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The Defence in International Criminal Trials

Observations on the Role of the Defence at the ICTY, ICTR and ICC

Bearbeitet von
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Inhalt

Benjamin Ferencz[*]

Preface

This is being written on November 20, 2015, which is exactly 70 years after the trial against Nazi war criminals began before the International Military Tribunal at Nuremberg. Since that time many new international courts have been created and international trials are now in process trying defendants from many lands for the most atrocious crimes committed against other human beings. Despite current shortcomings there can be no doubt that the progress toward applying the rule of law has been very impressive particularly if one recognizes that the newborn institutions are prototypes that will be improved with time.

I am now in my 96th year. I have tried only two criminal cases in my life. The first was in one of the subsequent Nuremberg proceedings (the *Einsatzgruppen* case), in which 22 defendants were convicted of the calculated murder of over 1 million people, including thousands of children killed one shot at a time. I was assisted by a staff of three other prosecutors and each defendant was entitled to counsel of his choice and an assistant. We were thus outnumbered by at least 10:1. I was then 27 years old. The second case was when I was invited to make the closing remarks in the first prosecution by the new International Criminal Court in The Hague, for the creation of which I had labored for half a century. I was then 92 years old.

My determination to pursue the rule of law was driven to large extent by my personal experiences as a combat soldier in World War II. I participated in every major battle of the war in Europe. As a sergeant in General Patton's army I joined the liberating forces entering several Nazi concentration camps to gather evidence for future war crimes trials. The horrors I personally witnessed are incomprehensible to any rational mind.

The law has never been static but has always evolved to meet the needs of the society it was designed to protect. The evolution of international criminal law has been an ongoing process. The fair trial for adversaries defeated in war is a relatively modern invention. Indeed, the notion of humane treatment for all combatants is a principle still being espoused in many quarters but practiced by very few. "The Defence in International Criminal Trials" gives rise to many questions and problems which deserve consideration. It is not merely a matter of protecting the rights of an accused criminal suspect. The social interest of the public should always be a primary consideration. Punishment of convicted offenders should always have, as its principal objective, the deterrence of criminal behavior by others. In order for the de-

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terrent effect to have a lasting impact it is vital that the trials are open to public scrutiny and to be so conducted that the fairness will never be challenged despite the gravity of the offense. We owe that much to ourselves as well as to the accused.

If the rule of law is to be effective criminal trials must be able to reveal the truth. If the public feels that truth has been distorted the outcome will lose all credibility. On the contrary, acquittals based on false testimony or evidence will serve only to enhance more crime. It is not the primary responsibility of the defense counsel to obtain the freedom of the client by illegal or impermissible means.

Unfortunately, we have not yet developed an effective international criminal system which can ensure justice through judicial process everywhere. Humanitarian interventions are frequently a subterfuge for nations to obtain their own political or economic goals. The statutes for the International Criminal Court as well as other tribunals require both judges and prosecutors to take all facts and circumstances into account. Where it is clear that humanitarian intervention imposes a legitimate responsibility (R2P) it will be up to the court and the prosecutor, and not the protagonists, to determine whether force is permissible. Morality may determine whether a trial is justified or sentences should be mitigated. These dilemmas remain a gray zone which should be clarified as international criminal law is further developed. All persons, regardless of the magnitude of the crime, are entitled to a fair trial and an opportunity to explain their motivation and deeds. Unfortunately, our current world order still lacks unbiased and competent judicial tribunals to judge the legality or acceptability of many deeds which large numbers of the population hold to be contemptible crimes. It is not up to the parties or their allies to decide which side is right and which side is wrong. That requires an independent judgment, which is recognized and acceptable to the world community. As long as that instrument is lacking or lacks enforcement capability the protagonists will continue to slaughter each other as they have always done and continue to do now.

The Nuremberg Tribunals recognized that illegal warfare is the supreme international crime because all of the other crimes are committed when groups or nations consider themselves to be at war. Crimes are committed by individuals and those who are responsible for the massive cruelties should not be able to obtain asylum by politically organized amnesties.

When the United Nations Charter was accepted it was anticipated that the work of the Nuremberg Tribunals would be continued by establishing a permanent International Criminal Court which would be governed by a code of punishable international crimes. Defining aggression was assigned to a stream of different committees. By 1974, the General Assembly approved “a consensus definition of aggression” reached by the appropriate Special Committee. However, major powers were not prepared to entrust any independent tribunal with authority to determine whether their use of armed force

was legal or criminal. Seventy years after the Nuremberg trials and years of debate by learned jurists, it is pathetic to argue that the supreme international crime – the one word "aggression" – could not be properly defined. The political will remains absent and the world remains in increasing peril.

It is a pity that, despite almost 70 years of effort by many learned lawyers, the Kampala amended definition of aggression of June 2010 remains full of loopholes and ambiguities . Calling the illegal use of force in violation of the UN Charter a punishable "crime against humanity" under ICC, domestic, and universal jurisdiction serves as a clearer warning to perpetrators everywhere that there will be no place to hide. It is high time to stop playing deceptive games with the future of humankind.

Layers who are interested in peace and a more humane world order should denounce the illegal use of force as a crime against humanity. The ICC Statute condemns as crimes against humanity, such acts as murder, apartheid, torture, rape, and similar abominations. It allows the punishment of "other inhumane acts." Similar provisions exist in many national criminal codes. The UN Charter prohibits the use of armed force except in self-defense against an armed attack or if mandated by the Security Council. Those individuals who are responsible for violating that fundamental principle should be brought before a court to explain and try to justify their action. The public will be able to decide whether the killing of innocent civilians can be justified or whether it is a punishable crime despite the arguments of the defense counsel and their clients and friends. The court of public opinion will be the final arbiter of what actions are justifiable or worthy of punishment adequate to deter such behavior in the future.

We have yet to learn that you cannot kill an ideology with a gun. What is needed is an ideology better suited to meet the needs of society. We have got to place less faith on military armaments that now have the capacity in cyberspace to cut off the electrical grid on planet Earth. Instead we must be willing to teach tolerance, compassion and a willingness to compromise. Prosecutors, defense counsel, judges, and the public must conclude that law is better than war. Transgressors should know they can be tried by any court that apprehends the perpetrator at anytime and anywhere under principles of universal jurisdiction which are already recognized in many countries. Those individual leaders who use armed force that is not in self-defense and not approved by the Security Council and knowing that it will inevitably kill large numbers of innocent civilians, should be held to criminal account. It is also important for the victims to be given an increased status in the search for justice. It is an old principle of tort law that he who causes unjustified harm is under a duty to compensate the victim and seek to minimize the damage. The victims of armed conflict with its devastating effect should be able to seek their remedies in a civil court of law in addition to the punishment of the perpetrators in criminal proceedings.

Heiko Ahlbrecht[*]

Vorwort

Mit Verabschiedung des Statuts des Internationalen Strafgerichtshofs am 17. Juli 1998 gelang der zentrale Durchbruch zu einem international verankerten Völkerstrafrecht und einem Ständigen Internationalen Strafgerichtshof (ICC), zuständig für die schwersten Menschheitsverbrechen. Zu diesem Zeitpunkt blickte man bereits auf die ersten Verfahren des Internationalen Strafgerichtshofs für das ehemalige Jugoslawien (ICTY) und des Internationalen Strafgerichtshofs für Ruanda (ICTR) zurück, deren grundlegende Rechtsnormen durch das ICC-Statut völkerstrafrechtlich in fortgeschriebener Form kodifiziert wurde. Zentrales und zugleich besonderes Merkmal dieser völkerstrafrechtlichen Entwicklung ist die Kodifikation eines allgemeinen und eines besonderen Teils des materiellen Völkerstrafrechts einerseits, zugleich aber auch die Entwicklung eines völkerrechtlichen Strafprozessrechts mit angloamerikanischen Grundsätzen im Schwerpunkt, in vielen Bereichen aber durch das kontinentaleuropäische Strafprozessverständnis modifiziert. Verkürzt gesagt: Es handelt sich um eine Mischung aus dem US-amerikanischen Parteienprozess (common law) und dem kontinentaleuropäischen Strafprozess (civil law) mit einem die materielle Wahrheit ermittelnden und über diese letztlich judizidierendem Gerichtskörper in einem Strafprozess, der von adversarischen Elementen bestimmt ist. Sowohl der ICTY wie auch der ICC haben ihren Sitz in Den Haag, im Herzen Europas, was das Erstaunen darüber erhöht, dass die Mitgliedstaaten der EU und erst recht nicht die Mitglieder des Europarates in der Lage sind, sich auf einen gemeinsames europäisches Straf- und Strafprozessrecht zu einigen. Vor allen Dingen die Fortschrittlichkeit der Hauptverhandlungsdokumentation (komplette Video- und Audiodokumentationen nebst Wortprotokoll der Hauptverhandlung, die jeweils am Ende des Verhandlungstages elektronisch zur Verfügung gestellt werden) in den Verfahren vor den Internationalen Strafgerichtshöfen ist eine Benchmark, die für die Verteidigung in jedem europäischen Mitgliedstaat in deren nationalen Strafprozessen überaus wünschenswert wäre – sie dient im Übrigen der Objektivierung der Suche nach der Wahrheitsfindung und der Qualität der Beweismittel.

Die besondere Herausforderung an eine Verteidigertätigkeit vor den Internationalen Strafgerichtshöfen liegt neben der intensiven zeitlichen Inanspruchnahme jedoch an anderer Stelle. Es ist das Verdienst dieses Sammelbandes, zentrale und in der Praxis wichtige Themen oder auch Streitfelder der Verteidigung darzustellen und im Detail anhand der vorliegenden Recht-

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sprechung der verschiedenen Strafgerichtshöfe wissenschaftlich zu kommentieren und praktisch zu unterlegen. Dies beginnt bei der Durchsetzung der Verteidigungsrechte und führt über die Spannungsfelder des eigenen Verteidigungsrechts des Angeklagten, das Konfrontationsrecht oder auch die dem deutschen Strafprozess nicht bekannte Handhabung der Offenlegung von Beweismaterialien aus dem Ermittlungsverfahren (disclosure) bis hin zur Organisation und (strategischen) Planung der Verteidigung der üblicherweise inhaftierten Mandanten. In diesem Kontext nehmen die operativen Unterstützungsmöglichkeiten durch das Office of Public Counsel for the Defence, aber auch durch die in Den Haag ansässige Verteidigervereinigung ADC-ICTY einen Unterschwerpunkt der Beschreibung ein. In der Praxis betrifft dies vielfältigste Fragestellungen wie beispielsweise die Bildung von Verteidigungsteams, den Umgangs mit den teilweise mehr als voluminösen Beweismitteln, Verteidigungskosten sowie Kosten für Sachverständige und eigene Ermittlungen oder sonstige Aktivitäten der Verteidigung.

Nur eine echte, gehaltvolle Verteidigung kann ein faires Verfahren und die Einhaltung des Grundsatzes der Waffengleichheit zwischen Ermittlungsbehörde und Verteidigung gewährleisten. Nur eine Verteidigung auf prozessualer Augenhöhe unter Ausübung aller Verteidigungsmöglichkeiten eröffnet die Möglichkeit einer Annäherung an ein gerechtes Urteil und ein “fair trial”. Dies ist die zentrale Botschaft und zugleich das wichtige Leitmotiv, dem sich die Herausgeber und Autoren dieses Werkes verschrieben haben.