

**Proceedings of the Second
International Humanitarian Law
Dialogs**

*August 25-26, 2008
at the Chautauqua Institution*

Edited by

Elizabeth Andersen

Executive Director
American Society of International Law

and

David M. Crane

Professor of Practice
Syracuse University College of Law

**Studies in Transnational Legal Policy • No. 40
The American Society of International Law
Washington, DC**

Table of Contents

Introduction

| | |
|---|---|
| Introduction to the International Humanitarian Law Dialogs <i>Elizabeth Andersen</i> | 1 |
|---|---|

Reflections on Nuremberg

| | |
|---|---|
| Nuremberg and Genocide: Historical Perspectives <i>John Q. Barrett, Whitney R. Harris, Henry T. King, Jr., and Benjamin B. Ferencz</i> | 9 |
|---|---|

The Legacy of the Modern Era: Commentary of Prosecutors of International Tribunals, Courts, and Chambers

| | |
|--|----|
| Reflections on Genocide <i>Serge Brammertz</i> | 57 |
| The Genocide Convention: A Sixtieth Anniversary Celebration <i>Fatou Bensouda</i> | 69 |

Commemorative Speeches and Papers

| | |
|--|-----|
| Luncheon Keynote <i>Clint Williamson</i> | 79 |
| Sixtieth Anniversary of the Genocide Convention: The Power of a Word <i>Mark A. Drumbl</i> | 97 |
| The Promise and Perils of International Justice <i>Omer Ismail</i> | 117 |
| Transnational Judicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity <i>Leila Sadat</i> | 123 |

Power not Process—The New Frontiers of Internationalized Justice
Michael A. Newton 171

International Claims Tribunals: What International Criminal
Prosecutors Might Need To Know
Lucy Reed 207

Conclusion

A Bright and Shining Light: The Genocide Convention and the
Establishment of Modern International Criminal Law
David M. Crane 231

Appendices

I. Dialog Summary 239

II. Biographies of the Prosecutors and Contributors..... 253

**Nuremberg and Genocide:
Historical Perspectives**

**Whitney R. Harris
Henry T. King, Jr.
Benjamin B. Ferencz**

Introduction
*John Q. Barrett**

I thank each of the sponsors who convened this extraordinary gathering. It is a privilege for me to be in conversation with these prosecutors, and particularly to be at this podium to moderate a panel of former Nuremberg prosecutors.

Professor Michael Newton said during a previous panel, “The era of accountability is underway.” That is a true and important statement. It also is, coincidentally, a fine setup line for this introduction, because before the

* Professor of Law, St. John’s University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). This panel, part of the second annual International Humanitarian Law Dialogs, occurred on August 26, 2008, at Chautauqua Institution’s Athenaeum Hotel. I am very grateful to panelists Whitney Harris, Henry King, and Ben Ferencz for their contributions here and for their generous and inspiring friendship. They join me in thanking Professor David M. Crane, Gregory L. Peterson, Adam C. Bratton, Lucy F. Reed, Elizabeth Andersen, Thomas Becker, and their respective Syracuse University, Robert H. Jackson Center, American Society of International Law, and Chautauqua Institution colleagues for co-sponsoring this program. We also thank St. John’s law student Andrew W. Dodd for excellent assistance in preparing this transcript, which has been edited for publication.

era of accountability could be underway in our time, there had to be accountability as a concept—accountability in principle—and then, in a “result” moment, accountability as an achievement.

Accountability in principle and accountability first achieved are descriptions of the Nuremberg trials that occurred in the United States occupation sector of the former Germany following the end of World War II in Europe. The Nuremberg trials began with the creation of the International Military Tribunal (IMT) in summer 1945 and the start of its trial that fall. After the IMT trial concluded a year later, Nuremberg was the site of twelve “subsequent proceedings”—United States military trials—during the next three years.

“Nuremberg” is many things. It is that Bavarian city and those moments and trials and legal and historical achievements. It has, as a word, become one in a very small category of special places, moments, and achievements that have become shorthand labels for some of the core realities and some of the highest things that we share as humans. Perhaps Rome (the International Criminal Court, or ICC, statute) and The Hague (site of the resulting ICC and other ongoing international criminal courts) also now are on that list—those institutions are young and developing.

The list of shorthand concepts, moments, and achievements definitely includes San Francisco—Lake Success—Turtle Bay—New York, New York: the founding of the United Nations.

From an American perspective, Antietam, Vicksburg, Gettysburg, and Appomattox Courthouse are on that list—those names stand for the United States Civil War and then for the new Constitution, the equality Constitution, that became ours, going forward to this day, following bloody conflict.

Philadelphia—Constitution Hall—1787: that hot summer and the first United States Constitution are on that list, as are Lexington and Concord, the Fourth of July 1776 and the successful revolution. So, too, Bethlehem and Calvary, Mount Sinai and Moses. These shorthand names and locations are permanently significant. They exist in geography and in history as people in places in moments. They also exist much higher, at the levels of principle, creed, and permanence. And Nuremberg, too, is on that list.

Each of these items is very much a work in progress. Never done, they are ours as they were our predecessors' and as they will be our successors'. Each in its manifold meanings is fundamental to the world that we have, and to the potential better world that we can leave to—and I use now a favorite, little noticed phrase from the Preamble to the Constitution of the United States—“our Posterity.”¹ As we talk about international

¹ U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the blessings of liberty to ourselves and our Posterity, do ordain and establish this Constitution...”). See generally Charles L. Black, Jr., *And Our Posterity*, 102 YALE L.J. 1527 (1993).

humanitarian law, of course we talk here in 2008, we talk to each other and we work in this moment. But this work and this discussion are not only about us. They are about our Posterity, as is each fundamental topic on that eternal list.

In this humbling context, it is my privilege first to introduce four friends who were at Nuremberg after World War II and who grace us with their presence today: Don Ellison, Raymond D'Addario, William H. Glenny, and Allan Dreyfuss. Don was a communications officer who made cables fly from Nuremberg on TWIX, an early ancestor of fax and email. Ray was the Nuremberg photographer whose work the world knows, and from which we all have learned so much. Bill was a prison guard at Nuremberg—among other things, he cared, properly and commendably, for the spiritual well-being of Hermann Goering and other prisoners. Allan covered the trial as a reporter for the United States Army newspaper, Stars and Stripes.²

It also is my privilege to make four more introductions. The first is a looming, incorporeal presence: Robert H. Jackson. He was a central part of, and he is present for any consideration of, the

² See ALLAN DREYFUSS, THESE 21 (Stars and Stripes 2006) (reprinting his 1946 pamphlet on the Nuremberg trial and defendants).

Nuremberg story.³ He was the architect, the United States Chief of Counsel, the employer and supervisor, and Nuremberg's leading man. He was the presidential appointee who accepted an almost impossible job: to go into the wreckage of Europe, into the undeveloped state of international law, to establish the principle that high leaders were legally accountable for crimes against peace, war crimes, and crimes against humanity. He had to work in alliance with three other nations and quite varying legal systems to gather evidence, build cases, prosecute individuals fairly, carry a burden of proof in public before an independent tribunal and, through that work, with all of his colleagues, to leave trails that we can follow and try to build forward as we work for our posterity.

Working directly for and with Justice Jackson, very closely on a personal level, is the man to my left, Whitney R. Harris. He today is a St. Louis lawyer and the senior Nuremberg trial participant. In his long life, his many, many achievements include always speaking and writing—including his comprehensive book,

³ See generally John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOBAL STUDIES L. REV. 511 (2007); John Q. Barrett, "One Good Man": *The Jacksonian Shape of Nuremberg*, in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945 (Die Nürnberger Prozesse: Völkerstrafrecht seit 1945) (Herbert R. Reginbogin & Christoph J.M. Safferling, eds., 2006).

Tyranny on Trial⁴—about Nuremberg and its legacies. Formed by his experience there as a young—not new, but young—lawyer, he understood in a way that none of us can how much it truly matters. It is an honor to be here with Whitney Harris.

I am also very pleased to introduce Henry T. King, Jr. Henry went to Nuremberg in the spring of 1946 as a very young lawyer. He was a kid, one of the youngest in Nuremberg. He was part of assisting the completion of the International Military Tribunal phase, and then he stayed in Nuremberg and worked as a prosecutor in the subsequent American proceedings, including the *Milch* case. Henry today is a Cleveland lawyer, a Case Western Reserve University law professor, a great teacher, writer, and speaker. It is an honor to be here with Henry King.

Finally, even younger than Henry is Benjamin B. Ferencz. Ben also came to Nuremberg in 1946. He earlier had worked on war crimes as a soldier, as an investigator, and as part of the Dachau trial process in 1945. Ben became a key part of Nuremberg's subsequent proceedings: he was the chief prosecutor in the *Einsatzgruppen* case, the single biggest murder case. He also worked on other cases, and in the occupation government—he did not return to the United States until the new Germany, which he helped midwife, had been

⁴ See WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945-1946* (including Foreword by Robert G. Storey and Introduction by Robert H. Jackson) (1954; 1995; rev. ed. 1999).

born. Over the last fifty plus years, Ben has developed path-breaking ideas, written and spoken indefatigably, and devoted his life to the future of international law. It is an honor to be here with Ben Ferencz.

Two final matters to introduce are concepts in the air. One, already introduced, is Nuremberg itself. It began with Jackson's appointment in the spring of 1945. He went to London that summer with a small team, met and recruited more personnel (including Whitney Harris), and reached with British, Soviet, and French allies in August the London Agreement and drafted a charter for the resulting International Military Tribunal. In Nuremberg, they found a mostly-standing courthouse with an adjacent prison. Relocating there, they drafted and filed an indictment in less than two months, gathered, analyzed, and assembled evidence and, by late November, commenced the trial of twenty-one surviving principal Nazi leaders and officials and six Nazi organizations.

That was the one and only international Nuremberg trial. After the completion of the IMT case in the fall of 1946, the United States prosecution effort remained in Nuremberg and alone tried twelve subsequent cases before the Nuremberg Military Tribunals. These cases included *Milch*, the *Einsatzgruppen*, the "Doctors Case," and the "Justice Case" that is the basis for the late Abby Mann's film, "Judgment at Nuremberg"—all important parts of supplying the content that the word "Nuremberg" today contains.

I also wish to introduce the Genocide Convention, which we heard discussed yesterday. It was drafted and agreed upon at the United Nations in 1948, so we are in its sixtieth anniversary year. Through its ratification process over ensuing decades, it became a key part of international humanitarian law. The word “genocide,” a new concept in the 1940s, grew out of the evidence and the Nazi crimes that Nuremberg addressed and proved. Raphaël Lemkin, a Polish lawyer and refugee who lost his family in the Holocaust, coined that word, achieved as a Jackson staff consultant its inclusion in the Nuremberg indictment, and then fought for that international covenant—he poured his life into that achievement, creating a challenge that now is, of course, ours.

I juxtapose that Genocide Convention with this morning’s New York Times. It contains a story of Sudanese armies going on Monday (their time)—literally as we were gathered in Chautauqua Institution’s cinema, watching and then discussing the documentary “Darfur Now”—into a Darfur refugee camp and, according to first reports, killing upwards of fifty people while United Nations forces and African Union military forces were allegedly nearby and doing nothing to stop it.⁵

The topics of our discussion will be Nuremberg, and today, and our posterity. Whitney Harris will be our first speaker.

⁵ See Lydia Polgreen, *Dozens Are Killed in Raid on Darfur Camp*, N.Y. TIMES, Aug. 26, 2008, at A9.

Remarks
*Whitney R. Harris**

Thank you very much, John, and my dear colleagues. These guys are my true friends, not only from Nuremberg but from all the years since, and I really love them. They are dedicated men, they really believe in the rule of law, and I am honored to be gathered here to be in their company.

During World War II, leaders of the Axis powers were repeatedly warned against the commission of acts of cruelty and barbarism. On December 17, 1942, the Allies took note of pogroms against the Jews and condemned in the strongest possible terms this bestial policy of cold-blooded extermination, reaffirming their solemn resolution to ensure that those responsible for these crimes shall not escape retribution.⁶

* Mr. Harris, a graduate of the University of California Berkeley Boalt Hall School of Law, served in the United States Navy and as United States Trial Counsel, International Military Tribunal, Nuremberg, 1945-46. He was primarily responsible for the prosecutions of defendants Ernst Kaltenbrunner, the *Gestapo*, and the *SD*. He served subsequently as Chief of Legal Advice during the Berlin Blockade, as a law professor at Southern Methodist University, as director of the Hoover Commission's Legal Services Task Force, as the first Executive Director of the American Bar Association, and as Solicitor General of Southwestern Bell Telephone Company in St. Louis.

⁶ See *11 Allies Condemn Nazi War on Jews*, N.Y. TIMES, Dec. 18, 1942, at 1, 10 (publishing text of declaration).

The crimes having continued, so far as could be ascertained behind the battle lines, on March 24, 1944, President Franklin Roosevelt declared:

In one of the blackest crimes of all history—begun by the Nazis in the day of peace and multiplied by them a hundred times in times of war—the wholesale systematic murder of the Jews of Europe goes on unabated every hour.

It is therefore fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished.⁷

At the close of the war in Europe, the major victorious powers, the United States, Great Britain, France, and the Soviet Union, agreed to bring to trial the leaders of the Axis powers responsible for initiating World War II in a commission of incomparable crime. By the London Agreement of August 8, 1945, the International Military Tribunal (IMT) was established with jurisdiction over crimes against peace, war crimes, and crimes against humanity, namely the extermination or other inhumane treatment of civilian populations in connection with other crimes within the jurisdiction of

⁷ *The President Asks That Frontiers Be Opened to Victims of Nazi Oppression and Declares That War Criminals Will Be Tried and Punished, March 24, 1944, in 13 PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT: VICTORY & THE THRESHOLD OF PEACE, 1944-45, at 103, 104 (Samuel I. Rosenman, ed., 1950).*

the Tribunal. Following the adoption of the charter of the Tribunal, an indictment was prepared charging twenty-four leaders of Nazi Germany with the commission of crimes within the Tribunal's jurisdiction.

The comprehensive judgment of the Tribunal made no explicit mention of genocide, confining its description of murder and ill treatment of civilian populations to the language of the Charter. Genocide as such was not declared to be a crime in international law by the IMT, but genocide as a legal principle was affirmed by the General Assembly of the United Nations in its resolution of December 11, 1945, when it defined genocide as the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings. Genocide today is a recognized and affirmed crime in international law through both the Genocide Convention and the statute of the International Criminal Court.

Genocide's recognition is the result and principal part of the evidence we assembled at Nuremberg. The subject was covered at length in my book, *Tyranny on Trial*.⁸ I have more recently written a volume on the incredible genocide by the Nazis at Auschwitz, entitled *Murder by the Millions*, which was published by the Jackson Center. It was this Nazi Holocaust which assured the universal recognition of genocide as a crime in international law.

⁸ See HARRIS, *supra* note 4.

Under the Nazi system, the principle repressive agencies, the *Gestapo* and the *SD*, had been combined with the Nazi intelligence system within the Reich Main Security Office, or RSHA. In fall 1945, Justice Jackson's executive trial counsel, Colonel Robert G. Storey, directed me to prepare the case against the *Gestapo* and *SD* and the chief Reich Main security officer, Ernst Kaltenbrunner. I was provided an office in the frigid Palace of Justice, a German secretary, and a secondhand typewriter, and I was told to find the evidence, write the briefs, and assemble the proofs for this aspect of the case.

Shortly after I was given this assignment, I found an interesting letter in our document room. It had been written by a man named Becker to Walther Rauff, the head of the motor vehicles department of the *Gestapo*. In his letter, Becker complained about the malfunctioning of a gas van he was operating in the eastern territories. It was written from an "*Einsatzkommando*." At that time, I knew nothing about *Einsatzkommandos* or criminal activities of the *Gestapo* and *SD* on the Eastern front.

While working on the Kaltenbrunner case, I also learned that British intelligence had taken prisoner a man by the name of Otto Ohlendorf and had him under interrogation in London. Ohlendorf was a head of *Amt III* of the RSHA, which dealt with matters of intelligence within Germany. I had no idea that he might be able to shed light on war crimes but I thought it would be useful to bring him to Nuremberg where I could learn more

from him about the organization of which Kaltenbrunner, my defendant, was a chief.

The British sent him to Nuremberg, and I began the interrogation by asking him what his activities had been during the war. He said that he had served as a chief of *Amt III* of the RSHA except for the year 1941. Naturally, I asked what he had done during that year. When he replied that in 1941 he had been in command of *Einsatzgruppe D*, I immediately recalled the Becker letter that had been written from an *Einsatzkommando*. I was inspired to ask, "Well, Ohlendorf, how many men, women and children did your group kill during that year?" And he answered "90,000." That broke the case on the extermination program of the *Einsatzgruppe* in the eastern territories. We were able to establish through the testimony of Ohlendorf and others that approximately two million persons, and namely Jews, had been murdered by these units of the *RSHA*. It was the initial proof of the Holocaust—genocide by Germany.

Ohlendorf testified before the IMT that he knew of Becker and Rauff, and that the Becker letter was genuine. The Soviet member of the Tribunal, General Ion Nikitchenko, asked the following questions of

Ohlendorf:

Question: In your testimony you said that the *Einsatz* group had the object of annihilating the Jews and the commissars, is that correct?

Answer: Yes.

Question: And in what category did you consider the children? For what reason were the children massacred?

Answer: The order was that the Jewish population should be totally exterminated.

Question: Including the children?

Answer: Yes.

Question: Were all the Jewish children murdered?

Answer: Yes.⁹

In *Tyranny on Trial*, a diagram is displayed containing a report by Stahlecker, the chief of *Einsatzgruppe A*, showing the number of Jews

⁹ IV TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946 ("The Blue Set"), at 337-38 (proceedings of Jan. 3, 1946).

exterminated in the Baltic states, each number encased in the diagram of a coffin.¹⁰ The report stated that in the first four months of operations, *Einsatzgruppe A* had murdered 135,000 Communists and Jews. Estonia was shown as already *judenfrei*—free of Jews.

By the time we had rested our case, we had not found the greatest killer of the regime, Rudolf Hoess, the commandant of Auschwitz concentration camp. It was, therefore, a dramatic moment when I was informed that Hoess had been captured by the British near Flensburg. I asked that he be sent to Nuremberg where I interrogated him over a period of three days, reducing his testimony to an affidavit. Hoess told me, and later testified to the Tribunal in open court, that approximately 2.5 million persons had been murdered at Auschwitz.

Upon completion of his testimony, he was turned over to the Polish government. While awaiting trial in Poland, Hoess recanted his confession, in part stating that the figure he had given me had been supplied by *Gestapo* chief Adolf Eichmann, and that he regarded the total of 2.5 million as far too high. Even Auschwitz had limits to its destructive possibilities, he wrote. Perhaps the figure was inflated. The U.S. Holocaust Memorial Museum estimates that over a million Jews—1.1 million Jews—were killed at Auschwitz. In addition, gypsies, Soviet POWs, Jehovah's Witnesses, and others were consumed in the inferno.

¹⁰ See HARRIS, *supra* note 4, at 361.

There may have been a macabre twist to Hoess's testimony. Since he was to be labeled "the world's supreme murderer" in any case, he may have thought in his morbid mind to establish a record of mass killings never to be surpassed by any other man. This seems a reasonable supposition when it is remembered that Eichmann had said that he would jump laughing into his grave, remembering the killing of six million Jews of Europe.

Hitler and his confederates who led Germany to disaster in the twentieth century are all dead. They were the principal actors in a fearsome drama, but as Prospero foretold they were all spirits and melted into air, into thin air. The tyrant Hitler, and his associates in crime, will someday be forgotten. Forgotten, too, may be their crimes. It is enough that tomorrow's world remembers what today's world has learned through the bitter experience of this fallen regime—that tyranny leads to inhumanity and inhumanity to death. The spirit of Hitlerism was one of the greatest factors for evil in all of history. For Hitler had the advantage over tyrants of earlier times of modern technology through which his propaganda could be constantly pounded into the German people, and his war machine could be made to strike his enemies with shattering force. The consequence of that spirit was the commission of genocide and other crimes against humanity which staggered comprehension.

After hearing the confession of Rudolf Hoess to the Nuremberg tribunal, the defendant Hans Frank, the Governor General of occupied Poland, declared: "That

was the low point of the entire trial—to hear a man say out of his own mouth that he exterminated 2½ million people in cold blood. That is something that people will talk about for a thousand years.”¹¹

We must have an effective system of international justice crowning our national systems of law. Our scientists have not feared to make thermonuclear weapons which could destroy civilization. Certainly, we should not fear to establish the principles of law which will permit civilization to survive. We must find the way to make laws supreme in international relations, or we shall live forever under a pall of fear.

Nuremberg stands firmly against the resignation of men to the inhumanity of man. Because of Nuremberg and the efforts which it represents—man’s attempt to elevate justice and law over inhumanity and war—there is a hope for a better tomorrow. Thank you.

¹¹ G. M. GILBERT, NUREMBERG DIARY 266 (1947).

Remarks
*Henry T. King, Jr.**

I thought I would give you a personal speech in terms of my personal experience incident to going to Nuremberg and then endeavor to try to set a model for other people in the future. My philosophy is that you can either stumble ahead in life, one foot ahead of the other, or you can keep your eyes on the stars. You can dream dreams of a better world. You can tithe for humanity. I learned that from my father and also at Nuremberg.

In 1946, I had just graduated from the Yale Law School. I was a very good student there, was sought after by every law firm there was, and I suddenly began working in the caverns of Wall Street. And I never saw my wife. So we agreed to have dinner every Wednesday night at Schrafft's at six o'clock. I said, "What do you do all day?" She said, "I can't tell you." I said, "Well, I am your husband, theoretically at least." She said, "You heard what I said." It developed she was working at the

* Professor of Law, Case Western Reserve University School of Law, and United States Director of the Canada-U.S. Law Institute. After graduating from Yale Law School, Mr. King practiced law in New York City with Milbank, Tweed & Hope, then served as a Nuremberg war crimes prosecutor, and then had a long career as a corporate counsel, including more than twenty years with TRW Inc., where he was chief corporate international counsel. He is former chairman of the American Bar Association's Section of International Law and Practice, served on the ABA's special task force on war crimes in the former Yugoslavia, and was U.S. chairman of a joint working group, organized by the American, Canadian, and Mexican bar associations, on the settlement of international disputes.

SAM labs on the atom bomb which was dropped at Hiroshima.

She said, "What do you do all day?" "Well, every afternoon at two o'clock I go to Chase Bank. I review corporate trust department documents. I work hard. And sometimes I work late at night." She said, "My God! There is a world out there. We ought to be part of it."

It wasn't long thereafter that I got very restless, so I agreed to go with a smaller law firm. I had an opportunity for partnership there even though I was very young at the time—I had done law school in two years instead of three. I invited Ted Fenstermacher, my classmate at Yale, out for a nice roast pork dinner, and I made my job announcement. He said nothing at first. Then he said, "Henry, I hate to upstage you, but I am joining the U.S. prosecution staff at Nuremberg."

My wife would not let me get to bed that night—I never got a moment of sleep. The following day, I was on the steps of the Pentagon, applying to join him. And I was hired.

Every other friend I had said, "You're giving up a sure partnership on Wall Street"—I did not agree, but they thought I was a sure thing. They said, "When you get back, there will be no jobs, you'll have insecurity, the veterans will be here, they'll have priority, you'll be out on the street." But I'm proud of my wife, who had a needle in my back.

I set sail for Nuremberg. I arrived there in March 1946 in a blinding rainstorm. I walked into the Grand Hotel, which was to be my home for a year and a half there. I didn't sleep much that night. The following morning, I walked through the ruins of Nuremberg and there was nobody there—the only human beings were a few old women with depressing black shawls. They had no food. And as I walked to the courthouse for the first time, I said I'm going to dedicate my life to the prevention of this. Since then, I have dedicated my life to it.

I got to the courthouse, and I had no supervision whatsoever. They said, "Prepare cases against von Brauchitsch," who was Commander-in-Chief of the German Army, "Guderian," who was the Chief of Staff of the German Army, "and Erhard Milch," who was head of the German Air force under Goering. Nuremberg was geared for self-starters. I am if anything a self-starter. I didn't like supervision. I had too many layers of supervision in the Milbank firm: there was a junior partner, a senior associate and this and that, and by the time anything got done it had been watered down so that it didn't mean as much as I wanted it to mean.

I worked on the human experiments case. I saw the crimes—I saw what Dr. Rascher had done at Dachau concentration camp. I saw the slave laborers—we had witnesses from the slave laborers, the largest slaving operation in history, nothing even remotely like it.

I also met some of the defendants. I talked with Hermann Goering. He was very entertaining—he was

quite a raconteur. The last time I saw him was a Saturday afternoon, September 28, 1946. We spent a couple of hours hearing about the gossip between Hitler and Count Ciano, who he hated, the Italian foreign minister of Italy and Mussolini's son-in-law. Goering was an unreconstructed Nazi. He was a person who believed that Hitler would come back, that there would be a return in sixty years.

I also met Albert Speer, who was the Minister of War Production—I wrote a book about him.¹² I had prepared a case with Speer against Erhard Milch, who was a leader of the Central Planning Board that governed Germany's economy in war time. I tried to get testimony against Milch from Speer. He did not have any testimony he wanted to give me. He said, "I am responsible, I was the chairman of the Central Planning Board, I take responsibility for it." So I got a dry hole in other words—in the oil industry, that's bad.

So I had to make conversations with Speer. I saw that he was drawing a picture of a woman with a black shawl, sitting on a park bench and looking into a dark sky. I said, "Who is that picture of?" He said, "It's my mother." I said, "Why is she so depressed?" He said, "Because I am here." I told him I thought the painting was very good—my mother was an artist and so was my mother-in-law, and so I got talking with him. I said, "You were the one who influenced Hitler more than anybody else. How did you do it?" He said, "Well,

¹² See HENRY T. KING, JR., WITH BETTINA ELLES, *THE TWO WORLDS OF ALBERT SPEER: REFLECTIONS OF A NUREMBERG PROSECUTOR* (1997).

every Wednesday night I took the night plane about 7:00 p.m. from Tempelhof aerodrome in Berlin to Hitler in Berchtesgaden, and I'd pre-dialog my conversations with Hitler." And I said, "What do you mean?" "Well," he said,

Let me give you an example. Bormann, who was party chief, wanted to destroy all the industrial installations in the Low Countries and in France, and I didn't want that. So on the way down from Tempelhof to Berchtesgaden, I conceived of a plan for handling the meeting and for destroying Bormann's objective. When I got down there, after my pre-rehearsal, I told Hitler, "You have this directive which Bormann has asked you to sign. You don't want to sign that! We are coming back! You told us we are coming back," and Hitler ripped up the directive.

So Speer intrigued me a great deal. He was the only one who effectively pleaded guilty—he said "I am responsible," and he certainly knew very well he did some terrible things. I learned a lot in Nuremberg, through Speer and through many other people, particularly on the prosecution staff.

When I got back from Nuremberg, I served my time like Milch. (He was the head of the air force and he was convicted for slave labor, but he was not convicted of the human experiments). With a good record from Yale Law School, which at that time was the top law school

and still is, I had to look hard for a job. I found that the Bar had a lot of misconceptions about Nuremberg, that lawyers were worried about the *ex post facto* element of Nuremberg. I had trouble getting a job. But I finally succeeded.

Since that time, I have been carrying the torch, first through the United World Federalists, then through the American Bar Association where I was chairman of the Section of International Law, and through other activities.

What I am saying is this: I am in the autumn of my life—perhaps the late autumn, I don't know, although I hope I have a few years left. As I look at it, Nuremberg was the most meaningful part of my life. I don't say that in a selfish stance—we have to sell young people on the substance. Peace is a concern of all persons who are going to be here on the planet and want a world in which weapons don't destroy men. We want men to control weapons—that's the important thing.

I return to my first premise: you have got to keep your eyes on the stars, live on hope, and keep idealism about the future. We have a special responsibility because we are a free society, a society where dreams can become reality. We have the American dream which becomes a reality in the business world. Let the American dream become a reality in the international political world. Thank you.

Remarks
*Benjamin B. Ferencz**

I find that numbers mean very little to an audience. What does it mean to say a million people killed? Or two million people killed? The story of Anne Frank everybody knows, but who were among the millions? How many fathers? How many children? And so on. It is a little too grim.

Henry has told you the inspiring story of how he was saved from Wall Street by going to suffer in the Grand Hotel, where whiskey was fifty cents a bottle or something like that. Not exactly Washington crossing the Delaware, but in fact we had no idea at that time that we would be sitting here sixty years later and discussing it. I am sure that none of us would have dreamt that that was at all possible.

Most of you, I am sure, have heard during this conference about how difficult it is in the various tribunals, the difficulties with the statutes, of various provisions and all that, all of which is correct if you are a

* Mr. Ferencz, a graduate of Harvard Law School, served as Chief Prosecutor of the *Einsatzgruppen* trial at Nuremberg in 1947. Upon returning to the United States in the 1950s, he was in private law practice in New York City. In the 1970s and 1980s, he wrote prolifically on issues of peace and international law. Since the close of the Cold War, he has been active at preparatory commission sessions for the International Criminal Court (ICC), monitoring and making available his expertise on current efforts to define aggression. He also has continued to mobilize support for the ICC, to take on pundits, and to educate often misinformed media.

technician or an expert on it. I would like to take a step back and take another view of it.

Let me follow Henry's lead by telling you how I got involved in this business. I was a graduate of a very good law school, Harvard, and soon after that event occurred the Army recognized my talent and made me private in the artillery. In that capacity, I landed on the beaches at Normandy, chased the Germans halfway to Berlin and went through all the battles. When the war was over, I had reached the exalted status of Sergeant of Infantry. I got an honorable discharge and five battle stars for having participated in leading battles and not having been wounded or killed, which I thought was a very good idea. I am not sure whether the bullets went over my head or whether I was just lucky, but in any case, those were my experiences.

As we got into Germany, we began getting reports of atrocities. I was reassigned from the artillery to General Patton's headquarters as a war crimes investigator. In that capacity—I won't go into the gory details—I was with liberating forces in all the concentration camps liberated by General Patton's army. Buchenwald, Mauthausen—these are names that no longer mean anything to the new generation, but there I personally witnessed the horrors of the camps as they were being liberated: total chaos; inmates dying and lying on the ground and chasing the guards; guards trying to flee; guards who had been caught being beaten to death or burned alive. I did not want to go into all of that, but I was a personal witness to all that in its most

horrible form. It was not just a statistic for me. It was much more than that.

I stayed on in Germany after that for the trials. I'm indebted to Whitney for having interviewed Ohlendorf and obtained from him, an SS General, the confession that the unit under his direct command had killed 90,000 Jews. I became the chief prosecutor in that trial, the *Einsatzgruppen* trial. We had found the daily reports from the front saying specifically which unit entered which town, who was the commanding officer, what was the date, how many people they killed, the different categories—Jews, Gypsies, Communist functionaries, and others. I personally totaled them to add up to over a million people.

At that point, I said that's enough. I flew from Berlin, where we did our research, down to General Telford Taylor, who was my Chief of Counsel at that time—he followed Justice Jackson for the twelve subsequent trials and was a very fine lawyer (from Harvard). We were later law partners before he became a professor at Columbia and Cardozo. Anyway, he appointed me chief prosecutor in what was known as the *Einsatzgruppen* trial. Nobody, of course, could pronounce it or translate it, but these were special extermination squads and their job was to do as Whitney described—their assignment was to go and kill all the Jews, men, women, and children. Wipe them out! Extirpate them. We couldn't find the right translation of the German language for it.

One point which is worth noting is in the examination on trial of Ohlendorf and twenty-two of his colleagues for the mass murder of over a million people. Ohlendorf was asked to explain why did he do that. It is important to understand that Ohlendorf was an intelligent man. Most of my defendants had doctorate degrees; I had six SS Generals in the dock. And why did they do that? He said it was self defense. What do you mean, self defense?—nobody attacked Germany. Germany attacked all the other countries all around them: France, Belgium, Norway, Sweden, Denmark, Poland, Russia. Well, he said, we knew that the Russians, the Soviets, were planning to attack us. Well, why did you kill all the Jews? Well, we knew that the Jews were sympathetic to the Bolsheviks; therefore, we had to kill them all. And why did you kill the children? The explanation was, look, if you are going to eliminate—they never used the term kill—the parents, then of course the children will grow up and be enemies of the state, and we were interested in long-term security, so we had to kill them, too. It's very logical.

These units used the gas vans which Whitney described in the documents that led him to the trial of SS officer Becker. I got the details of that. Ohlendorf didn't like the vans—they were not very good. He said we could only jam a certain number of people, usually of the age where they couldn't walk or the children who couldn't walk, into the vans. They had to throw them into the vehicle. They would throw them in, close the door, and the plan was when they got to their destination about twenty minutes away, a ditch somewhere, they would just dump them like you'd dump the garbage. But

Ohlendorf complained that sometimes some were still alive and it was terrible—a man had to unload them by hand, with the blood and the scratches and the feces and urine. He said this was very hard on my men. So Ohlendorf, really a sort of humane guy, was sentenced to death and hanged in Landsberg prison. It takes eight minutes to die, before you get a death certificate, after you've been dropped.

Enough of that. I mentioned this only because I see the picture in its goriest details. I, of course, have been traumatized by that experience, and I am trying to do as Henry and many others are doing as well, what the Jackson Center is doing as well: trying to change the world, trying to eliminate that kind of behavior. Well, how do you go about doing that? It's very easy to be discouraged. We hear all the complaints: you need a budget; you need to have an approval; you have to have judges; you have to have this; you have to have that. I take a long-term view even though I am so much younger than my colleagues here. I see the enormous problems, but I am terribly optimistic. You say, how could you be optimistic? It's like when people ask me, how do you feel? I say I am always feeling fine. How could you always be fine? It is very easy: I am aware of the alternatives.

It is the same with the experience we had here with international courts. When I went to school at Harvard (I don't know how it was at Yale), they didn't teach international criminal law. There was no such thing—it didn't exist.

After Nuremberg, the campaign for an international criminal court began. It was inspired by Jackson and by Taylor—if you have international crimes, it is logical you need a court in order to deal with it. That is what the first General Assembly of the United Nations decided. It passed a resolution saying we approve the Nuremberg principles and the judgment of the International Military Tribunal and we want to set up committees to establish a new court of international crimes. They referred also to genocide, which was not in the statutes of the International Tribunal or the subsequent trials, specifically as tribute to Raphaël Lemkin, who was also working there, pushing the UN on that.

So what happened to these instructions to follow the Nuremberg precedent? They set up committees. I got interested and began to sit in on those committees in no official capacity. I had big advantages over everybody there: nobody could fire me because nobody hired me and I could speak the truth. I began to write articles, books and all that.

Eventually, we had growth of international courts. First we had the international criminal tribunal for Yugoslavia, created by the United Nations Security Council itself—10,000 women had to be raped before we woke up to that. Then we had 800,000 people butchered in Rwanda. It was a disgrace to our whole world that after the Holocaust in Nazi Germany we allowed that to happen again. People killing people with machetes—no one needed to use nuclear weapons. So we set up a court in answer to that. Then we set up other

courts—you have heard about Cambodia and Sierra Leone, and gathered here are lawyers who are now responsible for prosecuting some of the people who were involved in those crimes.

After about sixty years from Jackson's effort, we do have an international criminal court, and it is quite a remarkable thing—the delegates had about a thousand points of dispute before they went to Rome, so to reach an agreement was very remarkable. Both of these gentlemen were in Rome. The only thing the delegates could not reach agreement on was the crime of aggression.

It is often overlooked that none of these war crime trials is intended to or capable of doing complete justice. At Nuremberg, we did not try all the criminals—we had a small sampling only. In the *Einsatzgruppen*, there were 3,000 men in the four different units. Every day they went out and their assignment was to kill Jews and others, and they did that for about two years and they reported on it. Three thousand men did that directly—they would strip people first, then line them up ten in a row, shoot them, and push them into a ditch. How many were tried? Twenty-two. Twenty-two! Why only 22 when there were 3,000 mass murders? Well, the ridiculous—absolutely ridiculous—answer is that we only had twenty-two seats in the dock. We weren't trying to do more. We couldn't. We were under pressure to move quickly. If we tried to try 3,000 people, we'd still be sitting in Nuremberg with probably not more convictions than we got in that one case. The trials petered out as time went by.

So no war crimes trial can do more than just a sampling of some of the leaders who bear top responsibility for the crime. If we succeed in doing that and creating a historical record, we make a great achievement, showing the victims that we know and we care what happened to them.

In her speech, Lucy Reed, president of the American Society of International Law, referred to the fact that we now have, for the first time in a criminal statute, a provision that victims are entitled to representation during the course of a trial and compensation for injuries. The details are still to be worked out and there will be enormous difficulties, but it is another step forward. I like to look at the alternatives, at the progress, and from that point of view it is fantastic.

When I started working for an international criminal court, people said I must be crazy. I said I know that, but I am going to try. And lo and behold, unfortunately, the tragedies came along which stimulated the creation of the courts. I hope we will be able to go further without waiting for tragedy, that we will follow Jackson's advice that the greatest tribute that power ever pays to reason is to subject villains to the judgment of the law.

In order to succeed, we have to change the way people think. You heard what Ohlendorf thought. He thought it was defensible to go out and kill somebody who you believe might attack you first—a preemptive strike. The U.S. government, in the trial of *United States v. Ohlendorf*, held that such a view was no justification,

that such killing was an international crime punishable by death. Ohlendorf was hanged, together with some of his colleagues.

Have we learned much? Well, a lot of people believe only in power and war. They say if you have the power, use it—power is the only thing that counts. The history of mankind is written as a history of warfare, but it is getting to be very dangerous—nuclear weapons and chemical weapons can kill everybody several times over. When are we going to start to change the way people think? It's enough to frighten you, except if you're like me—if you look at the alternatives, you can see the progress.

Since the creation of the International Criminal Court, I have been devoted to only one topic: aggression. I can't focus on everything. I did for a while: improving the United Nations; disarmament; a review conference for the UN Charter; an international military force. Now I am focusing on the crime of aggression.

Remember what Justice Jackson said was the most important accomplishment of his life (and Telford Taylor echoed the same): to condemn what had been a national right; making an international crime of aggressive war. The arrangement made was that the use of armed force was prohibited by the United Nations Charter. It binds all nations, including the United States, except if the Security Council authorizes armed force or it is used in defense against an immediate armed attack (and then only until the Council can intervene). Those

are the rules of the game. But aggressions have been committed in many places and are being committed as we speak.

It seems to me important to try to carry out the sense of what Jackson and Taylor and others worked on and said and meant. My motivation is not to diminish the United States. On the contrary, my motivation is to save the lives of all those poor soldier guys like me, and girls now, and the civilians, who are being killed and who will be killed in wars. I want to save their lives. I have seen what war means, and I don't know how to save their lives except by trying to prevent war-making.

How would the world look if we could prevent war-making? Imagine if we had an international court in existence before the first Iraq war, if on the outskirts of Baghdad we had told General Schwarzkopf to go in and arrest the criminals who were responsible for attacking Kuwait, a neighboring state, in a clear act of aggression. What would the world look like today if we had arrested them, put them on trial, convicted and sentenced them? We would have no Iraq war. We would have saved thousands of lives. We would have saved billions of dollars. We could have found authorization to do that in the Security Council resolution, which said to go in and expel the aggressors from the countries they invaded and restore peace in the area. We would have had to stretch that clause a bit because they did not have in mind to put Saddam Hussein on trial, but stretching that would have been better than stretching the UN Charter, ignoring the Security Council, and undermining the rule of law.

Let me conclude with this: international law is a very slowly evolving process. It is like a newborn baby. It cannot function. It needs help. It needs training. It needs experience. It has to be nurtured. But it certainly is moving in the right direction, and we must not be discouraged by little incidents that come up or the difference of opinion among people of good will. Differences of opinion are natural in a democracy, and America is a great democracy where you expect many opinions. Rational people must weigh the alternatives and say which way is better, not only for us but for all the rest of the world. I call this planetary thinking. We must recognize that we are inhabitants of one small planet. We must share the resources so that everyone on it can live in peace and human dignity.

It can be done. Don't tell me it can't be done! Don't tell me it can't be done because it has never been done before. Nothing that is new has been done before. If we could go to the moon, why can't we arrange the system to settle a dispute by peaceful means as required by law today? Why can't we do that? There is no good reason for that. We could fly airplanes which have ten thousands of parts and if any one part is defective the plane would crash. But we fly the planes and they do fly and we have Blackberries in our pockets and we can speak to the world. We have these miracles of accomplishment and we have to let women be raped in Darfur? We have to let African people starve to death? Why? I don't believe that's beyond human capacity. You need to generate the political will without waiting for someone to kill another few hundred million people.

So I say basically, on that happy note, that we are making good progress. Even if we weren't, even if the progress is slow and difficult, I think we have an obligation, a moral obligation, to those who have perished, to those who are in the military, to those who are yet to come, to try to make this a more humane, civil world under the rule of law. If we all set our minds to it, I am confident it can be done. I wish you luck and thank you.

Questions & Answers

Q. I am really curious about your frame of mind as you accepted this daunting task in your youth—was it pure trepidation? You were so young.

King: Well, I think you have to be willing to take a chance. I had training from my father, who was in politics. He said that you have to tithe for humanity a bit—there are too many takers, there are not enough givers, and somebody has to put something into the pot to create a better world for future generations. So I had that idealism. I also got that at the Yale Law School, where they seemed to take the socially desirable result and work backwards to figure out how to achieve it. So I was ready for Nuremberg in that sense. Somehow you have to instill in people what's important in life, that I am not just one person on earth, that there are future generations who can live in a better world. So it is idealism. It also is fulfilling, particularly at this point in life—it's wonderful to keep your eyes on the future and on the stars.

Ferencz: Well, I could say that they took me for my size and my beauty. My wife would say it's largely fate—it's chance. But it so happened that I was the most knowledgeable and experienced man in the world at the time I was given that responsibility. My knowledge came from having been the research assistant to Professor Sheldon Glueck at Harvard. He wrote a book on war crimes¹³ for which I did the research—I read every book in the Harvard Law Library that had to do with war crimes. My experience in the Army as a war crimes investigator, going into the camps, capturing the evidence, interrogating the criminals, was also unmatched.

Then I was in charge of the office in Berlin that had to collect evidence for all the trials. I had a staff of about fifty people doing that, and I had to screen the evidence and send it down to Nuremberg. When we came upon a complete set of *Einsatzgruppen 1* reports, I brought them down to Telford Taylor, who was a General and Chief of Counsel. I said we have to put on a new trial. He said we haven't planned a new trial, we don't have staff or budget or Pentagon support and all that. I said we just can't let these guys go—we had our own dog in the can, as we called it. He said, well, can you do it in addition to your other work? I said sure and so he said, okay, you are the chief prosecutor.

So I became the chief prosecutor of the biggest murder trial in human history. I was twenty-seven years

¹³ See SHELDON GLUECK, *WAR CRIMINALS: THEIR PROSECUTION & PUNISHMENT* (1944).

old. It was my first criminal case—my only criminal case in my life. I rested the case after two days. I didn't have enough brains to call witnesses—I said I don't need them. I convicted all the defendants on their own affidavits. There were thirteen death sentences. I was a totally immature, young, perhaps incompetent young man, but I did it.

Harris: I was practicing law in Los Angeles when the war broke out, unfortunately for me. I was not married at that time so I realized that I was going to have to take care of myself. As a matter of fact, my senior law partner tipped me off. He was very hard of hearing. He called me up on December 7, 1941, which was a Sunday, and said, "Whitney, the Japs have just bombed Pearl Harbor." I said, "Well, Mr. Goodspeed, thank you very much" and completely dismissed his statement, thinking he had misheard what the radio broadcast was. But when it proved to be true, then I squared around and finally got myself commissioned as an ensign in the United States Navy.

I served in the Navy throughout the war, except at the very end of the war, the Navy transferred me to the Office of Strategic Services (OSS) and the OSS, after some training, sent me to Europe to be in charge of the investigation of war crimes. I set up my headquarters down on St. James's, close by British intelligence, and there did my work for OSS collecting as many incriminating documents as I could, most of which I obtained from British intelligence. I turned them over to Justice Jackson's office, which had just been established there in London, and in that way they were very glad to

see me because they had no evidence and these documents were very helpful to them.

Colonel Robert Storey, who was Jackson's assistant, did the same thing in Paris with the American forces there. He collected evidence through the Army—captured documents, of course—and then, when we got to Nuremberg, we set up a document center and put all these German documents into the center. We were able to obtain some very brilliant individuals who translated thousands of documents, as it ultimately turned out, into English and other languages which were used in court. So we had this tremendous volume of documentary evidence which was incriminating to the Germans.

My chief, General Bill Donovan of OSS, was supposed to be Justice Jackson's top assistant. He came to Nuremberg a little bit late. By that time, Jackson realized that we were going to be able to prove the case against the Germans through documentary evidence. Now this was very important because in history the documents cannot be changed. Witnesses can be—the statements of witnesses can be denied and challenged in history, but documentary evidence cannot be. So Justice Jackson had made the decision that we would proceed as far as we could and build our case with documentary evidence. General Donovan, when he came to Nuremberg, found that decision had been made. He returned to the United States but he left me behind.

* * *

Q. We've heard the name Raphaël Lemkin. History credits him as the father of the Genocide Convention. He was a Polish lawyer, a refugee, a U.S. government consultant and employee in various capacities, and then he came back to Europe and was in and about London and Nuremberg during the times you were there. Do you have memories of Lemkin?

King: I knew Raphaël Lemkin—he was always bothering me outside of the Grand Hotel. He was unkempt looking, unshaven, had wild hair, and finally I got weary of going into the Hotel, which I had to go to for meetings. He had a concern about the fact that the International Military Tribunal judgment covered only wartime genocide, not peacetime genocide, and he wanted me to do what I could to change it. Well, they did change it in Allied Control Council Law No. 10, which covered peacetime genocide as well as wartime. That was the basis for the trials of defendants in the subsequent proceedings. He also got a resolution passed by the UN to condemn genocide on December 11, 1946, the same date they endorsed the Nuremberg principles. At the same time, he also was the author largely of the Genocide Convention, which was passed by the UN in 1948. He made a magnificent contribution, so you can't tell a book by its cover. I think he is a good example of an individual who wanted to change the face of the world and who did so. He was very persistent—he

published a book just before the Nuremberg trial,¹⁴ and he got genocide mentioned in the fall 1945 indictment of the defendants at Nuremberg. He published a very good article that the reason for endorsing genocide as a crime is the value of diversity of people—every group makes some contribution to the progress of civilization. So he is a hero, to my way of thinking. I have good memories of my contact with him. But I have always regretted that I didn't have a comb to help him with his hair.

Ferencz: I also knew Raphaël Lemkin. My observations were similar to Henry's in many respects. He was a traumatized man. His entire family had been exterminated by the Nazis. He went around pleading, saying, "Look, there has to be a special name for this. They killed my entire family. They didn't even know them and they killed them just because they were Jews. It's just not plain murder—there's got to be a different name for that." He was a scholarly man, so he put "genus" and "-cide" together, the killing of a whole group.

He was very persistent and he was rather unkempt. He came to see me in my official capacity when I was executive counsel to General Taylor, handling questions of housekeeping, assignment of staff, and so on. He was attached somehow to the Polish delegation at Nuremberg, but he had no official status with them. He always needed something. I had to get him a courtroom pass. I always gave him something, as I did to other

¹⁴ See RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* (Carnegie Endowment for International Peace, 1944).

victims who came and needed help. Logistically at that time in Germany everything was controlled by the Army. There was no food, there was no housing, there was no currency—cigarettes were the currency of the day. He gave me a copy of his very scholarly book, *Axis Rule in Occupied Europe*.

Then he came to the United States. He was working on trying to get the Genocide Convention accepted in the United Nations. He was working together with the man who I think invented the idea of an international criminal court, a Romanian diplomat by the name of Vespasien Pella. He had written a book on counterfeiting and there was nobody who tried counterfeiters, so he said we need an international court to deal with that crime. The two of them, aided by scholars from Lithuania, the Robinson brothers, Jacob Robinson and Henry Robinson, were working on drafting the Genocide Convention and trying to get it through the United Nations.

Lemkin was not married. He had no children. He had a brother living in New York and the brother had a son—a nephew. Raphaël Lemkin is buried in a cemetery in Queens with a simple stone identifying him as the father of the Genocide Convention. I share Henry's opinion: he is the example of what one persistent individual can do if he is right and continues to press despite opposition. So he's been a model.

There are many people I can name the same way. One is René Cassin. He was a refugee lawyer from Paris who retreated to London with General de Gaulle. One day he sat down and, with the help of Eleanor

Roosevelt's politics, drafted the Universal Declaration of Human Rights. I always carry it in my bag and can get it with my eyes shut. Another is Arvid Pardo from Malta with regard to the law of the sea—he said the seabed is the common heritage of mankind and should and does belong to everybody. Rachel Carson said the birds are not singing, there is something wrong with the environment, wrote *Silent Spring*, and sparked the environmental movement.

So one individual can make a difference. You may have to be a little bit crazy and a little bit unkempt, but if you persist and you are right, don't give up. You'd be surprised—you might make it.

Harris: You've all explained Raphaël Lemkin very well. The word "genocide" was new. But the concept was not, for as early as 1933, he had submitted to the Fifth International Conference for the Unification of Penal Law in Madrid a proposal to establish a crime of barbarity—the destruction of racial, religious, or social groups—in the law of nations. Reports of the deliberate murder of the Jews of Europe added urgency to the recognition of this hideous crime.

Ferencz: I'd like to add something which I forgot to mention. The *Einsatzgruppen* trial was a classic case of genocide—their instructions were to kill all the Jews because they were Jews, period. Gypsies the same. In the opening statement, I used the term genocide. I think that's one of the earliest times the term was used in the actual presentation of a case.

* * *

Q. As much as you hear about Nuremberg, you don't hear as much about the other side of the ocean, the Japanese. Did any of you get involved as advisors or were you ever consulted about anything that was done with the trials for the Japanese war criminals?

King: I was not.

Harris: Well, the Japanese trial had more judges than we did, but they followed the Nuremberg precedent faithfully. We count the Japanese trial as an affirmation of the principles of law which were approved at Nuremberg.

Ferencz: Japan recently ratified or signed the statute for the International Criminal Court. A Japanese woman was elected a judge of the ICC.

* * *

Q. Where is the United States on the International Criminal Court?

King: Well, we signed the treaty the last night of President Clinton's term. Then President Bush unsigned it, which was pretty unusual. So we are not anywhere. You are getting at the problem that we talk about among ourselves. We've got to sell Congress and the Executive Branch on what's right. There should be a legal agenda for peace before Congress, to sloganeer it, but the important thing is that the focus should shift from the

United States to Europe. Most nations have ratified the International Criminal Court, big issues are pending and we should want to play a role. An Assembly of States committee is trying to draft a definition of aggression and we are not allowed to participate. That's the important thing—the world is passing us by. We can kid ourselves with the tiny progress we are making, but I think the important thing is the big issues.

The United States, which has had dreams in the past, particularly under Justice Jackson, can be a leader again in the world instead of a follower. It is very important that we note what we have not done, including a number of treaties. The requirement of two-thirds Senate approval for treaties is at this time a handicap. The world is our beat but we have to take steps from the progress that has been made to create a more secure peace in the world, so that all nations are participating. I think we can do it.

Harris: The three of us were at the Rome conference and, of course, we are very strong supporters of the United States joining the ICC treaty. There will be a conference next year on possible amendments to the treaty. One of the things that we are concerned about is aggression. It was left out of the treaty because up to the last moment an agreement could not be reached among the delegates on the definition of aggression. I don't have any trouble with defining it—it's very simple. But the delegates couldn't agree. Fortunately for us, Hans-Peter Kaul of the German delegation came up with the idea at the last moment not to worry about the definition—to put aggression in the treaty subject to

subsequent definition. That is what has happened. So now we have the daunting problem facing us of finding a suitable definition for aggression. That has got to be done for the safety of mankind. It must be done.

Ferencz: I explained, or tried to, that there are differences of opinion in every democracy. There are differences of opinion in the United States on the subject of whether we should surrender any of our rights to any foreign court. There's a sizable body of opinion which says that the answer to that question is no. The departed Senator Jesse Helms was a champion of that. He said over my dead body and, well, he's died in the meanwhile. But he expressed a point of view that is a serious point of view for a large number of Americans. As Henry mentioned *en passant*, you need two-thirds of the U.S. Senate to ratify a treaty. There was no way in a conservative country frightened by the threat of terrorism and nuclear bombs that they were going to surrender any part of American sovereignty to a foreign court. President Clinton recognized that, but putting his signature on this thing indicated that in principle we were in favor. President Bush said no. John Bolton erased Clinton's signature. Now Bolton has been erased from his State Department job. So things keep changing and there is some hope that there will be some change in the future. But it won't be easy. It took forty years for the United States to ratify the Genocide Convention, which was easy compared to defining aggression.

On aggression, look at my website, www.benferencz.org. You will find there references to many volumes that I have written on that subject and hundreds of articles and dozens of speeches. They give

you all the details. The gist of it, in one sentence, is simply that we don't need a definition of aggression. Justice Jackson didn't need a definition of aggression. Neither did the International Law Commission. And we don't need it now. It is an excuse to avoid the jurisdiction of any court. As long as that happens, you are in deadly danger. Good luck!

* * *

Closing Remarks
John Q. Barrett

I find myself very much in agreement with Henry King's late wife, Betty. As we are studying and talking intensely about these topics, there is a world out there, and the better life to live, the higher path to take, is one that gets involved with it, that takes part in it, that works on it. We are not going to do the living for "our Posterity"—they will have that opportunity for themselves. But we will hand off to them the progress we can make on complex challenges and our examples in addressing them.

These men have taken, and blazed, higher paths, and it is very inspiring to know them and to learn from them. Please join me in thanking Whitney Harris, Henry King, and Ben Ferencz.

(Applause)