THE HOLOCAUST

AND THE

NUREMBERG TRIALS

By Benjamin Ferencz

Photo/Charles Alexander, Office of the United States Chief of Counsel, courtesy of Harry S. Truman Library.

Sydney S. Alderman *(standing)* of the United States prosecution panel reads the charging indictment at the Nuremberg war crimes trials in the first session of the International Military Tribunal at the Palace of Justice in Nuremberg, Germany, 1945.

The greatest tribute we can pay to the memory of those who perished in the Holocaust and similar tragedies is never to stop trying to make this a more humane and peaceful world.

The United Nations Charter of June 1945 expressed the determination "to save succeeding generations from the scourge of war". Its Preamble spoke of the equality of nations, large and small, and called for enhanced social justice, tolerance and respect for international law. In August 1945, the United States, the Soviet Union, Great Britain and France signed another Charter, creating the International Military Tribunal (IMT), to bring to justice some of the German leaders responsible for aggression, crimes against humanity and related atrocities. How far have we come and what more must be done before these noble goals can be achieved?

Germany had surrendered unconditionally and each of the four occupying Powers assigned leading jurists to serve as judges and prosecutors for the IMT. It was agreed that the proceedings had to be absolutely fair; the situs would be in Nuremberg, the home of Nazi party rallies. Robert H. Jackson, a leading architect for the trials, took leave from the United States Supreme Court to serve as America's Chief Prosecutor. In his opening statement, he set the standard: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."

Adolf Hitler and some of his top aides committed suicide, as did Field-Marshal Hermann Goering after he was sentenced to death by the Tribunal. Of the 24 defendants, 3 were acquitted, 9 were imprisoned and 12 were sentenced to hang–the world was put on notice that those who held the reins of power would be accountable for their crimes. The learned IMT jurists confirmed the legal jurisdiction of the court and the validity of the charges under existing law. All proceedings were open to the public. The accused were presumed innocent, given humane treatment and guaranteed rights that they, in the days of their pomp and power, never gave to any man.

After the widely adopted Kellogg Pact of 1928 outlawed the use of force, it should have come as no ex-post facto surprise to Nazi leaders that their blitzkrieg against other States would no longer be tolerated. Justice Jackson noted that international law did not stand still, but gradually evolved to meet changing needs. In 1946, the Nuremberg judgment and principles were unanimously affirmed by the first General Assembly of the United Nations. The law had taken a step forward. Aggressive war, which had previously been accepted as an international right, was confirmed as a punishable international crime.

Subsequent trials at Nuremberg, in Tokyo and elsewhere built on the IMT foundation. The Allied Powers were unable to agree on another joint international trial, but each could try their own captives. Since the Tribunal could provide only a snapshot of Nazi criminality, the United States decided to conduct a dozen "subsequent proceedings", to be directed by General Telford Taylor, a key player on Justice Jackson's staff. Indictments were filed against doctors who performed forced medical experiments, judges who perverted the law, and industrialists, military leaders and ministers who supported illegal Nazi policies. Of the 185 tried in the "subsequent proceedings", 142 were convicted.

In April 1946, I was recruited by the Pentagon to return to Germany to assist with the "subsequent proceedings". I had worked as a research assistant to a Harvard University professor, writing a book on war crimes, before I joined the

army as a private in the artillery in 1943. When American troops advanced into Germany, I was transferred to General Patton's headquarters to help set up a war-crimes programme; as an investigator, I dug up bodies of captured Allied flyers beaten to death by enraged German mobs. I entered many concentration camps with the liberating army and witnessed the horrors of the Holocaust first-hand; I assembled documents and data to prove the full extent of Nazi criminality. The trauma of those indescribable experiences has never left me.

After setting up offices in Berlin to gather evidence to support the planned new prosecutions, General Taylor assigned me to be Chief Prosecutor in what was known as the Einsatzgruppen case. The defendants were leaders of SS units that followed advancing German troops into occupied Poland and the Soviet Union, whose mission was to kill without pity or remorse every Jewish man, woman and child they could lay their hands on. Gypsies and any other perceived threats to the Reich were to suffer the same fate. According to their secret reports, these extermination squads, totalling about 3,000 men, deliberately massacred over a million innocent people; the victims were killed simply because they did not share the race, religion or ideology of their executioners.

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To prevent acts of genocidal barbarism, one must understand the mentality and reasoning of the murderers. The 22 defendants in the Einsatzgruppen case were selected on the basis of high rank and education–many held doctor's degrees, six were SS generals. The principal defendant, General Dr. Otto Ohlendorf, patiently explained why his unit had killed about 90,000 Jews. Killing all Jews and Gypsies was necessary, he said, as a matter of self-defense. According to Ohlendorf, it was known that the Soviets planned total war against Germany. A German pre-emptive strike was better than waiting to be attacked. It was also known that Jews supported the Bolsheviks; therefore, all Jews had to be eliminated. But why did he, the father of five children, kill the little babes, thousands of them? The bland reply was that if the children learned that their parents had been eliminated, they would grow up to be enemies of Germany: long-range security was the goal. Ohlendorf lacked facts sufficient to challenge Hitler's conclusions. According to him, it was all very logical.

I had not called for the death penalty, although I felt it was richly deserved. I simply asked the court to affirm the right of all human beings to live in peace and dignity, regardless of race or creed–it was "a plea of humanity to law". The three experienced American judges concluded that a pre-emptive strike as anticipatory self-defense was not a valid legal justification for mass murder. If every nation could decide for itself when to attack a presumed enemy and when to engage in total war, the rule of law would be destroyed and the world would be destroyed with it. All of the defendants were convicted: 13 were sentenced to death and Ohlendorf was hanged. I was 27 years old then and it was my first case. The ideals that I then expressed have remained with me all of my life.

How far have we come? Despite having promised my wife when we were wed in New York that we would be in Germany only for a brief honeymoon, we stayed on to help obtain restitution, compensation and rehabilitation for the survivors of persecution. As a salaried employee of Jewish charities, I directed innovative programmes that had no historical or legal precedent. When by 1956 Nazi victims of all persuasions had received payments from the West German Government of about $50 billion, we decided that it was time to return home with our four children, who were born in Nuremberg. Practicing law in New York proved uninspiring; with war and killings raging all over the globe, I decided, at fifty, to spend the rest of my life trying to replace the law of force by the force of law.

My mind turned to international criminal courts to deter international crimes. In 1946, the United Nations had called for a code of international crimes and an international criminal court to build on the Nuremberg precedents. Accredited as a member of a non-governmental organization, I obtained access to UN archives. I learned that delegates, unable or unwilling to agree upon a definition of the crime of aggression, argued that without it there could be no criminal code, and without a code there could be no court. In truth, powerful nations were not ready to yield cherished sovereign prerogatives to any international criminal tribunal. After a definition of aggression by consensus was finally reached in 1974, the gates were opened for further work on the criminal code and court. The problems were thoroughly explored and documented in a number of books that I published between 1975 and 1983, and my 1994 book, *New Legal Foundations for Global Survival,* was a comprehensive overview, which UN Secretary-General Kofi Annan generously described as "remarkable".

It took mass rapes in the former Yugoslavia in 1991 to shake the world out of its lethargy. In 1993, the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY) to hold accountable those responsible for war crimes, crimes against humanity and the genocide cloaked as "ethnic cleansing". To the everlasting shame of the international community, when over 800,000 people were butchered in Rwanda in fratricidal tribal rivalries, the Council set up another ad hoc tribunal–the International Criminal Tribunal for Rwanda (ICTR)–to bring the instigators and perpetrators to justice. Similar international tribunals, with

limited jurisdictions, are beginning to function for crimes against humanity committed in Cambodia, Sierra Leone, Timor Leste and elsewhere. It should be obvious that temporary courts created for a limited time in a limited area after crimes have been committed is hardly the most efficient way to ensure international justice. The missing link in the world's legal order was a permanent court with universally binding laws that might help deter such crimes before they occurred.

After many years of difficult negotiations and compromises, the Statute for the International Criminal Court (ICC) was adopted under a treaty signed in Rome on 17 July 1998, with 120 delegations voting in favour and 7 against. Secretary-General Annan called it "a gift of hope to future generations". By 1 July 2002, the treaty went into effect, with 60 ratifications, and by the end of 2005 the number had swelled to 100, but ratification by some of the major Powers is still outstanding. The United States indicated its early support for the ICC when President Bill Clinton addressed the UN General Assembly and had the treaty signed at the United Nations on New Year's Eve of 2000. But in an unprecedented repudiation, his signature was cancelled as the new Bush Administration in May 2002 notified the United Nations that the United States had no intention of becoming a party to the ICC.

Conservative forces in the United States Government argued that the uncontrolled prosecutor might unfairly prosecute American service members. Nations were warned that the United States economic and military aid would be halted unless they signed agreements exempting American citizens and their employees from the reach of the new Hague tribunal. The United States, which had done so much to advance the rule of law, turned its back on the Nuremberg principle espoused by Robert Jackson, Telford Taylor and many others that law must apply equally to everyone. The fears expressed by the United States Government are misguided and not shared by the hundred nations that support the ICC, including America's staunchest allies and the entire European Community. Under the ICC Statute, every nation must be given priority to try its own nationals; only when the country is unable or unwilling to provide a fair trial can the ICC exercise jurisdiction. No prosecutor in human history has been subject to more controls. The American Bar Association and leading jurists support the ICC, and it is hoped that when the ICC has proven its fairness and merit, the United States will end its unreasonable boycott and join the other nations seeking to uphold fundamental principles of international humanitarian law.

Where are we going? In every great democracy, it is inevitable that there will be differences of opinion. There have always been those who are convinced that warfare is an unchangeable part of man's nature. War is seen as a glorious manifestation of divine law–"the big fish eat the little fish". Despite pretensions to the contrary, such skeptics do not really believe in international law. They reject the utility of new rules of the road or new institutions that seek to improve human behaviour. They deride as "dreamers" or "idealists" those who believe that entrenched practices and values can be altered. Yet, history proves they are mistaken.

Slavery has been abolished, women's rights are growing, colonialism has all but ended, sovereign States are forming multinational unions bound by common rules, international criminal law and humanitarian law have come into existence, and international courts are beginning to flourish. Nations are increasingly recognizing that in this interdependent world they must cooperate for their common welfare. The revolution in technology and communications holds forth the promise of a completely altered international and integrated human society for the enhanced benefit of all.

Adherence to traditional cultures can enhance the quality of life and should be nourished. Loyalty to one's neighbourhood, nation or religion is cherished values that should be respected. But, as Nuremberg showed, differences of race, religion or ideology cannot be tolerated as valid grounds for destroying those who happen to be different. It is not permissible "self-defense" to slaughter "the other"–it is the crime of murder. Aggression, according to the Nuremberg judges and other precedents, is "the supreme international crime" since it includes all the other crimes. There can be no war without atrocities, and unauthorized warfare in violation of the UN Charter is the biggest atrocity of all. The best way to protect the lives of courageous young people who serve in the military is to avoid war-making itself. One cannot kill an idea with a gun, but only with a better idea. If people believe that law is better than war, they must do all they can to enhance the power of law and stop glorifying war.

There can be no real peace for anyone until there is peace for everyone. Education for peace must start at the earliest ages and be carried through all the institutions and modalities of learning. Understanding, tolerance, compassion, compromise and infinite patience hold forth more promise than the threat of nuclear annihilation or the devastating perils of modern warfare. The memory of those who perished in the Holocaust and countless wars since then cries out for an improved social order and a more humane and peaceful world for everyone. ❑

Benjamin B. Ferencz served as a chief prosecutor in the Nuremberg war crimes trials against the Nazi extermination squads. He directed post-war restitution programmes for survivors of persecution, practised law in New York and was an adjunct professor at Pace Law School. He is the author of many books and articles and a frequent lecturer on world peace (see his website at www.benferencz.org).