deutschen Reiches und gleichgestellter Rechtsträger* (*Bundesrückerstattungsgesetz* (BRüG) of 19 July 1957.

⁸¹ Konrad Adenauer, Address to CDU Party Committee, Bonn, 6 September 1952, in Roderick Stackleberg and Sally Winkle, *The Nazi Germany Sourcebook: An Anthology of Texts*, Routledge, 2002, p. 400.

⁸² Ferencz’ personal account of his struggle to see German industrialists that profited from forced labour during the Holocaust pay their dues to victims has been provided in full in his *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation*, Harvard University Press, 1979. For the purposes of this publication, however, it is worthwhile to provide a brief summary.

by labour' was an integral part of Hitler's final solution.⁸³ It had been established during Nuremberg Subsequent Trials Nos. 5, 6 and 10 that Flick, IG Farben and the Krupp group had grossly benefitted of forced labour.⁸⁴ They were by far not the only ones.⁸⁵ Some of the major slave labour abusers, such as Herman Göring Works, Todt, and official SS and government entities had disappeared with the Third Reich. Others, like Messerschmidt, Heinkel, and Junker were in ruins following the end of the war.⁸⁶ Smaller companies had also benefitted of slave labour, but some of them could no longer be identified, whereas those who could be, refused to pay indemnities until bigger companies had also paid their dues.⁸⁷ Despite the national 'climate' of 'making amends', the private sector had always refused to acknowledge responsibility, let alone criminality, some even claiming that their slave labour had kept many Holocaust victims alive and that, considered the alternatives, their generosity should be rewarded, not punished.⁸⁸

Ferencz, of course, did not agree. Nor did Norbert Wollheim, a former Auschwitz internee, and his lawyer Henry Ormond (né Hans Oettinger). When the Allied High Commission decreed that IG Farben be split into sub-groups under the control of a liquidating committee,⁸⁹ Ormond and Wollheim sued IG Farben before the Frankfurt district court.⁹⁰ In *Wollheim v. I.G. Farben in Liquidation*, the Frankfurt court ruled that IG Farben was liable (as a company) for their failure to protect the plaintiff's life, body, and health, in light of the forced labour and other conditions that Wollheim had been subjected to during his internment in Auschwitz, which was owned by IG Farben.⁹¹ This ruling opened the door

⁸³ Ferencz and Taylor, 1979, p. 155-170, see *supra* note 12. For an account of the pervasiveness of slave labour and its centrality to the Nazi 'final solution', see Marc Buggein, *Slave Labour in Nazi Concentration Camps*, Oxford University Press, 2014; Gerald Fleming, *Hitler and the Final Solution*, University of California Press, 1987.

⁸⁴ Telford Taylor, "The Nuremberg War Crimes Trials", in *International Conciliation*, 1949, no. 450; Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946–April 1949, U.S. Government Printing Office, Washington DC, 1949.

⁸⁵ See *supra* note 83.

⁸⁶ Ferencz and Taylor, 1979, pp. xviii–xix, see *supra* note 12.

⁸⁷ *Ibid.*

⁸⁸ Ferencz and Taylor, 1979, p. x, see *supra* note 12.

⁸⁹ Allied High Commission Law No. 35, and Report on Germany (Office of the U.S. High Commissioner, 21 September 1949–31 July 1952), pp. 114–115.

⁹⁰ Frankfurt District Court, *Wollheim v. I.G. Farben in Liquidation*, 30 June 1953, Court File no. 2/3/0406/51.

⁹¹ *Ibid.*

to a number of lawsuits and out of court settlements for IG Farben and other companies that understood they too could be sued by survivors.⁹² IG Farben paid 27 million German Marks to the Claims Conference;⁹³ Krupp paid a mere 10 million Marks;⁹⁴ Siemens paid about 7 million Marks;⁹⁵ and Rheinmetall paid 625,000 USD.⁹⁶ While all these sums were very meagre, too many others simply got away.⁹⁷ In the words of Telford Taylor, “the remarkable thing about Benjamin Ferencz’s story is not that he and his colleagues reaped a meager harvest, but that they achieved anything at all”.⁹⁸

8. Intellectual Influences, and the Pursuit of Human Rights and World Peace

The period of Ferencz’ life between 1956 (when he returned to the US) and the 1970s (when he vigorously embarked on his lifelong quest for ‘world peace’) were years in which he practised law domestically, after joining Telford Taylor’s law firm, and did what he could to continue to represent Holocaust survivors and other victims in their quest for compensation.⁹⁹ In 1948, the eightieth US Congress had passed the War Claims Act creating the War Claims Commission to adjudicate claims and pay out compensation to American prisoners of war and civilian internees of World War II.¹⁰⁰ By virtue of the Act, ten programmes for prisoners of war and civilian internees, and four for war damage and loss compensation were authorized. 11 of these programmes were to be carried out by liquidation of Japanese and German assets seized by the US during the war. Pursuant to the new legislation, Ferencz represented the International Order of the B’nai B’rith as well as other Jewish charitable organizations before the War Claims Commission, obtaining a one million USD settlement for the B’nai B’rith concerning about one hundred lodges in German territory that had been disposed when Hitler came to power.¹⁰¹ In those

⁹² Ferencz and Taylor, 1979, pp. 34–52, see *supra* note 12.

⁹³ *Ibid.*, p. 52.

⁹⁴ *Ibid.*, p. 86.

⁹⁵ *Ibid.*, p. 123.

⁹⁶ *Ibid.*, p. 149.

⁹⁷ *Ibid.*, pp. 155–181.

⁹⁸ Ferencz and Taylor, 1979, pp. xi–xii, see *supra* note 12.

⁹⁹ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Creative Approach to Law Practice”, in *Benny Stories*, available at www.benferencz.org.

¹⁰⁰ U.S. Congress Public Law 80-896, 62 Stat. 1240, 50 U.S.C., 3 July 1948.

¹⁰¹ Seized records of enemy-controlled organizations, Records of the Office of Alien Property Archives, United States Department of Justice, para. 131.3.2; Beauvallet and Ferencz,

years, Ferencz also worked with the Coordinating Council of Churches and Charities with War Claims Awards to pass amendments to the War Claims Bill, and represented a group of Catholic women who had been victims of experiments while prisoners at the Nazi concentration camp in Ravensbrück, Poland.¹⁰² These were also years in which Ferencz took to academic journals and other specialized reviews to discuss the substantive and procedural challenges that the ground-breaking Nuremberg trials and programmes of reparation and restitution had posed.¹⁰³

The 1970s marked a new intellectual era for the former Nuremberg Prosecutor. As the human rights movement gained strength across the globe and in policy and academic circles,¹⁰⁴ Ferencz experienced a renewed interest in the ‘rights of man’ and the pursuit of a world “where all could live in peace and human dignity, regardless of their race or creed”.¹⁰⁵ Whereas Ferencz dedication to international human rights can be easily traced throughout his career, the intellectual foundations of his beliefs can be credited to several influential individuals whom Ferencz met and was mentored by, starting with his formative years at the Harvard Law School. Professor Zachariah Chafee, who taught him ethics, had “espoused human rights long before Human Rights was taught”. From him, Ferencz “learned about tolerance and the need to treat all human beings justly”.¹⁰⁶ Other early influences were Harvard law professors Roscoe Pound and Lon Fuller, as well as the “decisions of towering Judges like Benjamin Nathan Cardozo, Learned Hand, and Oliver Wendell Holmes”.¹⁰⁷ These judges, in particular, have remained a source of inspiration for Ferencz throughout his career:

2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Creative Approach to Law Practice”, in *Benny Stories*, available at www.benferencz.org.

¹⁰² Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Creative Approach to Law Practice”, in *Benny Stories*, see *supra* note 101. Hofmann, 2014, p. 181, see *supra* note 3.

¹⁰³ Benjamin B. Ferencz, “West Germany: Supreme Court Bars Claims of Forced Laborers”, in *The American Journal of Comparative Law*, 1967, vol. 15, no. 3, pp. 561-566; *idem*, “Restitution to Nazi Victims: A Milestone”, in H. Schneiderman (ed.), *International Morality, in Two Generations in Perspective*, Monde Publishers, 1957; *idem*, “War Crimes Law and the Vietnam War”, in *The American University Law Review*, 1968, vol. 17, no. 3.

¹⁰⁴ On the history of the international human rights movement, see Aryeh Neier, *The International Human Rights Movement: A History*, Princeton University Press, 2012.

¹⁰⁵ Opening Statement of the Prosecution, see *supra* note 51.

¹⁰⁶ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Lessons Learned at the Harvard Law School”, in *Benny Stories*, available at www.benferencz.org.

¹⁰⁷ *Ibid.*

Years later, in my first law office, I hung portraits of those three inspiring legal giants on the wall above my desk. When a visiting judge remarked that the legal greats looked down on me, I replied, ‘No, I look up to them’.¹⁰⁸

Ferencz is also a great admirer of the late Justice Robert Jackson, and felt great admiration for his law partner Telford Taylor, who gave him the opportunity of his lifetime appointing him Chief Prosecutor in the trial of the *Einsatzgruppen*.¹⁰⁹

Among the human rights leaders who exerted intellectual influence on him was also Nobel Peace Prize laureate René Cassin. They first met at the Strasbourg Institute for Human Rights in the 1970s.¹¹⁰ Ferencz observed that his quiet demeanor “concealed the fact that he was, to a large extent, responsible for the beginning of a revolution”.¹¹¹

Worthy of mention as one of Ferencz’ influencers is certainly the tireless Raphael Lemkin who, “without any official mandate, [...] stalked the halls of Nuremberg trying to get the Prosecutors to charge that genocide was an international crime”, and later pursued his goal at the UN, playing a key role in drafting the Genocide Convention.¹¹² He may have inspired Ferencz’ own methods of ‘lobbying’ the international community, when necessary.

Another of Ferencz’ greatest influencers was surely Vespasian Pella, a Romanian legal expert who Ferencz considers the “founding father of international criminal law”. Among other achievements, Pella served as the President of the Committee of Legal Questions of the League of Nations, participated in the drafting of the Genocide Convention, and was a member of the UN International Law Commission.¹¹³ Most importantly to Ferencz, Vespasian Pella (with Henri Donnedieu and others) led the Association Internationale de Droit Pénal to consider a proposal for the establishment of a permanent international criminal tribunal in the inter-war period.¹¹⁴

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* In English, see Benjamin B. Ferencz, “Peace Advocates Unite” and “Friends Who Made a Difference”, in *Benny Stories*, available at www.benferencz.org.

¹¹¹ *Ibid.* In English, see Benjamin B. Ferencz, “Friends Who Have Made a Difference”, in *Benny Stories*, see *supra* note 110.

¹¹² *Ibid.*

¹¹³ In Romanian, see Aurora Ciucă, “Studiu introductiv”, in Vespasian V. Pella, *Criminalitatea colectiva a statelor si dreptul penal al viitorului*, Editura Hamangiu, 2017.

¹¹⁴ Schabas, 2012, p. 9, see *supra* note 22.

Inspired by these human rights figures and their teachings, when he himself joined Pace Law School as an Adjunct Professor teaching a course on the ‘International Law of Peace’ and directing the Pace Peace Center,¹¹⁵ Ferencz turned his interest to the world’s debate on the definition of international aggression, and the world’s ‘search for peace’. He also began conceptualizing the role of international criminal courts and tribunals to achieve and maintain international peace and security.¹¹⁶ As the international community debated the contours and validity of a definition of international aggression, Ferencz joined a group of intellectuals and jurists that advocated in their writings for the establishment of a permanent international criminal court with jurisdiction over the same crimes Jackson, Taylor, and Ferencz himself had tried in Nuremberg. In this context, he became acquainted with, and inspired by, US jurists Grenville Clark, Robert Kurt Woetzel, Myres S. McDougal, Louis B. Sohn, Louis Henkin, Oscar Shachter, Thomas Buergenthal, as well as, among others, Professors Otto Triffterer, Ved P. Nanda, Michael Scharf, and Mahmoud Chérif Bassiouni.¹¹⁷

It was also thanks to these influences that in the 1970s Ferencz developed further his vision and its intellectual affirmation. In these years, Ferencz wrote extensively on the role of international law and international judicial institutions to promote and uphold international peace.¹¹⁸ He

¹¹⁵ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Stories 57-59”, in *Benny Stories*, available at www.benferencz.org.

¹¹⁶ Benjamin B. Ferencz, “Compensating Victims of the Crimes of War”, in *Virginia Journal of International Law*, 1972, vol. 12, no. 3, pp. 343-357; *idem*, “Defining Aggression: Where it Stands and Where it’s Going”, in *American Journal of International Law*, 1972, vol. 66, no. 3, pp. 491-508; *idem*, “A Proposed Definition of Aggression: By Compromise and Consensus”, in *International and Comparative Law Quarterly*, 1973, pp. 407-433; *idem*, “The United Nations Consensus Definition Of Aggression: Sieve Or Substance”, in *International Journal of Law and Economics*, 1975, pp. 701-724; *idem*, 1975, see *supra* note 7; and *idem*, 1975, see *supra* note 7.

¹¹⁷ Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Friends Who Have Made a Difference”, in *Benny Stories*, see *supra* note 110.

¹¹⁸ Benjamin B. Ferencz, *The Coming of International Law and Peace*, Global Education Associates Whole Earth Papers, 1980; *idem*, “The Draft Code of Offences Against the Peace and Security of Mankind”, in *American Journal of International Law*, 1981, vol. 75, no. 3, pp. 674-679; *idem*, “The Future of Human Rights in International Jurisprudence: An Optimistic Appraisal”, in *Hofstra Law Review*, 1982, vol. 10, no. 2, pp. 379-400; *idem*, “The Road to World Peace”, in *Jewish Spectator*, 1980; *idem*, *A Commonsense Guide to World Peace*, Oceana, 1989; Ferencz and Keyes, 1988, see *supra* note 4; Ferencz, 1983, see *supra* note 7.

became interested in multilateralism.¹¹⁹ By the mid-1970s, his vision had come together, and his plan for world peace was unveiled in 1975 with the publication of *New Legal Foundations for Global Survival: Security Through the Security Council*,¹²⁰ which received the praise of UN Secretary-General Kofi Annan, who said: “it is a remarkable work, and the spirit in which it is written is the spirit that guides all that we do at the United Nations”.¹²¹ In it, Ferencz presented an evaluation of the current system of multilateral institutions. He denounced the international armament and nuclear programmes, and the lack of a permanent international criminal tribunal as a way to enforce the international laws that had promised the world international peace and security. These were fertile times, in which Ferencz’ call resonated within the UN. Within a few years – thanks in large part to a window of political opportunity – the UN began re-evaluating the role of international criminal courts, and the multilateral process to establish a permanent international criminal tribunal started.

9. Working Towards a Permanent International Criminal Court

Already in the period between the two World Wars, several actors considered a proposal for the establishment of a permanent international criminal court, most notably the International Law Association and the Association Internationale de Droit Pénal.¹²² These inter-war debates led to the 1937 League of Nations Convention for the Creation of an International Criminal Court, which never entered into force.¹²³

In 1947, after the Tokyo and Nuremberg trials, the UN International Law Commission was tasked with the preparation of a draft Code of Offences Against the Peace and Security of Mankind, which the Commission approved in 1954,¹²⁴ even though the General Assembly then de-

¹¹⁹ On Ferencz’ theories of multilateralism, see Benjamin B. Ferencz, *World Security for the 21st Century: A Colloquium Between American and Soviet Legal Experts*, Oceana, 1991.

¹²⁰ Ferencz, 1995, see *supra* note 6.

¹²¹ Letter of the UN Secretary-General Kofi Annan to Benjamin B. Ferencz, 24 June 1997 (copy on file with author).

¹²² Schabas, 2012, p. 9, see *supra* note 22.

¹²³ Vespasian V. Pella, “Convention pour la création d’une cour pénale internationale, ligue des nations O.J. Spec. Suppl. N°.156, 1936, LN DOC. C.547(I) 1937. V (1938), présenté au nom de la Roumanie”, in *Revue internationale de droit pénal*, 2015, vol. 86, no. 3, pp. 893–902.

¹²⁴ Draft Code of Offences against the Peace and Security of Mankind, with Commentaries, *Yearbook of the International Law Commission*, 1954, vol. II, doc. A/2693, paras. 49 and 54. For a commentary, see D.H.N. Johnson, “The Draft Code of Offences against the Peace and Security of Mankind”, in *International and Comparative Law Quarterly*, 1955, vol. 4, no. 3, p. 445.

clined to adopt it.¹²⁵ By the mid-1950s, all enthusiasm for the establishment of an international criminal tribunal had faded due to Cold War tensions, and “international criminal justice went into its second period of hibernation (the first was in the 1920s and 1930s)”.¹²⁶

In 1981, giving in to the calls of advocates and intellectuals, including Ferencz' own pleas, and perhaps prompted by the growing authority of the human rights movement, the International Law Commission was tasked with resurfacing the 1954 Draft Code and proceeding with the drafting of the statute for a permanent international criminal court.¹²⁷ In 1993 and 1994 respectively, the UN International Criminal Tribunals for the former Yugoslavia and for Rwanda were established.¹²⁸ Although more *ad hoc* and hybrid tribunals were to come in the following years,¹²⁹ by 1996 the international community had turned seriously to the idea of having a permanent international criminal court.¹³⁰

In 1998, Ferencz' strenuous advocacy for the establishment of a permanent international criminal tribunal finally witnessed that the UN convened the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.¹³¹ Ferencz, who had written

¹²⁵ United Nations General Assembly, Draft Code of Offenses Against Peace and Security of Mankind, resolution 897 (IX), 4 December 1954 (<http://www.legal-tools.org/doc/1e2bbe/>).

¹²⁶ Schabas, 2012, p. 13, see *supra* note 22.

¹²⁷ United Nations General Assembly, Draft Code of Offences Against Peace and Security of Mankind, 10 December 1981, resolution 36/106 (<http://www.legal-tools.org/doc/617503/>). In the following years, Trinidad and Tobago was the UN Member State that put political weight behind the idea of a permanent international criminal court. In 1990, Arthur Napoleon Raymond Robinson, its then Prime Minister, was held hostage and shot in the knees during a *coup* attempt. According to Ferencz, of whom he was a friend, “he called on the General Assembly of the UN to move forward with creating the International Criminal Court, hoping it could end the prevailing impunity of organized criminal gangs who were stronger than national law enforcement authorities”. In Beauvallet and Ferencz, 2012, see *supra* note 11. In English, see Benjamin B. Ferencz, “Peace Advocates Unite”, in *Benny Stories*, see *supra* note 110.

¹²⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, amended 7 July 2009 (<http://www.legal-tools.org/doc/b4f63b>); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 (<http://www.legal-tools.org/doc/8732d6/>).

¹²⁹ Schabas, 2012, pp. 15–16, see *supra* note 22.

¹³⁰ Draft Code of Crimes against the Peace and Security of Mankind, including the Statute of a Permanent International Criminal Court, in *Yearbook of the International Law Commission*, 1996, vol. II, Part Two (<http://www.legal-tools.org/doc/bb5adc/>).

¹³¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome, 15 June–17 July 1998. The ICC Preparatory Works and Statute Amendments Collection in the Legal Tools Database contains the leading collection of documents.

extensively on the need for and importance of a permanent international criminal court to deter and prevent international crimes,¹³² was invited to attend the Conference as a civil society representative.¹³³ Like his friend Raphael Lemkin who “without any official mandate, [...] stalked the halls of Nuremberg”, Ferencz stalked the halls of Rome to make sure government lawyers and diplomats delivered on their promise for a statute. Several contentious issues were raised concerning the statute’s substance and the court’s jurisdiction that made many believe no compromise would be reached.¹³⁴ In his address to the conference, Ferencz stated:

A permanent court is needed for permanent deterrence. The time for decisive compromise has come. Now the challenge is in your hands. [...] Outmoded traditions of State sovereignty must not derail the forward movement. [...] No nation and no person can feel secure until all are secure. The silent voices of “We the Peoples” – who are the true sovereigns of today – cry out for enforceable law to protect the universal human interest. You have it in your power to make the dream of a more humane world order under law come true.¹³⁵

His words did ring true among delegates and on 17 July 1998, amidst celebrations, the Conference adopted the Rome Statute of the International Criminal Court.¹³⁶ Despite the milestone achievement, however, the time had yet to come for Ferencz to put his advocacy to rest. In the years following the signing of the Rome Statute, he campaigned for US participation in the ICC system, engaging the US Senate and even ad-

¹³² Ferencz, 1975, see *supra* note 6; *idem*, “An International Criminal Code and Court: Where They Stand and Where They’re Going”, in *Columbia Journal of Transnational Law*, 1992, vol. 30, no. 2, pp. 375-400; *idem*, “Courting an International Criminal Court”, in *Nuclear Age Peace Foundation*, 1997; *idem*, “From Nuremberg to Rome: The Prosecution of International Crimes”, in *Development and Peace Foundation*, 1998; *idem*, “Needed: A World Criminal Court”, in *Neue Züricher Zeitung*, 1998; *idem*, “A Prosecutor’s Personal Account – Nuremberg to Rome”, in *Columbia Journal of Transnational Law*, 1999.

¹³³ *Idem*, “From Nuremberg to Rome: A Personal Account”, in Mark Lattimer and Philippe Sands QC (eds.), *Justice for Crimes Against Humanity*, Hart Publications, 2004, pp. 31-45.

¹³⁴ Roy S.K. Lee, *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results*, Martinus Nijhoff Publishers, 1999.

¹³⁵ For an overview of the most contentious issues, see Benjamin B. Ferencz, “Ferencz Addresses Rome Conference” and “Creating A Permanent ICC”, 16 June 1998, both available at www.benferencz.org.

¹³⁶ Rome Statute of the International Criminal Court, 17 July 1998 (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9>).

dressings US President Clinton,¹³⁷ in his efforts to dismantle political opposition and substantive misconceptions about the Court. On 12 December 2002, Ferencz joined forces with former Secretary of Defense, Robert McNamara, to call on President Clinton to use his executive powers to sign the Rome Statute.¹³⁸ We will never know if the call had any real effects on the actual decision, but on 31 December 2000, US President William Jefferson Clinton sent his Ambassador-at-Large for War Crimes, David Scheffer, to the UN headquarters to sign the Rome Statute.¹³⁹ The following administration immediately denounced the signing of the treaty, and on 6 May 2002, then Under-Secretary of State John Bolton notified the UN Secretary-General that the US no longer intended to ratify the Rome Statute¹⁴⁰ (an act that was advertized in the media and policy circles as “un-signing” the treaty).¹⁴¹

While Ferencz' campaign to reconcile his country with the International Criminal Court yielded very little results during President Bush's era, Ferencz participated with enthusiasm in the establishment and work-

¹³⁷ Benjamin B. Ferencz, “Misguided Fears about the International Criminal Court”, in *New Jersey Law Journal*, 2000, pp. 223-246; *idem*, “A Nuremberg Prosecutor's Response to Henri Kissinger”, in *Brown Journal of World Affairs*, 2001, pp. 177-182; and *idem*, “A Letter to the New York Times regarding International Courts”, in *The New York Times*, November 2003. See also the following texts by Benjamin B. Ferencz available at www.benferencz.org: “Know the Truth About the International Criminal Court”; “A Response to Congressional Slander of the International Criminal Court”; “The Nethercutt Amendment and the International Criminal Court”, 2004; “Letter to US Senate”, 2001; and “Letter to President William Jefferson Clinton”, 11 November 2000.

¹³⁸ Benjamin B. Ferencz and Robert S. McNamara, “For Clinton's Last Act”, in *The New York Times*, 12 December 2000.

¹³⁹ The White House, Statement by US President Bill Clinton, authorizing the US signing of the Rome Statute of the International Criminal Court, 31 December 2000.

¹⁴⁰ Department of State, “Letter to UN Secretary General Kofi Annan from Under Secretary of State for Arms Control and International Security John R. Bolton”, 6 May 2002 (<http://www.legal-tools.org/doc/70cf17/>).

¹⁴¹ See, for example: Human Rights Watch, “United States ‘Unsigning’ Treaty on War Crimes Court”, Human Rights Watch, New York, 2002; Kenneth Roth, “Letter to President George W. Bush: Don't ‘Unsign’ the ICC Treaty”, Human Rights Watch, 2002; David J. Scheffer, “A Treaty Bush Shouldn't ‘Unsign’”, in *The New York Times*, 6 April 2002. Although the subsequent administration adopted an approach of positive engagement with the Court (see Harold Hongju Koh, “The Challenges and Future of International Justice, Panel Discussion at NYU Center For Global Affairs”, 27 October 2010, Archives of the U.S. Department of State (<http://www.legal-tools.org/doc/dabf84/>)), at the time President Barack Obama came to power, his international justice priorities differed considerably from Ferencz' take on the criminalization of aggressive war-making. More generally, the question of U.S. engagement and disengagement with the Court has been treated, among others, in David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time*, Oxford University Press, 2014.

ings of the International Criminal Court during those years. It took four years after the Rome Conference for the Statute to enter into force. When the Court was finally inaugurated, Ferencz was once again invited to take the floor in celebration of this incredibly hard-fought achievement. In his remarks, Ferencz invited his listeners not to lose sight of the vision for the centrality of the rule of law in international peace and security that had been laid out in Nuremberg, stating that: “we owe it to the memory of the dead to honor these commitments to peace”.¹⁴² When the first International Criminal Court Prosecutor, Luis Moreno-Ocampo, was sworn in, Ferencz again repeated his plea for the centrality of the rule of law and of international courts in the achievement and maintenance of international peace:

Nuremberg was little more than a beginning. Its progress was paralyzed by cold-war antagonisms. Clear laws, courts and a system of effective enforcement are vital prerequisites for every orderly society. The matrix for a rational world system has countless parts that are gradually and painfully being pressed into place. The ICC is part of this evolutionary process. It is a new institution created to bring a greater sense of justice to innocent victims of massive crimes who seek to live in peace and human dignity.¹⁴³

Ever since the establishment of the International Criminal Court, Ferencz has tirelessly expressed his support for the Court, and continues to advocate for what he sees as its fundamental function: the deterrence of future atrocity crimes, and well as the importance of the international legal system to achieve world peace. To him, international courts and tribunals are the instruments of choice for the enforcement of the international legal system, and as such constitute a fundamental pillar of his vision.¹⁴⁴ Ferencz has never failed to acknowledge that the “evolution of international criminal law”, which he credits to “the slow awakening of the human conscience”,¹⁴⁵ is a sign of progress towards his vision for interna-

¹⁴² Benjamin B. Ferencz, “Remarks Made at the Opening of the International Criminal Court”, 1 July 2002, available at www.benferencz.org.

¹⁴³ Benjamin B. Ferencz, “Revised remarks of Benjamin B. Ferencz, a former Nuremberg Prosecutor as delivered at the swearing-in ceremony in the Hague of Luis Moreno Ocampo as Chief Prosecutor of the new International Criminal Court”, 16 June 2003, available at www.benferencz.org.

¹⁴⁴ Ferencz, 1995, see *supra* note 6

¹⁴⁵ Benjamin B. Ferencz, “Statement at the Closing of the Lubanga Case for ICC Prosecution”, 22 May 2008, available at www.benferencz.org. International Criminal Court, Situa-

tional peace. Throughout the years, however, he has also recognized that, admittedly, the vision outlined at Nuremberg cannot and will not be complete until the ‘supreme international crime’ – aggressive war – becomes fully justiciable again.¹⁴⁶

10. Getting Aggressive about Preventing Aggression

There is little doubt that, throughout the years, Benjamin B. Ferencz has been among the most unwavering advocates of the criminal nature of illegal war-mongering.¹⁴⁷ The criminality of aggressive war, and its enforcement by an international tribunal, was indeed the essence of the vision outlined at Nuremberg. Yet, although the UN Charter recognizes “acts of aggression” and “threats” or “breaches to the peace” as inconsistent with its purposes,¹⁴⁸ never again has an individual been tried for a breach of international peace.¹⁴⁹ With his innumerable talks, lectures, and addresses, Ferencz has played an instrumental role in lobbying to ensure that the criminal nature of violating international peace remained on the agenda of the international community. Ever since the 1970s, Ferencz has engaged in an impressive and continued advocacy campaign for the inclusion of “aggression” into the Statute of the International Criminal Court as a way of “completing the legacy of Nuremberg”.¹⁵⁰ Despite his best efforts,

tion in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Judgement, 22 May 2008.

¹⁴⁶ For example, see: Benjamin B. Ferencz, “Getting Aggressive About Preventing Aggression”, in *Brown Journal of World Affairs*, 1999, pp. 87-96; *idem*, “A World of Peace Under the Rule of Law: The View from America”, in *Washington University Global Studies Law Review*, 2007, vol. 6, no. 3, pp. 663-674; *idem*, “Ending Impunity for the Crime of Aggression”, in *Case Western Journal of International Law*, 2009, vol. 41, nos. 2 and 3, pp. 281-290; *idem*, “Remarks on the Anniversary of Opening of the Einsatzgruppen Case, Nuremberg Military Tribunal, September 29, 1947”, 29 September 2017 (on file with the author).

¹⁴⁷ See, *inter alia*, Beauvallet and Ferencz, 2012, see *supra* note 11. In English see Benjamin B. Ferencz, “Friends Who Have Made a Difference”, in *Benny Stories*, see *supra* note 110. Ciucă, 2017, see *supra* note 113, Human Rights Watch, 2002, see *supra* note 141; Roth, 2002, see *supra* note 141; Scheffer, 2002, see *supra* note 141, Bosco, 2014, see *supra* note 141.

¹⁴⁸ Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, United Nations, Charter of the United Nations (<http://www.legal-tools.org/doc/6b3cd5/>).

¹⁴⁹ On the occurrence of wars of aggression since the end of World War II, see Kathryn Sikkink, Federica D’Alessandra and Aroop Mukharji, “Memo: Has International Law Diminished the Illegal Use of Armed Force?”, Carr Center for Human Rights Policy White Paper, Harvard University (unpublished); Hathaway and Shapiro, 2017, see *supra* note 17.

¹⁵⁰ See, among others, Benjamin B. Ferencz, “A Nuremberg Legacy: The Crime of Aggression” in *Washington University Global Studies Law Review*, 2016, vol. 15, pp. 555-558.

however, the saga of aggression in international criminal law has been one of the most frustrating and politicized aspects of the evolution of the discipline.

From the Nuremberg and Tokyo Charters, it took the international community 65 years and innumerable sparring opportunities before the criminality of aggressive war would be included in another statutory provision.¹⁵¹ When the UN International Law Commission was tasked with consolidating the accomplishments of Nuremberg, the definition of what constituted a ‘crime of aggression’ for the purposes of the Draft Code became such a divisive question that the project was suspended for lack of consensus.¹⁵² Although there has always been little disagreement that aggression is “a violation of the UN Charter”,¹⁵³ it took another 20 years for the General Assembly to come up with a non-exhaustive list of ‘acts’ that would qualify as such.¹⁵⁴ Finally, the ‘crime of aggression’ made it into the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which included a draft Statute for the International Criminal Court.¹⁵⁵ In submitting the draft to the General Assembly, however, the International Law Commission noted that, because of the “responsibilities of the UN Security Council under Chapter VII of the Charter”, the crime should be included “subjected to certain safeguards”.¹⁵⁶

This should have not come as a surprise to anyone, since efforts to return aggression to the realm of ‘justiciability’ have repeatedly been frustrated by power politics in the UN Security Council.¹⁵⁷ Which ‘safeguards’ were necessary was a topic of intense discussion at the Diplomatic Conference convened in Rome to finalize negotiations on the Statute. The question of the inclusion of aggression became again such an issue that, in

¹⁵¹ Claus Kreß and Stefan Barriga, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2016; Stefan Barriga and Claus Kreß, *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, 2012.

¹⁵² Schabas, 2012, p. 200, see *supra* note 22.

¹⁵³ See, for example, Louis B. Sohn and Grenville Clark, *World Peace Through World Law*, Harvard University Press, 1958; Myres McDougal, “The Role of Law in World Politics”, in *Mississippi Law Journal*, 1949, vol. 20, pp. 253-283; see also Larry May, *Aggression and Crimes Against Peace*, Cambridge University Press, 2008.

¹⁵⁴ UN General Assembly, Definition of Aggression, A/RES/3314, 14 December 1974 (<http://www.legal-tools.org/doc/752c30/>).

¹⁵⁵ Yearbook of the International Law Commission, 1996, see *supra* note 130.

¹⁵⁶ Report of the Working Group on a draft statute for an international criminal court, UN International Law Commission, Forty-sixth session, 1994 (<http://www.legal-tools.org/doc/f73459/>).

¹⁵⁷ Donald Ferencz, “Continued Debate Over the Crime of Aggression: A Supreme International Irony”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 24-27.

order to make progress on less controversial fronts, the chairman of the negotiating process proposed to abandon it.¹⁵⁸ The suggestion was not well met by many delegations,¹⁵⁹ and ultimately the crime of aggression was included in the Statute without a substantive definition.¹⁶⁰

In the years between 1998 and 2010, a group of dedicated diplomats and members of the civil society – including Ferencz – worked from the sidelines to achieve a consensus on what the substantive definition of aggression and what the conditions for the exercise of jurisdiction should be.¹⁶¹ To “the surprise of most and the joy of many”,¹⁶² the work of this group culminated in a series of amendments to the Statute adopted at the Kampala Review Conference of 2010.¹⁶³

11. The Crime of Aggression at the International Criminal Court

On 11 June 2010 in Kampala, Uganda, Articles 8*bis*, 15*bis*, and 15*ter* were finally added to the Rome Statute (together with a few other changes), spelling out the substantive definition and the jurisdictional regime for the International Criminal Court’s exercise of jurisdiction over the crime of aggression.¹⁶⁴ Based on the 1974 UN General Assembly resolution defining aggression (which itself drew heavily on the precedent set at Nuremberg),¹⁶⁵ a ‘crime of aggression’ for the purposes of the Rome Statute was thus defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by

¹⁵⁸ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Rome, 15 June–17 July 1998 (<http://www.legal-tools.org/doc/ee97ab/>, <http://www.legal-tools.org/doc/253396/> and <http://www.legal-tools.org/doc/656f32/>).

¹⁵⁹ Schabas, 2012, p. 201, see *supra* note 22.

¹⁶⁰ Article 5(2), ICC Statute.

¹⁶¹ Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser (eds.), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003–2009*, Lynne Rienner, 2009.

¹⁶² Schabas, 2012, p. 202, see *supra* note 22.

¹⁶³ International Criminal Court, Official Records of the Review Conference, 31 May–11 June 2010 - Kampala, Uganda (<http://www.legal-tools.org/doc/146df9-1/>).

¹⁶⁴ International Criminal Court, “The Crime of Aggression”, Resolution RC/Res.6, in the Official Records of the Review Conference, 31 May–11 June 2010, Kampala, Uganda (<http://www.legal-tools.org/doc/de6c31/>).

¹⁶⁵ See *supra* note 154.

its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.¹⁶⁶

According to Articles 15*bis*, the Court could “exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar”.¹⁶⁷ This language in the Kampala formula suggested the creation of a regime whereby States Parties that wanted to be excluded from the Court’s jurisdiction over aggression needed to manifestly opt out of the provision.¹⁶⁸ The background was an intense – some would say bitter – negotiation in Kampala.¹⁶⁹ Perhaps advocates of an expansive jurisdiction – among them, Ferencz – had hoped that the political price associated with an opt-out from the jurisdictional provision would discourage a good number of States from pursuing it. The resolution adopting the amendments to the Statute was adopted by consensus.¹⁷⁰ Although the crime of aggression became part of the Rome Statute, the decision concerning the

¹⁶⁶ Unlike the 1974 UN resolution, Article 8*bis*(1) included a differentiation between a “crime” of aggression and an “act” of aggression, adding the qualifying threshold of a “manifest” violation of the UN Charter. Article 8*bis*(2) goes on to list the “acts” of aggression that, meeting the threshold, could qualify as “crimes” of aggression “in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression” as the following: “(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein”.

¹⁶⁷ Article 15*bis*(4), ICC Statute, as amended on 11 June 2010.

¹⁶⁸ Handbook on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the International Criminal Court, Liechtenstein Institute of Self-Determination, 2nd edition, October 2013, pp. 9-10 (<http://www.legal-tools.org/doc/caffe7/>).

¹⁶⁹ *Ibid.*, pp. 10 ff.

¹⁷⁰ *Supra* note 167.

activation of its jurisdiction was postponed until “after January 1, 2017”.¹⁷¹

Having achieved the required number of ratifications to subject the activation to a two-thirds majority vote in December 2017, at the eve of the vote, arguments were still being put forward not to activate the Court’s jurisdiction according to the formula that had been agreed upon and accepted by consensus in Kampala.¹⁷² The activation negotiations – which took place during the sixteenth Session of the Assembly of States Parties to the Rome Statute in New York – saw further controversy develop among delegates concerning this point.¹⁷³

Ultimately, the historic decision to activate the Court’s jurisdiction over aggression was taken – in a situation of frustration among many delegates – thanks to a final effort by the Vice-Presidents of the Assembly, late in the night of 14 December 2017 (effective as of 17 July 2018).¹⁷⁴ The outcome left some States unhappy, as delegates felt that a smaller number of countries had tried to renegotiate the jurisdictional regime that had already been agreed in Kampala.¹⁷⁵ In fact, although the language of the activation resolution spells out that States must accept the jurisdiction in order to be subjected to it,¹⁷⁶ this seems to contradict the language con-

¹⁷¹ Articles 15*bis*(3) and 15*ter*(3), ICC Statute.

¹⁷² For an overview of the arguments being presented, see Dapo Akande, “The ICC Assembly of States Parties Prepares to Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?”, in *Opinio Juris*, 27 June 2017; and Astrid Reisinger Coracini, “The Kampala Amendments on the Crime of Aggression Before Activation: Evaluating the Legal Framework of a Political Compromise”, in *Opinio Juris*, 29 September 2017.

¹⁷³ Jennifer Trahan, “Historic Activation of the International Criminal Court’s Crime of Aggression: the Assembly of States Parties Decides to Activate the ICC’s 4th Crime”, in *International Justice Monitor*, 2017 fall; and Dapo Akande, “The International Criminal Court Gets Jurisdiction Over the Crime of Aggression”, in *EJIL: Talk!*, 15 December 2017.

¹⁷⁴ International Criminal Court, ICC-ASP/16/Res.5 Activation of the jurisdiction of the Court over the crime of aggression (<http://www.legal-tools.org/doc/6206b2/>).

¹⁷⁵ The author participated in the 16th Session of the Assembly so some of the observations contained here are her first-hand observations based on conversations during the Session.

¹⁷⁶ Paragraph 2 of resolution 5 of Assembly Session 16 reads: “Confirms that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or proprio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments”.

tained in the actual amendments to the Rome Statute.¹⁷⁷ The activation resolution adopted by consensus in New York contains language that emphasize the ultimate judicial powers and independence of the Court.¹⁷⁸ While a few commentators have come forward with their views that the paragraph might be superfluous,¹⁷⁹ others have emphasized that “there is no harm including [it] in the resolution”, and that “it was probably a nod to those who were not happy with the ultimate outcome”.¹⁸⁰ Ultimately, the judges of the Court will have to interpret the Statute, amendments included.

We may not know for a long time how judges will interpret the relevant provisions. What we do know is that, even if judges adopt more expansive readings of the provisions, the jurisdictional regime emanating from the Kampala compromise, despite the best efforts of many, fell short of Ferencz’ hope for the Court. There was in fact significant disagreement in Kampala also concerning whether the Security Council should have control over the Court’s ability to prosecute the crime of aggression.¹⁸¹ After complex negotiations, a special jurisdictional regime was agreed. It would give the Council powers of referral and deferral in respect of Court proceedings on aggression,¹⁸² and a potential role in the determination that aggression had occurred.¹⁸³ Furthermore, unlike with all other crimes where the Court may exercise jurisdiction over nationals of non-States Parties if crimes against humanity, genocide, and war crimes are committed on the territory of a State Party, the Court cannot exercise jurisdiction over aggression against nationals of non-States Parties to the Court.¹⁸⁴ The substantive definition of aggression was hotly debated as well in Kampala, and while the list of ‘acts’ of aggression contained in UN Gen-

¹⁷⁷ For an elaboration on what was agreed in Kampala by one of the State delegates, see Astrid Reisinger Coracini, “More Thoughts on ‘What Exactly was Agreed in Kampala on the Crime of Aggression’”, in *European Journal of International Law: Talk!*, 2 July 2010.

¹⁷⁸ Paragraph 3 of resolution 5 reads: “Reaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court”.

¹⁷⁹ See Dapo Akande, *supra* note 173. See also Kevin Jon Heller, “ASP Adopts the Aggression Amendments by Consensus”, and “The Draft Resolution’s Curious Paragraph 3”, in *Opinio Juris*, 15 December 2017.

¹⁸⁰ See Jennifer Trahan’s response, 15 December 2017, *ibid.*

¹⁸¹ Barriga, Danspeckgruber and Wenaweser, 2009, see *supra* note 161.

¹⁸² Articles 15ter and 16, ICC Statute.

¹⁸³ *Ibid.*, Article 15bis.

¹⁸⁴ *Ibid.*, Article 121(5).

eral Assembly resolution 3314 was endorsed,¹⁸⁵ an additional three-fold ‘manifest’ threshold (“character, gravity and scale”) would have to be met to for the ‘act’ of aggression to be considered a crime under the Statute.¹⁸⁶

Having campaigned his entire life for a world in which “warfare, which had always been glorified in the past, was condemned not as a national right, but as an international crime”,¹⁸⁷ there is no doubt that Ferencz would have hoped to see a stronger regime coming out of Kampala. While the intrinsic value of the Kampala achievements cannot and should not be understated,¹⁸⁸ the jurisdictional regime and substantive definition of aggression that emerged fell short, in his eyes, of what was necessary and desirable.¹⁸⁹ It is for this reason that, alongside the progress made in Kampala, Ferencz has also been a strong proponent of ‘alternative legal theories’ that would fill in the gaps and strengthen the framework of accountability. Some scholars have indeed engaged with some of Ferencz’ alternative legal theories, suggesting, for example, that the illegal use of armed force, when not amounting to the crime of aggression under the Rome Statute, could be charged as a war crime¹⁹⁰ or might substitute, in some cases, as a crime against humanity.¹⁹¹

¹⁸⁵ *Ibid.*, Article 8bis(2); UN General Assembly, Definition of Aggression, A/RES/3314, 14 December 1974, see *supra* note 149.

¹⁸⁶ Article 8bis(1), ICC Statute.

¹⁸⁷ Benjamin B. Ferencz, “ICC Jurisdiction over the Crime of Aggression”, available at www.benferencz.org.

¹⁸⁸ See, for example, Christian Wenaweser and Sina Alavi, “From Nuremberg to New York: The Final Stretch in the Campaign to Activate the ICC’s Jurisdiction over the Crime of Aggression”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 20-23; Hector Olasolo and Lucia Carcano, “The ICC Preventive Function with Respect to the Crime of Aggression and International Politics”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 66-70; Leila Nadya Sadat, “Accountability for the Unlawful Use of Force: Putting Peacetime First” in *Harvard International Law Journal*, 2017, vol. 58, pp. 74-78.

¹⁸⁹ He is not by far the only critic. “Sometimes the best is enemy of the good”, writes Schabas, 2012, p. 204, see *supra* note 22. Also see, for example, David Scheffer, “The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 83-86; M. Cherif Bassiouni, “The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 87-89; Sanji Mmasenono Monageng, “The Crime of Aggression: Following the Needs of a Changing World?”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 79-82.

¹⁹⁰ Rachel E. VanLandingham, “Criminally Disproportionate Warfare: Aggression as a Contextual War Crime”, in *Case Western Reserve Journal of International Law*, 2016, vol. 48, pp. 215-271.

¹⁹¹ Manuel J. Ventura and Matthew Gillet, “The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity”, in *Washington University Global Study Law Review*, 2013, vol. 12, pp. 523-538; Benjamin B. Ferencz, “The Illegal Use of Armed Force as a

Others have called for a more comprehensive approach to the question of aggression that would take into account the human rights framework.¹⁹² Many questions, of course, still remain open concerning the compatibility of these alternative legal theories and the current status of the law.¹⁹³ However, it is encouraging to see that the interest in closing accountability gaps is growing, and a greater number of scholars are engaging on the issue.¹⁹⁴ It is important to note, that “these ideas [...] do not seem to preclude the coexistence of such theories and the framework agreed upon at Kampala”.¹⁹⁵ Furthermore, while Kampala might not have gone as far as many would have hoped, it is important to rejoice at the activation of the Court’s jurisdiction: even if not a single conviction was ever obtained under that definition, “add[ing] a further tool for deterring military adventurism” seems indeed an endeavour worth pursuing.¹⁹⁶

12. Conclusions

In his more than 70 years of service, Benjamin B. Ferencz has proven to be both a relentless advocate for, and a towering figure of, the international law and international justice communities. As one of the first ever ‘victims lawyers’, Ferencz gave a powerful voice to the voiceless, taking on industrialists and *Schutzstaffel* alike, helping to bring justice to millions of victims of Nazi crimes. He was among the first Prosecutors to ever use the word ‘genocide’ in a trial, and once the trials were over, his work on reparations and restitutions was so ground-breaking that it helped shape the

Crime Against Humanity”, in *Journal on the Use of Force and International Law*, 2015, vol. 2, pp. 187-198; M. Cherif Bassiouni, “The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 87-89.

¹⁹² William Schabas, “The Human Right to Peace”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 28-32; Frédéric Mégret, “State Responsibility for Aggression: A Human Rights Approach”, in *Harvard International Law Journal*, 2017, vol. 58, pp. 62-65.

¹⁹³ Federica D’Alessandra and Robert Heinsch, “Rethinking the Relationship Between *Jus in Bello* and *Jus ad Bellum*: A Dialogue Between Authors”, in Leila Nadya Sadat (ed.), *Accountability for the Illegal Use of Force*, Cambridge University Press, forthcoming in 2018.

¹⁹⁴ Sadat, 2017, see *supra* note 179. See also “The Illegal Use of Force: Reconceptualizing the Laws of War”, International Experts Meeting, Washington University School of Law, Whitney R. Harris World Law Institute, September 11–12, 2015; *Harvard International Law Journal Spring Symposium*, 2017, vol. 58.

¹⁹⁵ Federica D’Alessandra, “Accountability for Violations of the Prohibition against the Use of Force at a Normative Crossroads”, in *Harvard International Law Journal*, 2017, vol. 58, p. 13. Perhaps the ‘belt and suspenders’ approach advanced by William Schabas is a viable way of reconciling these theories with the ICC Statute, see Schabas, 2012, p. 215, see *supra* note 22.

¹⁹⁶ *Ibid.*

economy of a newborn nation and alleviate the dire humanitarian situation of millions of survivors. Even though, as he himself has said, “justice was not perfect” at Nuremberg, the trial and reparations programmes that he led form landmarks that are still emulated as important precedents in transitional justice. A visionary who would not take ‘no’ as an answer, Ferencz fully embraced the revolutionary idea of his time, that unlawful war is an international crime, and has helped shape the conversation on human rights and ‘world peace’ ever since.

To this date, Ferencz has in fact proven a formidable advocate for the international rule of law, the criminalization of illegal war-making, and the prevention of atrocity crimes. Throughout his life, he has strived for ideals that have brought us closer to a world where every human life counts, and where the rights of people and individuals can be impugned in the face of injustice. His most enduring contribution is perhaps the immense perspective that he brings to the field of international justice, embodying the journeys, successes, and failures of several generations of lawyers that fought for a more just and humane world. He reminds us every day how far we have come since it all began in Nuremberg, and yet how much there still is to be done. Every day he tries to carve a path forward. In the words of ICC Prosecutor Fatou Bensouda, Ferencz continues to:

raise awareness about the evils of atrocity crimes, educate successive generations about the horrors of war and conflict; advocate for accountability and strengthening efforts to end impunity for atrocity crimes with the hope of deterring future atrocities – stressing the centrality of victims in all his work.¹⁹⁷

As difficult as the path ahead might be, and as hard as achievements to date have been, if the field of international criminal law is moving in the right direction, or in any direction at all, it is also thanks to pioneers like Benjamin B. Ferencz, men who ‘walked the walk’ of international justice before the rest of us began talking about it. The evolution of international criminal law has certainly not reached its end point. As we go forward, one important lesson to distil from the life of Ferencz is to never give up. We should aspire to be as ‘valiant and unshakable’ men and women as he has been, standing on the side of ‘right’ instead of that of

¹⁹⁷ Fatou Bensouda, Remarks at the Launch of USHMM Ferencz International Justice Initiative, ASIL 2017: United States Holocaust Museum, “Museum Launches Ferencz International Justice Initiative to Promote Accountability”, available on the web site of the Museum.

‘might’, not hesitating to speak truth to power. I believe we owe him our gratitude for continuing to inspire students, scholars and practitioners alike.

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‘Law, Not War’: Ferencz’ 70-Year Fight for a More Just and Peaceful World

Federica D’Alessandra

This essay is about Benjamin B. Ferencz, the last living Nuremberg prosecutor. Born in Romania in 1920, he came to the United States as a child, and later studied at the City College of New York and Harvard Law School under Roscoe Pound and Sheldon Glueck. The essay describes how, upon graduating from Harvard in 1943, he joined the United States Army in World War II, and served on the team tasked with setting up a war crimes branch and collecting evidence. He became a prosecutor in the legal team of Telford Taylor, with responsibility for the *Einsatzgruppen* case, one of the twelve military trials held by the United States authorities at Nuremberg. He participated in setting up reparations and rehabilitation programmes for victims of Nazi persecutions, and played a role in the process leading to the Reparations Agreement between Israel and West Germany in 1952 and the first German Restitution Law in 1953.

The essay discusses Mr. Ferencz’ contributions after he and his family returned to the United States in 1956, where he entered private law practice as a partner of Mr. Telford Taylor. In numerous publications – including his 1975 book *Defining International Aggression: The Search for World Peace* – he argued for the establishment of a permanent international criminal court and a strengthened international legal order. From 1985 to 1996, Mr. Ferencz also worked as an Adjunct Professor of International Law at Pace University at White Plains, New York. The paper traces several milestones in Ferencz’ life and service, as well as discusses the lasting legacy and contributions of a man ahead of his time, in recognition of which Mr. Ferencz was granted the 2018 M.C. Bassiouni Justice Award. The author is a Visiting Scholar at Harvard Law School.

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