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A World of Peace Under the Rule of Law: The View from America

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A WORLD OF PEACE UNDER THE RULE OF LAW: THE VIEW FROM AMERICA[†]

BENJAMIN B. FERENCZ*

Thank you very much for that brief introduction. I've had twenty-five speakers ahead of me describe everything there is to know about Nuremberg. I have to find something different that you haven't heard before. So let me begin by confessing that I am more connected to Nuremberg than anyone else in this room. My wife and I had four children born in Nuremberg. A sample is here in my son Donald.

I shall try to give you some indication of what it was like for an American in Germany during and immediately after the war. First, I'm going to ask Professor Safferling, who has carefully explained past and present attitudes in Germany, to do me a personal favor. You may have noticed that he comes from Erlangen, which is near Nuremberg. I entered Erlangen for the first time when I was serving as a war crimes investigator in General Patton's headquarters. We received a report from the London Central Registry of War Crimes and Security Suspects that doctors in the Erlangen Hospital were suspected of having conducted medical experiments on Nazi victims. I strapped on my .45 caliber pistol, jumped into my Jeep and raced to Erlangen. I found the trembling Chief Doctor and demanded that he show me through the hospital since he was accused of illegal medical experiments. A cursory search revealed nothing incriminating. The U.S. Army was moving forward rapidly and I couldn't tarry. In anticipation that I might return later, I gave him an order: "I'm placing you under house arrest. You are not allowed to leave here unless I give you my permission." He responded in German with a crisp "Yes, Sir!" as he snapped to attention. I left. Well . . . I must admit that I never went back. What I want to ask Professor Safferling to do when he gets home, is to go to the hospital and if he sees an old doctor, a very old doctor, standing at attention, please convey my apologies and tell him he can go home now.

The program says that I am supposed to talk to you about a world of peace, the rule of law, and the view from America. In order to have a

[†] Details of the observations made in this address can be found on the author's website, www.benferencz.org. The following references have been provided by the staff of the *Washington University Global Studies Law Review*.

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peaceful world, you need three basic components. You need laws to define what is permissible and impermissible. You need courts to settle disputes amicably or to hold wrongdoers accountable. And, you need a system of effective enforcement. Those three components—laws, courts, and enforcement—are the basic foundations for every society, whether it be a city, or a town, or a village, or a nation, or the world. You can imagine what the world would look like here in St. Louis if you didn't have laws, or courts, or enforcement. You'd have total chaos. And in the international arena, all of these component parts are very weak. The laws are uncertain and ambiguous. International courts, such as the International Court of Justice, have no independent enforcement powers. The new International Criminal Court ("ICC") and other similar international tribunals are all part of a burgeoning evolutionary process, as is evident from Professor Tom Franck's prescient observations regarding state responsibility. We live in a world that is just beginning to be put together on an international level that contains the vital component parts for a more civilized world community. Insofar as we succeed in putting the missing parts in place, the world will be more tranquil. To the extent that we don't have those components, the world will be less peaceful.

The most important point of Nuremberg was the conclusion that aggressive war, which had been a national right throughout history, was henceforth going to be punished as an international crime. That was a revolution in thinking. We've always had wars, and many would say that warfare was inevitable and immutable as part of some Divine eternal plan—"The big fish eat the little fish." Well, Justice Jackson said, "No more!" Jackson was very explicit when he wrote to President Truman saying the time had come when we must hold accountable those leaders who hold the reins of power, so they will know that they will be answerable for their evil deeds, and warfare is an evil deed. It's an evil thing. And they agreed that no matter what the reason, no matter what justification is offered, warfare would not be tolerated. International disputes could be settled by peaceful means only. That was the main point of Nuremberg. I was a combat soldier in World War II—from the beaches of Normandy to the final Battle of the Bulge. I know about war. Jackson's call for a world of peace under the rule of law deserves universal support.

Nuremberg also condemned Crimes Against Humanity; these principles were articulated after the First World War. Since the American Civil War, there were legal prohibitions against certain forms of criminal behavior on the battlefield. It's illegal, for example, to use poison gas or shoot your enemy with a poisoned arrow. But, it's not yet illegal to be the first to drop a nuclear bomb on a city. Philippe Kirsch presided over the

Rome Conference where the delegates from India and Pakistan, both possessing nuclear weapons, proposed that the first use of such weapons should be punishable. There was no way that good idea would be acceptable to the great nuclear powers—particularly the United States. So there is still a long way to go before we get civilized. In fact, the current U.S. administration insists that, although we possess and have used such weapons, other nations that plan to acquire such weapons must be stopped, by unilateral force if necessary.

The first meeting of the U.N. General Assembly passed three resolutions to follow up on the Nuremberg trials. They affirmed the Charter and Judgment of the International Military Tribunal (“IMT”) and called for a codification of international criminal law based on the Nuremberg precedents. Committees were formed to prepare for an international criminal jurisdiction to enforce the new code. That was 1946. I was young then. Forty years later, the International Law Commission came up with a code of crimes. It confirmed that aggression is a crime and that the definition that proved acceptable to Justice Jackson and all the IMT judges was adequate. Germany’s attacks against her neighbors were so flagrant and such a flagrant violation of existing treaties that it was clearly criminal. Aggression is listed as a crime in the Rome Statute for the ICC, along with genocide, war crimes, and crimes against humanity. Unfortunately, the tribunal cannot act on the crime of aggression until certain conditions have been met. One: they have to redefine it. Two: they have to agree upon the elements of the crime, whatever that means. And three: practically all state members of the court have to agree. When and whether that will happen remains to be seen. The sad fact is that many nations are not yet ready to give up their right to go about killing innocent people if they think that it is necessary to protect their own national interests. That’s what war is all about. Today wars kill ten civilians for every person in uniform. That’s not very nice at all. The lesson that we tried to teach at Nuremberg doesn’t seem to have been absorbed very well. In fact, it was largely due to the skill of Chairman Philippe Kirsch that aggression was even listed as a crime in the Rome Statute for the ICC. Jackson’s greatest contribution had to be pushed to the back burner until the other prescribed preconditions were met. Until then, the ICC cannot act on what the IMT called “the supreme international crime.”

THE RULE OF LAW—TWELVE SUBSEQUENT TRIALS AT NUREMBERG

Something which hasn’t been discussed here—much to my surprise—were the twelve subsequent trials at Nuremberg. Everybody knows about

the IMT and the role of Justice Jackson. He was a great man and it was a great trial. He deserves all the credit that we have all been giving him. But there were twelve subsequent trials after Nuremberg. General Telford Taylor, an outstanding Harvard lawyer who had served in military intelligence during the war, was the man in charge. He was my Chief at Nuremberg and we were later law partners. The trials under his direction were designed to show that Germany could not have committed all of those horrible crimes without the support of a broad cross-section of German society. Bankers and industrialists supported the Nazi party and programs. Doctors performed medical experiments. Jurists perverted the law for political purposes. Ministers conspired to commit Nazi aggressions, and the military carried them out. The Schutzstaffel (“SS”) were mass murderers.

Taylor first assigned me to help collect evidence for the twelve subsequent trials. Whitney Harris has explained that a great deal of evidence was assembled in London and in Paris. But there was quite a lot that we still didn’t have. Hidden in the woods around Berlin, there was what appeared to be a small villa. Beneath the small house there were subterranean caverns holding about ten million carefully filed Nazi Party records. They showed the names of every member of the Nazi party and the comprehensive documentation of how they served the Third Reich. It’s ironic that the highly esteemed German Judge Hans-Peter Kaul, who sits on the new ICC in the Hague, has his residence not far from the old Berlin Document Center. When I worked there in 1946, the German staff employed by the Americans was happy to be paid with cigarettes, soap and coffee. That was the only currency that had any value.

Let me give you another brief illustration of what it was really like. One of my researchers in Berlin came upon a number of loose-leaf binders, which were the reports of the SS from the Russian front. Special units called Einsatzgruppen (“EG”)—a name Americans couldn’t pronounce and nobody could translate. These were special extermination units assigned to follow the German lines as they advanced into Poland and the Soviet Union and were there to “eliminate” (they never said “murder”) every Jewish man, woman, and child they could lay their hands on, as well as every Gypsy, and any suspected opponent of the Nazi regime. And that’s what they did. And then they proudly reported the details. How nice! The top secret reports gave us the name of the commander, the unit, how many people they killed, the time, the place, and the distribution list with as many as one hundred names of leaders who later said they knew nothing about the genocide. I took a sample of the damaging evidence and flew from Berlin to Nuremberg. I said to

General Taylor, “We’ve got to put on another trial.” Taylor was hesitant. Another trial had not been planned and no budget had been approved. Taylor was persuaded to approve an unplanned trial against these killing squads and assigned me to be responsible for the case, in addition to my other work. So, I became the Chief Prosecutor for the United States, in what was truly the biggest murder trial in human history. I accused twenty-two SS Officers, including six SS Generals, of murdering in cold blood over a million people. Relying on the documents and without calling a single witness, I rested the prosecution’s case after two days. I was twenty-seven years old and it was my first case.

THE RULE OF LAW—THE CRIME OF AGGRESSION

One of the EG commanders was being held in Nuremberg as a potential witness in the IMT trial. Whitney Harris had interviewed him. He became the lead defendant in the new EG case. SS General Dr. Otto Ohlendorf, father of five children, a handsome man, was one of the smartest and outspoken of the accused. He had admitted that his unit killed about 60,000 Jews, but he quibbled about the precise number since sometimes his men bragged about the body count. Imagine, bragging that you murdered more than you actually killed! None of the mass murderers showed any remorse whatsoever. Ohlendorf was asked to explain why they had killed all the Jews. Most defendants argued that they were only obeying superior orders. Ohlendorf was much more honest. He said it was necessary in self-defense. Self-defense? Where do you come up with self-defense? Germany attacked all of its neighbors.

“Ah, yes,” he explained, “we knew that the Soviet Union planned to attack us, and therefore it was necessary for us to attack them first.” (These days we call it “preemption.”)

Question: “And why did you kill all of the Jews?”

Answer: “Well, we knew that the Jews were sympathetic to the Bolsheviks. Everybody knows that. So, we had to get rid of them, too.”

Question: “And why did you kill thousands of little children?”

Answer: “Well, if they grew up and learned that we had eliminated their parents, they would become enemies of the Reich. So, of course we had to take care of them, too.”

It sounded so natural and logical . . . to the mass murderer.

It was not persuasive to the three American judges. They carefully considered the doctrine of preemptive self-defense, or anticipatory self-defense. They held, unanimously, that it was not a valid defense that could justify the crimes. If everyone felt they could go out and attack their

neighbor, and also kill their children and other perceived enemies, what kind of a world would we have? It was an echo of Justice Jackson's famous phrase that has been quoted here about not passing the Germans "a poisoned chalice" lest we put it to our own lips as well. Law must apply equally to everyone.

In Telford Taylor's closing statement, he said to accept preemptory self-defense as a justification for murder would be like saying that a man who breaks into a house can then shoot the owner in presumed self-defense. Those who made that argument were found guilty and were hanged. I was a young man then, and it was clear to me that those innocent souls who were slaughtered by these Nazi extermination squads were killed because they did not share the race, or the religion, or the ideology of their executioners. I thought then that such thinking was pretty terrible. I still think it's pretty terrible today. Of course, it affects my judgment when I come to consider the view from the United States.

THE VIEW FROM AMERICA

America is a great democracy. It consists of very many people, with very many different views. And there is no such thing as the view from the United States. There is a view from this administration, or from some previous administration. And I can talk to you about that, but I want to remind you that when America began in 1776, it was in a revolution against King George, King George of England, I mean.

Because we live in a great democracy, there are those here and in other parts of the world that don't believe in the rule of law. They say that's nonsense, that's idealistic dreaming. If you've got the power, use it. That's the way the world has always been run. Countries have grown by conquest, that's the way to go. That was not the view of Justice Jackson. He said, "No more!" And he didn't invent that prohibition. The IMT judges went into the question of ex post facto law. The idea that war was impermissible had been an evolving doctrine from the First World War. The legal committee of the League of Nations at the time was unanimous that aggression was a crime, but the best that could be done was to agree that in future it would be punished—regardless of the rank or status of the responsible perpetrator. The Kellogg-Briand Pact of 1928 specifically prohibited the use of armed force.

Truth is that the leaders of important powers in the world today are not prepared to give up their right to use force in their national interests, when they believe it's necessary, or even as a preemptive matter as far as the United States is now concerned. That is the policy of this Administration

as confirmed by the Quadrennial National Defense Strategy Reviews issued by the President and the Pentagon. We specifically reserve the right to act unilaterally in defense of our national interest when the Administration sees fit. Of course, there are many citizens who think that's correct; that's what Presidents are supposed to do. But even at the risk of being labeled an idealist or a dreamer, I ask: where is that policy getting us? Have we found peace that way? Have we served our people that way? Have we advanced our reputation worldwide by staying the course to show resolve?

When I look at the view from America, I see two different trends. Let us first view things, which, in my opinion, do not serve our national interests. The present security strategy of the United States is a repudiation of the most important principle coming out of the Nuremberg trials. If you compare the published national security strategy with the judgments of the Nuremberg trials, it is clear that they are not compatible. The argument made by "realists" is that times have changed; we live in a nuclear world where the mushroom cloud looms. Terrorists do not respect the law. To meet the new threats, administration lawyers argue that they can disregard or stretch the law. They invent new terminology. It's "soft law." Soft law means you're violating the law, but you're trying to find a moral basis in order to justify what you're doing. Well, that's one way to approach it, and there are good lawyers who have taken that position. I think it's a very dangerous practice to allow people to decide that the law doesn't work so they're entitled to ignore it. If the law doesn't work, what you must do is improve the law, not discard it. Imagine what would happen if every time a judge rendered a bad decision, or they passed a new law which may have been a bad law, you decided you were entitled to disregard it. What would the world look like? We'd be back to the Wild West. That may bring nostalgia in some Texas hearts, but as a policy for peace in the world, I don't think that would be very effective. An illegal act does not become legal when it is done with good intentions.

Let me note another problem that causes concern. Tom Franck will recall the top secret "Downing Street Papers" published by the *London Times* in July 2002. Leading British cabinet members discussing plans for an upcoming war with Iraq concluded that the United States was fixing the facts to match the policy. It seemed clear to them that the U.S. had made up its mind to go to war against Iraq, no matter what. The Americans were determined to bring about a "regime change." When it was noted that doing so by force would be illegal, administration lawyers, adept at finding new interpretations of laws, came up with the argument that preemptive force would be justified as self-defense from an imminent

nuclear threat. The U.N. Charter says a nation may defend itself against an armed attack. As far as I can make out, Iraq wasn't engaged in or even planning an armed attack against the United States. So the creative lawyers stretched the law by arguing that since the Security Council of the U.N. was too politicized, it could be bypassed if necessary. A preemptive war followed.

America's misguided opposition to the ICC also troubles me. Judge Goldstone and Ambassador David Scheffer have given other examples of U.S. intransigence. John Bolton now sits as America's permanent representative at the U.N., having found a way to bypass the normal constitutional requirement of Senate confirmation. Ambassador Scheffer mentioned "Article 98" immunity agreements. The U.S. insists that unless a country signs a commitment never to send an American to the ICC, all U.S. military and economic aid will be cut off. Many of the countries use our funds to hunt narcotics traffickers and terrorists. Judge Goldstone wrote a news article saying the American policy almost borders on the irrational. That's the language of a real gentleman. I would have put it more simply. I would have said, "It's plain crazy!" Other current administration actions that are distressing include those strengthening executive powers regarding prisoner-of-war interrogations that have brought our nation into worldwide disrepute.

Now let us look at the more positive things. The progress toward a world under the rule of law has been fantastic! When delegates from about 160 nations went to Rome in July 1998 to seek agreement on an international criminal court, there were about a thousand points still being discussed, and they reconciled all of them. That was largely due to the determination of many countries and the skill of Chairman Philippe Kirsch and others who worked very hard in the preparatory commissions ("pre-coms"). We now have a truly international criminal court for the first time in human history. Unfortunately, the crime of aggression, that was the most important achievement of Nuremberg, was only listed as one of the four core crimes. But, the ICC was not empowered to deal with that offense until various conditions could be met. Nevertheless, the confirmation in the ICC statute that aggressive war is an international crime had significant repercussions.

One of the delegates at the prep-coms and in Rome was the representative of the U.K., Elizabeth Wilmshurst, a very nice lady and British civil servant who occupied an important legal post in the Foreign Office. She was their expert on aggression. When she recognized that Britain and the U.S. were going to war against Iraq without Security Council approval she resigned. "I can no longer serve a government which

is engaged in the crime of aggression,”¹ she wrote. That’s an exact quote. I have a copy of the letter. Britain’s legal officer says the U.K. and the U.S. are engaged in the crime of aggression. Britain’s top intelligence people say the U.S. is misleading the public about the proximity of a nuclear attack and that Iraq supports terrorists that bombed the United States. These are allegations that challenge the validity and legality of our going to war and they call for more detailed explanation than has been forthcoming.

I’ve never seen the people of this country so frightened. And I have lived through the Depression, when lawyers and doctors were selling apples on the street, and the days when Father Coughlin was preaching racial hatred and support for Hitler. I have seen how Senator McCarthy decimated the State Department by falsely challenging the loyalty of patriotic Americans. These national crises have been overcome. It is necessary to change the way people think. If people are prepared to kill and die for their particular ideals, whether it is nationalism or religion or anything else, there is no easy solution. Those who are prepared to die while blowing up a school bus see themselves as heroic martyrs. Their mothers bless them and boast to their neighbors about the noble death of their child.

These are ideas that cannot be fought with a gun. You can only prevail over a confirmed idea with a better idea. Changing the way people think about ingrained ideals takes hard work and a long time. You have to begin very early to educate young minds that war is not glorious. War is an abominable crime, no matter what the cause. The U.N. Charter (“Charter”) prescribes many ways of settling disputes by peaceful means. It is time to give the Charter a chance. There is a growing awareness that current thinking regarding peace and power must be changed.

What I am going to propose to you is something that I realize may sound a bit crazy. It will take a long time and hard work to achieve the peaceful world all people desire. But I believe it can be done—eventually. I suggest that we all try to live up to Jackson’s dream and to the aspirations we’ve heard here from former Nuremberg lawyers and several distinguished professors. We have to eliminate war-making. You may well ask: “How can you do such a thing?” It has never happened. Well, nothing ever happened until it happened for the first time. By definition, everything that is new has never existed before. Let me remind you of the

1. Elizabeth Wilmshurst, *Wilmshurst Resignation Letter* (Mar. 24, 2005), available at http://newsbbc.co.uk/2/hi/uk_news/politics/4377605.stm.

two brothers in Ohio, Wilber and Orville Wright. They had the crazy idea of putting wings on a bicycle and peddling hard until it left the ground. The neighbors mocked them as mad. "If God wanted man to fly He would have given them wings."² At this moment there are thousands of airplanes circling the globe. Being a little crazy may be a good thing.

We are at the beginning of an amazing information revolution, the magnitude of which we cannot even grasp. The potential for changing the way people think is enormous. But it will take time. I don't know if it will be a hundred years or two hundred years or more. There is no such thing as instant evolution or painless revolution, but it can be done. How do I know? Well, I see the trend from all the changes I have witnessed during my lifetime. We are spiraling upward. For example, when I went to school there were no females in my class in high school, college or law school. Under the U.S. Constitution, women had no right to own property or to vote. A man with white skin could legally own a man with black skin. Those discriminations, fortunately, no longer exist in our country.

We had to fight a civil war to end slavery because some argued that our economy and way of life was at stake. We have changed the way people think on such important issues in a relatively short time. An international criminal court never existed before in human history. But it exists today. New institutions are being born to cope with global problems. Such transformations all required and still require determination, patience and a willingness to teach tolerance, compassion and the benefits of compromise rather than conflict. The U.N. Charter prohibited the use of armed force without Security Council approval. It called for disarmament and the creation of an international military force to preserve the peace. It listed many ways to settle disputes by peaceful means. No doubt, the Charter needs improvement, and that should be our primary goal. It is time for all nations to live up to their legal and moral obligations.

2. Dr. Richard Stimson, *Celebrate the Success of the Wright Brothers*, WRIGHT BROTHERS STORIES, <http://www.wrightstories.com/aviators.html> (last visited Oct. 15, 2007).

CONCLUSION

You cannot achieve lawful ends by unlawful means. Respect for the rule of law is basic. Good intentions can't make legal what is illegal. I do not challenge the intentions, or the patriotism, of persons who do not share my point of view. They are entitled to their opinions. Please let me quote some distinguished Americans whose views I admire. They also reflect a view from America. I quote: "In a very real sense, the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law."³ My supreme commander in World War II, Dwight D. Eisenhower, wrote that on April 30, 1958, when he became President of the United States. Lest you think that is an exception, let me quote from the 1964 memoirs of another great military leader, General Douglas MacArthur: "For years, I have believed that war should be abolished as an outmoded means for resolving disputes between nations."⁴ On January 16, 1991, President George Bush, the father of the present President, addressed the nation, saying: "We have before us the opportunity to forge for ourselves a new world order where the rule of law, not the law of the jungle, governs the conduct of nations."⁵ I would be happy if his son would listen to his papa.

There are other patriotic military leaders whom I know personally and who do not believe in war: Robert McNamara, former Secretary of Defense; Admiral Stan Turner, former head of the CIA; four-star General Lee Butler, who was trusted to carry the trigger for the nuclear bomb. On his retirement, Butler warned the nation of the devastating perils of nuclear warfare. All of them are agreed that our present nuclear policy is insane. That's their language, not mine. Who is crazy? I think we have an obligation to remember and honor Nuremberg for what it stood for. Tom Paine, who inspired the American Revolution, had it right. A patriot is not one who says "My country, right or wrong." A true patriot will support his country when it is right but will have the courage to speak out when it's wrong and try to set it right.

Let me close with a message written by Thomas Paine on February 14, 1776, in his pamphlet *Common Sense*: "O, ye that love mankind! Ye that

3. Dwight D. Eisenhower, President of the United States, Presidential Statement in Observation of Law Day (Apr. 30, 1958), available at <http://www.eisenhowermemorial.org/speeches/#1958> (select "Statement by the President on the Observation of Law Day" hyperlink).

4. See DOUGLAS MACARTHUR, COURAGE WAS THE RULE: GENERAL DOUGLAS MACARTHUR'S OWN STORY (1965).

5. George H.W. Bush, President of the U.S., Address to the Nation on Invasion of Iraq (Jan. 16, 1991).

dare oppose not only tyranny but the tyrant, stand forth!”⁶ I say to you stand forth! Never stop trying to make this a more humane and peaceful world. Keep peddling. It’s going to fly!

6. Thomas Paine, *Common Sense*, line 53 (1776), available at <http://www.bartleby.com/133/3.html>.