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EDITORIAL

## 'A Plea of Humanity to Law': *In Memoriam* for Benjamin Berell Ferencz (1920–2023)

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### 1. Introduction

Mainstream accounts of international criminal justice's origin story have given rise to much mythmaking and hero-worshipping. While welcome and essential critiques of the historiography of international criminal law continue to highlight the significance of developments that long pre-date the Second World War,<sup>1</sup> it is nonetheless a firmly held and canonically embedded dictum that what we recognize as the contemporary system of international criminal justice was forged in the smouldering embers of Nuremberg. Cast as a quasi-Enlightenment moment, Nuremberg embodied a paradigm shift in what remained of the international legal order in the aftermath of the Second World War. The setting, context, and retributive ambition of the International Military Tribunal (IMT), and the subsequent trials conducted pursuant to Control Council Law No. 10, combined to create a cinematically Manichean struggle.

To be involved in the prosecution of crimes at Nuremberg, in whatever capacity, meant contributing to the reification of international norms and principles that are by now taken for granted. While the scope of Nuremberg's legacy is disputed and fetishized in equal measure, its influence on the subsequent evolution of international humanitarian law, international human rights law, and international criminal law is such that it could be argued that it constitutes the most consequential set of proceedings in the history of international law. It is therefore not surprising that those most prominently involved in the Nuremberg trials would be forever lauded as international legal pioneers. In the decades following the completion of the trials, the vast majority of those involved in the prosecution of Nazi crimes returned to civilian life, their foray into international justice at a welcome and satisfying end. However, a small, primarily US, cohort forswore the relative comfort of a more sedate legal career in domestic practice, and instead dedicated themselves to ensuring that Nuremberg's legacy would have a meaningful and lasting influence on the conduct of states. Notable in this respect were Telford Taylor, Whitney Harris, Henry King, and Benjamin Berell Ferencz.

For decades, through various means and mediums, this band of Nuremberg veterans sought to ensure that the foundation stones of a system of international criminal justice that they had helped to put in place would be built upon rather than neglected and consigned to the bibliographic stacks of elegiac memoir. The efforts and activities of some were more prominent than others. At the

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<sup>1</sup>See, for example, M. Bergsmo et al., *Historical Origins of International Criminal Law: Volume 1* (2014).

conclusion of the IMT, Robert Jackson resumed his tenure as an Associate Member of the US Supreme Court and offered only fleeting reflections on the significance of the 'Nuremberg moment' before his untimely death in 1954.<sup>2</sup> Following the subsequent Control Council Law No. 10 trials, Telford Taylor, his successor as Chief US Counsel, became an outspoken critic of US foreign and domestic policy. During the 1950s, Taylor actively challenged McCarthyism and, in the 1960s and early 1970s, was a vocal and tenacious opponent of the conduct of US forces in Vietnam.<sup>3</sup> His 1992 memoir, *The Anatomy of the Nuremberg Trials*, immediately became the seminal first-hand account of the IMT and the subsequent Control Council trials. Whitney Harris and Henry King combined private practice with academic positions and were prominent campaigners in the 1980s and 1990s for the establishment of a permanent International Criminal Court.<sup>4</sup> While Taylor, Harris, and King used their status as Nuremberg veterans in the cause of international justice, their contemporary, colleague and friend, Benjamin Ferencz, who died on 7 April 2023 at the age of 103, stands on his own.

In his later years Benjamin Ferencz was affectionately, if rather morbidly, referred to as 'the last surviving Nuremberg prosecutor'; however, his contribution to contemporary international criminal law did not begin and end in Courtroom 600. Although not directly involved in the IMT proceedings, his role in the subsequent trials conducted under the auspices of the US Office of the Chief Counsel for War Crimes (OCCWC), while unquestionably formative, was just one chapter in a life dedicated to ending the scourge of war through the peaceful settlement of disputes. His simple if utopian mantra of 'law not war' came to define his life's work. A more conventional personality with the admirable ambition of contributing to the cause of world peace would perhaps pursue a political role, or a career as an international civil servant. However, Benjamin Ferencz was far from conventional. Exploiting the moral authority justifiably attached to his role in Nuremberg, he deliberately chose to remain above and outside politics. As an independent actor on the international stage, he lent his voice to the voiceless and stood resolute in the face of state power and indifference.

It is extremely difficult to do justice to the life and career of Benjamin Ferencz in a short *In Memoriam* such as this. Consequently, our modest ambition is to provide a vignette of a career fundamentally grounded in a traumatically informed praxis. From the host of interviews Ferencz conducted over the years, it is all too evident that the trajectory of his life was shaped by the trauma he experienced during the Second World War. As a war crimes investigator in the US Army, he was an active participant in the liberation of concentration camps located across Nazi occupied Europe.

Witnessing the sickening remnants of mass atrocity, as well as the profound and ongoing suffering of those who survived, instilled in him a deeply felt anger and sadness that such acts of inhumanity could occur. Fuelled by this foundational experience, he determined that the crimes committed must be investigated and the perpetrators tried and punished, the victims must be compensated, and every conceivable effort must be made to put in place effective international legal structures to ensure that such horrors would never be repeated. His career can thus be neatly divided into his pursuit of these three aims. His efforts over the course of more than 80 years to prosecute, compensate, and prevent international crimes have had a lasting impact on contemporary international criminal law. Our aim in what follows is not only to celebrate Benjamin Ferencz's extraordinary life but to specifically highlight those aspects of international criminal law that bear his indelible imprint.

<sup>2</sup>See, for example, R. H. Jackson, 'Nuremberg in Retrospect: Legal Answer to International Lawlessness', (1949) 35 *American Bar Association Journal* 813.

<sup>3</sup>Taylor's anti-war advocacy is perhaps best captured in his influential book, *Nuremberg and Vietnam: An American Tragedy* (1970).

<sup>4</sup>See, for example, W. R. Harris, 'A Call for an International War Crimes Court Learning from Nuremberg', (1991–1992) 23 *University of Toledo Law Review* 229; H. T. King and T. C. Theofrastous, 'From Nuremberg to Rome: A Step Backward for US Foreign Policy', (1999) 31 *Case Western Reserve Journal of International Law* 47.

## 2. Investigator and prosecutor of international crimes

Benjamin Ferencz's career trajectory is somewhat like that of a great athlete, where the high point takes place in the early years. This is not to say that his contribution over the many decades of active life was not quite astonishing. But even the final great citation, the award of the Congressional Gold Medal in July 2022, spoke of 'recognition of his service to the United States and the international community during the post-World War II Nuremberg trials' as well as 'his lifelong advocacy for international criminal justice and the rule of law'.<sup>5</sup> As a young man of 27, only a few years out of law school, Ferencz led the prosecution team in one of the great cases comprising the 'subsequent proceedings', namely the *Einsatzgruppen* case.

A combat veteran who emerged from the war with five battle stars, Benjamin Ferencz's journey to membership of the US prosecution team at the subsequent Nuremberg proceedings began in the Harvard Law Library. Immediately before enlisting in the 115<sup>th</sup> Anti-Aircraft Artillery Gun Battalion in 1943, Ferencz obtained his JD from Harvard. At Harvard he benefitted first-hand from the learning and lectures of the likes of Lon Fuller and Roscoe Pound; however, it was the comparatively lesser-known figure of Sheldon Glueck who exerted the greatest influence. As Professor of Criminal Law and Criminology, Glueck recruited Ferencz in 1942 to assist him with the preparation of his monograph *War Criminals: Their Prosecution and Punishment*.<sup>6</sup> Glueck was a member of the Commission on the Trial and Punishment of War Criminals of the London International Assembly and had actively engaged with the early work of the UN War Crimes Commission (UNWCC). When it was published in 1944, his monograph was amongst the first contemporaneous scholarly contributions examining possible frameworks for the prosecution of Nazi crimes. In his role as research assistant, Ferencz provided detailed summaries of 'everything that had been written about war crimes, the First World War and way back' thereby gaining a solid knowledge of international humanitarian law and nascent international criminal law.<sup>7</sup> It is not entirely surprising then, that when in 1944 the US Army Advocate General decided to establish a War Crimes Section to be overseen by General Patton's Third Army, Glueck recommended that Ferencz be immediately transferred as one of its first recruits.<sup>8</sup>

For the remainder of the war, Ferencz, with limited assistance, would collect, collate, and analyse evidence of war crimes with a view to their eventual prosecution. Initially, much of his efforts and those of his colleague, Jack Howitz, were taken up with investigating the murder of downed American flyers. However, as the Nazi's grip on Europe weakened, Ferencz would be present as Allied forces uncovered the full-scale of Nazi atrocities. From Flossenbürg and Mauthausen, to Ebensee and Buchenwald, Ferencz took it upon himself to ensure that in the chaos of the moment of liberation, all available critical evidence be secured and preserved. Relying on a combination of wit, determination, and a natural inclination towards insubordination,<sup>9</sup> Ferencz was uncompromising in the lengths he was willing to go to in order to secure evidence of Nazi crimes:

A large map on my wall tracked the advances of our army and the location of known Nazi concentration camps. My assignment was to get into the camps as soon as possible and assemble whatever evidence was needed to prove beyond doubt the nature and extent of the atrocities committed. I knew that I would have to rely on help from the advancing troops. I therefore typed out an official authorization saying that I was entitled to interrogate any suspects, enter any premises, and do all things necessary to carry out a war crimes

<sup>5</sup>S.4587 - Benjamin Berell Ferencz Congressional Gold Medal Act, 117th Congress (2021-2022).

<sup>6</sup>S. Glueck, *War Criminals: Their Prosecution and Punishment* (1944).

<sup>7</sup>United States Holocaust Memorial Museum, 'Interview with Benjamin B Ferencz', 26 August 1994 and 21 October 1994, RG-50.030\*0269, at 12.

<sup>8</sup>*Ibid.*

<sup>9</sup>Ferencz took great pride in his insubordination: 'I had no respect whatsoever for military authority. I had nothing but contempt. The higher the rank, the more contempt', *ibid.*, at 17.

assignment. All units and commanders were directed to give me every possible assistance. It was signed “On behalf of the Commanding General” well known to all as the ferocious Patton. I then found an officer to sign it. I think he was sober at the time. To make it even more impressive, I stamped “Secret” at the top and bottom. Officially classified as a Jeep driver, I had the front of my vehicle painted in bold letters with the German words “IMMER ALLEIN”, meaning “always alone”, as I prepared to pursue Nazi criminals single-handed like the Lone Ranger.<sup>10</sup>

The evidence Ferencz collected was typically used in the context of US Third Army Military Commissions at Dachau<sup>11</sup> – a process that Ferencz lamented as amounting to little more than a form of summary punishment<sup>12</sup> – or was shared with the UNWCC and the Central Registry of War Criminals and Security Suspects.

As the first and often only investigator on hand to gather evidence of mass atrocities, Ferencz directly confronted the horror of the Holocaust. From interviews he has given, and from the extensive archive of personal correspondence he donated to the US Holocaust Memorial Museum, what he witnessed would have left most people with long-lasting distress. In an interview with the US Holocaust Memorial Museum in 1994, he was asked how he coped with the trauma resulting from the work he was doing:

I think the human body has a capacity for survival which enables it to build insulation, insulating mechanisms to prevent yourself from going mad. And I do not recall feelings of rage. I do not recall feelings of fear. I do not recall feeling hatred. I do recall the urgency of doing something and getting the job done before it's too late. So, I went about my business as best I could – and I did it, I think, very well – by putting myself into a mental cocoon which was surrounded by an ice barrier which just enabled me to go on. And that little ice barrier lasted until it melted, you know, but as long as it was necessary to do the job it remained there, as a self-protective device, I think.<sup>13</sup>

In December 1945, Ferencz was honourably discharged from the US Army and returned to New York intent on resuming his civilian life. However, in March 1946 he received a call from Telford Taylor, at that point deputy to Robert Jackson in the ongoing IMT Proceedings, with an invitation to return to Germany and to join the Subsequent Proceedings Division of the OCCWC. His role would be to collect evidence that would support the 11 subsequent thematic prosecutions contemplated by the US under Control Council Law No. 10. Ferencz agreed, but with the strict proviso that he not be required to re-enlist in the US Army, but instead would be considered a civilian employee with the equivalent rank of Colonel. Once in Germany, Taylor instructed Ferencz to go to Berlin and head up a team of analysts with the gargantuan task of searching through seized Nazi archives for usable, relevant evidence. In this role, Ferencz made a critical contribution to the construction of the planned prosecutions. However, perhaps more significantly, he was central to the investigation and successful prosecution of the *Einsatzgruppen* case, a previously unplanned twelfth case which was almost entirely of his own devising.<sup>14</sup> The *Einsatzgruppen* case provided the young

<sup>10</sup>B. B. Ferencz, ‘Trials by US Military Commissions’, available at [benferencz.org/stories/1943-1946/trials-by-u.s-military-commissions/](http://benferencz.org/stories/1943-1946/trials-by-u.s-military-commissions/).

<sup>11</sup>For a detailed examination see D. Riedel, ‘The US War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today?’, (2006) 24 *Berkeley Journal of International Law* 554.

<sup>12</sup>See US Holocaust Memorial Museum, ‘An Evening with Ben Ferencz in Discussion with Joan Ringelheim’, 5 October 2000, Transcript, available at [benferencz.org/articles/2000-2004/an-evening-with-ben-ferencz-in-discussion-with-joan-ringelheim/](http://benferencz.org/articles/2000-2004/an-evening-with-ben-ferencz-in-discussion-with-joan-ringelheim/).

<sup>13</sup>See ‘US Holocaust Memorial Museum Interview, 1994’, *supra* note 7, at 34–5.

<sup>14</sup>For the full account see *ibid.*, at 47.

Ferencz with the opportunity to move from the crime scene to the courtroom and take charge of one of the most significant cases of the post-war period.

### 2.1 United States v. Otto Ohlendorf et al.: The Einsatzgruppen case

The *Einsatzgruppen* case concerned leaders of the four SS death squads that followed the German armies into the Soviet Union. An estimated two million persons were murdered by the Einsatzgruppen, about two-thirds of them Jews, as they proceeded through the Baltic states, Belarus and Ukraine. Twenty-four defendants were charged, led by Otto Ohlendorf, who had earlier testified in the proceedings of the IMT as a witness for the prosecution.<sup>15</sup> Ohlendorf had commanded Einsatzgruppe D. It was mainly active in the southern Ukraine where it carried out mass murders of Jews and communists in towns and villages with names like Mariopol, little known then but familiar around the world more than 80 years later. ‘The instructions were that in the Russian operational areas of the Einsatzgruppen the Jews, as well as the Soviet political commissars, were to be liquidated’, Ohlendorf told the IMT.<sup>16</sup> He candidly described how Jewish men, women, and children were assembled, trucked to ditches and then summarily executed by firing squads. Later, gas vans were used.

In his testimony before the IMT, Ohlendorf had referred to the existence of documentation of the killings. In interviews during the 1990s, Ferencz told Hilary Earl of his excitement when binders filled with daily reports on the Einsatzgruppen atrocities were discovered. Ferencz immediately flew from Berlin to Nuremberg to convince Taylor that there was enough documentary evidence for a trial.<sup>17</sup> The Associated Press would call it the ‘biggest murder trial in history’. The trial itself only took about eight months, most of it taken up with testimony of defence witnesses. Ferencz’s case in chief consisted entirely of documentary evidence and was completed within three days. He called one witness, a handwriting expert, in rebuttal.

The subsequent proceedings applied Control Council Law No. 10, where the subject-matter jurisdiction was modelled on that of the IMT, with minor modification. The term ‘genocide’, which had first appeared in late 1944, did not appear in the definitions. It had been employed occasionally by lawyers in the trial of the IMT but does not figure in the judgment. Telford Taylor used the term ‘genocide’ in two places in his opening statement in the *Medical* case, in December 1946.<sup>18</sup> In July 1947, ‘genocide’ was charged in the *Einsatzgruppen* case. Paragraph 2 of the indictments stated that ‘[t]he acts, conduct, plans, and enterprises charged in paragraph 1 of this count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups by murderous extermination’.<sup>19</sup> The indictment in the *RuSHA* case, filed at the same time, used the same formulation but with a slight change, adding the words ‘in part’ before ‘by murderous extermination’.<sup>20</sup> Ferencz later recalled that Raphaël Lemkin, who had devised the term ‘genocide’ and campaigned for its recognition as a crime under international law, had been present at Nuremberg in June 1947 when the indictments were being drafted.<sup>21</sup>

Looking a bit like a law school moot court participant, films show the boyish and eloquent Ferencz at the podium in the legendary Nuremberg courtroom.<sup>22</sup> In his opening statement, on 29 September 1947, he referred to ‘genocide’ on several occasions. Ferencz declared that the prosecution would:

<sup>15</sup>Twenty-sixth day, 3 January 1946, (1948) 4 IMT 308, at 311–55.

<sup>16</sup>*Ibid.*, at 316.

<sup>17</sup>H. Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958, Atrocity, Law, and History* (2009), at 78–9.

<sup>18</sup>Opening Statement of the Prosecution by Brigadier General Telford Taylor, 9 December 1946, *United States v. Brandt et al.*, (1949) 1 TWC 27, at 38, 48.

<sup>19</sup>*United States v. Ohlendorf et al.*, Amended Indictment, (1949) 4 TWC 13, at 15.

<sup>20</sup>*United States v. Greifeldt et al.*, Indictment, (1949) 4 TWC 608, at 609.

<sup>21</sup>See Earl, *supra* note 17, at 212.

<sup>22</sup>For example, [encyclopedia.ushmm.org/content/en/gallery/ben-ferencz-and-the-einsatzgruppen-case](https://encyclopedia.ushmm.org/content/en/gallery/ben-ferencz-and-the-einsatzgruppen-case).

show that these deeds of men in uniform were the methodical execution of long-range plans to destroy ethnic, national, political, and religious groups which stood condemned in the Nazi mind. Genocide, the extermination of whole categories of human beings, was a foremost instrument of the Nazi doctrine. Even before the war the concentration camps within the Third Reich had witnessed many killings inspired by these ideas. During the early months of the war the Nazi regime expanded its plans for genocide and enlarged the means to execute them. Following the German invasion of Poland there arose extermination camps such as Auschwitz and Maidanek. In spring 1941, in contemplation of the coming assault upon the Soviet Union, the Einsatzgruppen were created as military units, but not to fight as soldiers. They were organized for murder. In advance of the attack on Russia, the Einsatzgruppen were ordered to destroy life behind the lines of combat.<sup>23</sup>

The motivation for genocide, Ferencz told the Tribunal, ‘as it was carried out by Hitler and his legions in all of the occupied and dominated countries, stemmed from the Nazi ideology of “blood and race”’.<sup>24</sup> Ferencz explained that ‘the killing of defenceless civilians during a war may be a war crime, but the same killings are part of another crime, a graver one if you will, genocide-or a crime against humanity’.<sup>25</sup>

The judgment in *Einsatzgruppen* referred to ‘genocide’ in two places<sup>26</sup> and is among the first judicial pronouncements to use the term. Some of the other indictments in the subsequent proceedings took the lead from *Einsatzgruppen* and used the term ‘genocide’.<sup>27</sup> Nevertheless, Benjamin Ferencz deserves great credit not only for the reference to genocide in the indictment but also for the first significant discussion of the scope of the crime of genocide in any judicial proceeding. At the time of his opening statement, which he presented as ‘a plea of humanity to law’,<sup>28</sup> the work on the Genocide Convention had barely started. The process had been launched by the General Assembly in December 1946. On 26 June 1947, a few weeks before the indictment in *Einsatzgruppen* had been filed, the United Nations Secretariat issued an initial draft of a convention prepared by three experts, Raphael Lemkin, Henri Donnedieu de Vabres, and Vespasian V. Pella.<sup>29</sup> However, significant negotiations of the Convention text at the political level had yet to begin.

On 10 April 1948, the Tribunal returned guilty verdicts on all 22 defendants: 14 were sentenced to death, two received life sentences, five received sentences of between ten and 20 years, and one defendant was released for time served. Ultimately, only four would be executed – Ohlendorf, Naumann, Blobel, and Braune. Despite Ferencz’s protestations, the remainder had their sentences commuted by US High Commissioner for Germany, General John J. McCloy, and were released by 1958.<sup>30</sup> While awaiting execution in June 1951, the lead defendant Otto Ohlendorf received a visit from Ferencz in his cell in Nuremberg. Ferencz was motivated by a desire to see if Ohlendorf would be willing to express any remorse for his role in the murder of tens of thousands of individuals. Predictably, no such remorse was forthcoming. Ferencz later recalled that Ohlendorf had said to him that ‘the Jews in America will suffer for what you have done to me’.<sup>31</sup> What

<sup>23</sup>*United States v. Ohlendorf et al.*, Opening statement of the prosecution, 29 September 1947, (1949) 4 TWC 30, at 30.

<sup>24</sup>*Ibid.*, at 32.

<sup>25</sup>*Ibid.*, at 48.

<sup>26</sup>*United States v. Ohlendorf et al.*, Opinion and Judgment, 10 April 1948, (1949) 4 TWC 411, at 450, 469.

<sup>27</sup>*United States v. von Leeb et al.*, Indictment, (1949) 10 TWC 10, at 36; *United States v. von Weizsaecker et al.*, Indictment, (1949) 12 TWC 13, at 44.

<sup>28</sup>*Ibid.*, at 30.

<sup>29</sup>Draft Convention on the Crime of Genocide, 26 June 1947, E/447.

<sup>30</sup>See G. Gordon, ‘Benjamin Ferencz and the Treatment of Victims in International Criminal Law: Mapping Out *Lex Lata* and *Lex Ferenda* (Ferencza?) in an Emerging Field’, (2023) 23 *International Criminal Law Review* 239.

<sup>31</sup>See ‘US Holocaust Memorial Museum Interview, 1994’, *supra* note 7, at 53.

particularly affected Ferencz was the fact that it was all too evident that the atrocities he investigated and prosecuted were committed by regular, often highly educated people:

The notion that these crimes were committed by sadistic beasts is a mistake. These crimes were led by very well-educated, distinguished, German cultured citizens. They were kind to their cats and dogs, they could quote Goethe, they all loved Wagner, and they killed human beings like they were flies.<sup>32</sup>

### 3. Victim advocate

In July 1948, as the work of the OCCWC was coming to an end, Benjamin Ferencz was approached by the American Jewish Joint Distribution Committee to take on the role of Director of the recently established Jewish Restitution Successor Organization (JRSO). The purpose of the JRSO was to ensure that Jewish property seized by the Nazis be identified, requisitioned and returned to survivors, their heirs or, if no heirs remained, unclaimed assets were to benefit the survivors of Nazi persecution. Thus began the phase of Ferencz's career that focused on reparation and restitution processes for victims of Nazi crimes.

Ferencz was acutely aware that the justice process does not end with the conviction and sentencing of perpetrators. This is all too clear from his 1994 interview with the US Holocaust Memorial Museum:

What about the victims? People tend to forget in the drama of the courtroom, they think ah, the criminals are punished; it's over. It's not over. These victims are more important than the criminal. Criminals can be punished or killed. It doesn't make a big difference unless it's a deterrent to the repetition of the crimes. But what do you do about those who survived?<sup>33</sup>

Ensuring that the proceeds and profits of Nazi persecution be returned to the victims, their heirs and communities, rather than the successor state, was but one means by which those who survived could be aided in the reconstruction of their lives. Governed by Military Law No. 59 ('The Restitution of Identifiable Property') in the US Zone of Occupation, the legal processes by which to retrieve, return or redistribute Jewish property (including Jewish cultural property in the form of religious ceremonial objects such as confiscated Torahs scrolls, as well as Jewish cemeteries)<sup>34</sup> was both novel and bureaucratically complex. The scale of the work involved cannot be underestimated. As Ferencz put it, '[t]he variety and unpredictability of the work in which we were engaged was unimaginable'.<sup>35</sup> Within just four months of taking up his post, the JRSO had submitted some 163,000 individual claims for heirless property in the US Zone of Occupation. Many claims would be litigated for several years and end up before the US controlled Supreme Restitution Court which was housed in the former Berlin Headquarters of the 'Rosenberg Bureau', i.e., the Nazi cultural agency overseen by IMT defendant, and architect of the Nazi looting machine, Alfred Rosenberg.

It was all too clear, however, that irrespective of the commitment of Ferencz and his sizeable JRSO staff, it was not equipped to even scratch the surface of Jewish material losses, which if estimated by present standards amounted to roughly US\$230–320 billion.<sup>36</sup> If nothing else, the

<sup>32</sup>*Ibid.*, at 54.

<sup>33</sup>*Ibid.*, at 98.

<sup>34</sup>In order to determine the cultural significance of reclaimed objects, and how they might contribute to 'Jewish cultural reconstruction', Ferencz sought advice from, amongst others, Hannah Arendt. See 'US Holocaust Memorial Museum Interview, 1994', *supra* note 7, at 92–3.

<sup>35</sup>B. B. Ferencz, 'Seeking Redress for Hitler's Crimes (1948–1956)', reprinted in H. V. Stuart and M. Simons, *The Prosecutor and the Judge* (2009), at 137.

<sup>36</sup>See Gordon, *supra* note 30, at 239.

temporal limitations of Military Law No. 59, which required all claims to be submitted by 31 December 1948, made it inevitable that substantial amounts of heirless property would accrue to the German state. Consequently, attention turned to the negotiation of an interstate process through which the Federal Republic of Germany (the German Democratic Republic being, *ab initio*, entirely unsympathetic to any such process) would accept liability for reparations. The road to a reparations agreement began in 1951, when the recently recognized State of Israel submitted diplomatic notes to the Allied Occupying Powers arguing, *inter alia*, that since it had 'made itself responsible for the absorption and rehabilitation of the survivors' of the Holocaust, it regarded itself 'as entitled to claim reparations from Germany by way of indemnity to the Jewish people'.<sup>37</sup> In a speech before the Bundestag in September 1951, Chancellor Konrad Adenauer, eager that West Germany should atone for the material harm inflicted by the Nazi regime, indicated the desire of his Government to make some modicum of reparation:

The Federal Government, and with the great majority of the German nation, is aware of the immeasurable suffering brought upon the Jews in Germany and the occupied territories during the period of National-Socialism . . . Unspeakable crimes were, however, committed in the name of the German nation and they render moral and material reparations obligatory, both as far as the individual damage suffered is concerned, and as regards Jewish property for which individual claimants may no longer be alive. In this matter the first steps have been taken, but very much remains to be done . . . The Federal Government is prepared, jointly with representatives of Jewry and of the State of Israel which has accepted so many homeless Jewish refugees, to bring about a solution of the problems of material reparation, in order in this manner to ease the way towards spiritual pacification. It is deeply convinced that the spirit of true humaneness must once again become alive and fruitful. The Federal Government regards it as the foremost duty of the German nation to serve this spirit with all the power at its command.<sup>38</sup>

Shortly after Adenauer's speech, the framework for negotiations between Israel and the Federal German Republic were drawn up. Israel would partner the Conference on Jewish Material Claims Against Germany ('Claims Conference'), an entity specifically established for the purpose of consolidating the views of the leading Jewish diaspora organizations (such as the World Jewish Congress and the American Joint Distribution Committee) in the planned negotiations. Given his leadership of the JRSO, Ferencz was invited to join the Claims Conference negotiating team. Formal negotiations commenced in March 1952 amidst virulent and often violent backlash from survivor groups, who viewed the very notion of sitting down with Adenauer's Government to agree a price for the suffering of the Jewish people to be a profound insult to and betrayal of victims. In the town of Wassenaar, a few kilometres from The Hague, Israeli and Claims Conference negotiators engaged in secret talks with Adenauer's government amid the spectre of credible death threats.

These negotiations eventually led to the signing, in Luxembourg in September 1952, of an agreement between the Federal German Republic and the State of Israel. The Luxembourg Agreement provided that over the course of a 12-year period, Adenauer's government would not be liable for a monetary payment as such, but rather would furnish the State of Israel with goods in the amount of three billion Deutschmarks. Two Protocols, known as The Hague Protocols, were also agreed, wherein West Germany would enact legislation – subsequently referred to as the *Bundesentschadigungsgesetz*, or the Law for the Compensation of Nazi Victims – allowing victims

<sup>37</sup>*Documents Relating to Agreement Between the Government of Israel and the Government of the Federal Republic of Germany* (1953), at 20.

<sup>38</sup>K. Adenauer, 'Speech Before the Bundestag', 27 September 1951, English translation available at [search.archives.jdc.org/notebook\\_ext.asp?item=2054163&site=ideaalm&lang=ENG&menu=1](https://search.archives.jdc.org/notebook_ext.asp?item=2054163&site=ideaalm&lang=ENG&menu=1).

to submit individual claims (Protocol I) and would provide the Claims Conference with DM450 million for distribution to Nazi victims amongst the global Jewish diaspora (Protocol II).<sup>39</sup> Ferencz was central to the Claims Conference's negotiation strategy and the final outcome. He had an unexpectedly important role in the signing ceremony in Luxembourg:

The Reparations Treaty was signed in Luxembourg on the morning of September 10, 1952. Chancellor Adenauer, who was to sign first, discovered that his pen had run out of ink. A bad omen? I handed Goldmann a pen that my wife had given to me when I graduated from law school in 1943. It was an Old Watermann with a lifetime guarantee. Whose life was guaranteed, it didn't say. She gave it to me as a good luck charm with a promise that I would return with it after the war. I had carried it with me safely through every campaign. Goldmann handed it across the table to Adenauer and said he would be honored if the Chancellor signed with "his" pen. I demanded restitution from Goldmann after the meeting.<sup>40</sup>

In the years following the adoption of the Luxembourg Agreement, Ferencz would engage closely with its implementation, in particular the drafting of the Law for the Compensation of Nazi Victims. In 1953, he became the founding Director of the United Restitution Organization (URO), whose mandate was to provide legal advice and assistance to survivors of Nazi crimes who wished to submit a claim pursuant to the newly enacted West German law. The URO grew to be an enormous enterprise with offices in 19 countries and over 1,000 staff-members assisting Holocaust survivors. One such survivor who reached out to Ferencz for assistance was a young Thomas Buergenthal. Their interactions would develop into a life-long friendship.<sup>41</sup> A child survivor of Auschwitz and Sachsenhausen, where he was forced to work for the Heinkel Flugzeugwerke, Buergenthal would go on to be a titan of international human rights law and would serve with great distinction on the Inter-American Court of Human Rights, the Human Rights Committee, and the International Court of Justice.<sup>42</sup> More than worthy of an LJIL *In Memoriam* in his own right, Judge Buergenthal passed away just a few months after Benjamin Ferencz in June 2023.<sup>43</sup>

In 1956, after a decade of pioneering legal practice, Ferencz resigned as Director of the JRSO and the URO, returned to New York and partnered in a firm with his old boss, Telford Taylor. Ferencz's legal practice in the years that followed was varied, but his focus on pursuing redress for Nazi crimes continued through his involvement in Claims Commission-supported litigation against surviving German corporate entities such as I.G. Farben, AEG, Siemens, and Krupp, who had all profited from Jewish slave labour. His acclaimed monograph, *Less Than Slaves: Jewish Forced Labour and the Quest for Compensation*, published in 1979, documents not only the manner in which Nazi slave labour was systematized but also the post-war legal barriers to compensation.<sup>44</sup> When the manuscript was nearing completion, Ferencz took the extraordinary step of reaching out to Albert Speer, the former Nazi Minister of Armaments and War Production and IMT convict, who had served an arguably lenient 20 years in Spandau Prison before his release in 1966. Ferencz arranged to meet with Speer in Frankfurt Airport. During the course of the conversation, he asked if Speer would, in a sense, peer-review his manuscript for factual accuracy. Speer agreed, and sometime later provided Ferencz with his annotated notes.<sup>45</sup>

<sup>39</sup>For a contemporaneous critique of the Luxembourg Agreement see F. Honig, 'The Reparations Agreement Between Israel and the Federal Republic of Germany', (1954) 48 *American Journal of International Law* 564.

<sup>40</sup>See Ferencz, *supra* note 35, at 133. Nahum Goldmann was the President of the World Jewish Congress.

<sup>41</sup>B. B. Ferencz, 'A Mélange of Vignettes', available at [benferencz.org/stories/1956-1970/a-melange-of-vignettes/](http://benferencz.org/stories/1956-1970/a-melange-of-vignettes/).

<sup>42</sup>For a compelling account of his childhood see T. Buergenthal, *A Lucky Child. A Memoir of Surviving Auschwitz as a Young Boy* (2007).

<sup>43</sup>See S. Roberts, 'Thomas Buergenthal, Holocaust Survivor and Judge, Dies at 89', *New York Times*, 5 June 2023.

<sup>44</sup>See B. B. Ferencz, *Less Than Slaves: Jewish Forced Labour and the Quest for Compensation* (1979).

<sup>45</sup>See 'US Holocaust Memorial Museum Interview, 1994', *supra* note 7, at 124–5, 127.

In accounts of his life's work, Ferencz's involvement in Nuremberg is naturally foregrounded, but there is much to be said for Gregory Gordon's assertion that 'his greatest impact in the field of international criminal law [was] as an advocate for atrocity victims, rather than as a prosecutor of atrocity perpetrators'.<sup>46</sup> Asserting victim rights would be central to his relentless advocacy from the early 1970s onwards for the establishment of an International Criminal Court with jurisdiction over the crime of aggression.

#### 4. Campaigner for the codification of the crime of aggression and the establishment of an International Criminal Court

Firmly of the belief that the promise of Nuremberg must not be squandered, Benjamin Ferencz was convinced that '[s]ome method must be found whereby all human beings, regardless of race, religion or political conviction, can live in peace and dignity without the constant fear and threat of extinction'.<sup>47</sup> In his view, central to any such 'method' must be the establishment of a permanent International Criminal Court. He argued that an international legal institution with jurisdiction over the crime of aggression would have a deterrent influence and 'prevent the recurrence of the events which had given rise to unprecedented tragedies'.<sup>48</sup>

Throughout international criminal law's Cold War hiatus, Ferencz was Sisyphusian in his efforts to persuade states to take concrete steps towards the reinvigoration of a system of international criminal justice. Writing in 1968, he pointedly argued that '[t]he price for the absence of an accepted penal court will continue to be paid in human blood'.<sup>49</sup> During this period, his most significant contribution to the then barely embryonic discussions on both the establishment of an International Criminal Court and the codification of the crime of aggression, was his publication in the second half of the 1970s of a series of multi-volume works charting the historical, legal, and diplomatic evolution of the two subjects.<sup>50</sup> *Defining International Aggression: The Search for World Peace – A Documentary History and Analysis* and *An International Criminal Court: A Step Toward World Peace – A Documentary History and Analysis*, published in 1975 and 1979 respectively, were amongst the very few meaningful publications in the field of international criminal law at that time. Reflecting on the importance of these volumes, Roger Clark recently remarked that they constituted 'enormously valuable collections of semi-ephemeral material when it came to the negotiations on the creation of an International Criminal Court', and that '[t]he academic and diplomatic impact of these two blockbusters is hard to overstate'.<sup>51</sup>

A tireless campaigner, Ferencz was ever present and influential at the various milestones in international criminal law's journey to codification. During the 1970s he regularly attended the meetings of the UN General Assembly's Special Committee on the Question of Defining Aggression and was present when the General Assembly adopted the Committee's definition by consensus in 1974. The adoption of the consensus definition, while important in its own right, was for Ferencz more notable for the fact that it 'removed the barrier that had been used as the excuse

<sup>46</sup>See Gordon, *supra* note 30.

<sup>47</sup>B. B. Ferencz, *An International Criminal Court: A Step Toward World Peace – A Documentary History and Analysis – Volume I – Half a Century of Hope* (1979), at xi.

<sup>48</sup>B. B. Ferencz, *Defining International Aggression: The Search for World Peace – A Documentary History and Analysis – Volume I* (1975), at x.

<sup>49</sup>B. B. Ferencz, 'War Crimes and the Vietnam War', (1968) 17 *The American University Law Review* 403, at 423.

<sup>50</sup>See B. B. Ferencz, *Defining International Aggression: The Search for World Peace – A Documentary History and Analysis – Volume I and II* (1975); B. B. Ferencz, *An International Criminal Court: A Step Toward World Peace – A Documentary History and Analysis – Volumes I and II* (1979).

<sup>51</sup>R. S. Clark, 'In Memoriam: Benjamin Berell Ferencz 1920–2023', (2023) 34 *Criminal Law Forum* 141, 144.

to halt work on the draft Code of Crimes and the creation of an International Criminal Court that had been mandated by the General Assembly in 1946'.<sup>52</sup>

Almost 25 years later, at the opening of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in June 1998, Ferencz, despite being an individual observer who classified himself as 'an unpaid lobbyist for peace', was invited to address the Plenary. In his five-minute speech,<sup>53</sup> he passionately stated that he had travelled to Rome 'to plead with the distinguished Plenipotentiaries to help make the dream of a more humane world order under law come true'.<sup>54</sup> 'Nuremberg', he stated, 'was the beginning of a process', and '[f]ailure to build on its precedents has cost the world dearly'.<sup>55</sup> He emphasized the central importance of imbuing the future court with jurisdiction over the crime of aggression:

Aggression is the soil from which the worst human rights violations invariably grow. States that commit crimes against peace will not punish themselves and excluding aggression from international judicial scrutiny is to grant immunity to malevolent leaders responsible for "the supreme international crime".<sup>56</sup>

He argued that '[t]o condemn a crime yet provide no impartial institution to try the offenders is to mock the victims and encourage more criminality'. The time had come 'for human rights to prevail over human wrongs, for international law to prevail over international crime'.<sup>57</sup>

After six weeks of fraught negotiations, on 17 July 1998, the Conference adopted the Rome Statute by consensus, a moment Ferencz described as 'an unforgettable experience'.<sup>58</sup> Clearly, he was relieved and overjoyed that consensus had been reached, but viewed the Statute as 'much too long' and 'remarkable and defective in many ways'.<sup>59</sup>

Most obviously defective was the entirely inadequate way in which the crime of aggression had been included. Permanent members of the Security Council, in particular the United States, the United Kingdom and France, had always been unenthusiastic about including aggression in the Statute of the Court. At the Rome Conference, the Bureau suggested that aggression might be omitted from the text,<sup>60</sup> a view endorsed by the European Union.<sup>61</sup> There was a vigorous reaction from states of the Global South, with the result that the final version adopted identified 'the crime of aggression' as one of four crimes within the jurisdiction of the Court. However, the Statute left the definition and matters relating to enforcement of aggression to be resolved by a Review Conference to take place seven years after the Statute entered into force. Ferencz spent the next decade campaigning to ensure that the promise that the Court could actually deal with aggression became a reality. He attended many of the preparatory meetings and, of course, was present and very engaged at the Kampala Review Conference in June 2010.

When the aggression amendments were finally adopted, late in the evening on the final day of the Kampala Review Conference, exhausted delegates rose to applaud the result. Ferencz was not among them. Present in the room, he remained seated and quite despondent. Friends pleaded with

<sup>52</sup>B. B. Ferencz, 'Aggression Defined by Consensus', available at [benferencz.org/stories/1970-present/aggression-defined-by-consensus/](http://benferencz.org/stories/1970-present/aggression-defined-by-consensus/).

<sup>53</sup>Available at [benferencz.org/video/ferencz-delivers-remarks-in-rome-1998/](http://benferencz.org/video/ferencz-delivers-remarks-in-rome-1998/).

<sup>54</sup>The transcript of the speech is published in, T. Hofmann, *Benjamin Ferencz: Nuremberg Prosecutor and Peace Advocate* (2014), at 8–10.

<sup>55</sup>*Ibid.*, at 9.

<sup>56</sup>*Ibid.*

<sup>57</sup>*Ibid.*

<sup>58</sup>B. B. Ferencz, 'Benjamin Ferencz Reflects on the Rome Statute', available at [benferencz.org/articles/1990-1999/benjamin-ferencz-reflects-on-the-rome-conference/](http://benferencz.org/articles/1990-1999/benjamin-ferencz-reflects-on-the-rome-conference/).

<sup>59</sup>*Ibid.*

<sup>60</sup>A/CONF.183/C.1/L.59; A/CONF.183/C.1/SR.33, para. 3.

<sup>61</sup>A/CONF.183/C.1/SR.33, para. 13.

him to take a positive view, reminding him that he deserved much personal credit for the result. There was a suggestion that what troubled him was the postponement of the entry into force of the amendments for at least seven years. Some thought that perhaps this was the frustration of a man entering his tenth decade who feared he would not live to see the final victory. He wanted nothing of it. For Ferencz, the aggression amendments were a defeat, a trap, a fraud.

After Kampala, Ferencz began to develop a new strategy by which the crime of aggression might be prosecuted as a crime against humanity. He commissioned scholars to help develop this creative interpretation of the law.<sup>62</sup> However, rumours of his passing, like those of Mark Twain, proved to be exaggerated and Benjamin Ferencz lived to see the amendments enter into force. He also lived to see them further emasculated by the Assembly of States Parties. Finally, he lived to see their impotence when confronted with the commission of the crime of aggression by a non-party state on the territory of a state that had accepted the jurisdiction of the Court.

What may have been little more than intuition at Kampala showed itself to be clairvoyance a dozen years later. On the subject of the crime of aggression, it is now clear that Benjamin Ferencz's insight during the final minutes of the Kampala Review Conference was prescient. His dissatisfaction with the amendments is also confirmed by the reluctance of states of the Global South to ratify the amendments on the crime of aggression. Only about one-third of states parties have even ratified the amendments. Well more than half of the ratifiers are European states; only two of them are African.

The definition of aggression itself in Article 8 bis is not the problem, and Ferencz had no serious objection to it. The problem was always the arcane provisions set out in Articles 15 bis and 15 ter governing the exercise of the Court's jurisdiction over the crime of aggression. In practice, they ensure the immunity of the permanent members of the Security Council. At the Kampala Review Conference, probably a large majority of states parties would have been content to adopt the definition in Article 8 bis but forgo any special regime for exercise of jurisdiction, leaving the crime of aggression to be dealt with in the normal way, like genocide, crimes against humanity and war crimes. After all, what possible justification can there be for separate treatment if indeed, as the Statute declares, the crime of aggression is one of the 'most serious crimes of concern to the international community as a whole'? This is the reality that has become painfully clear following Russian aggression in Ukraine. If Articles 15 bis and ter were removed, the Prosecutor would be free to charge Russian leaders with the crime of aggression. It is a reality that Benjamin Ferencz, morose and depressed, had understood when the amendments were adopted at the close of the Kampala Review Conference.

## 5. 'Never Give-Up!'

Benjamin Ferencz's extraordinary contribution to international criminal justice has been recognized in the various awards he received throughout the latter part of his career. In 2009, alongside the late and much missed Antonio Cassese, he was awarded the prestigious Erasmus Prize. In 2017, the Municipality of The Hague named a footpath adjacent to the Peace Palace, 'Benjamin Ferenczpad', in his honour. Today, a bench with his motto 'law not war' can be found there, offering passers-by the opportunity to sit and contemplate the potential of international law to bring about world peace. Since his passing, it also offers the opportunity to reflect on his extraordinary life.

To spend time in the company of Benjamin Ferencz was educational, motivational, fascinating, and humbling. It was also an enormous amount of fun. Endowed with a razor-sharp wit and magnetic charm, he was a natural conversationalist and a talented raconteur with a seemingly endless array of tales to tell. He could transfix a dinner table by casually asking, 'did I ever tell you

<sup>62</sup>See, for example, B. B. Ferencz, 'The Illegal Use of Armed Force as a Crime Against Humanity', (2015) 2 *Journal on the Use of Force and International Law* 187.

about the time that myself, Mrs. Ferencz, Telford Taylor and Mrs. Taylor had to parachute out of a burning plane over occupied Berlin?' He enjoyed witnessing parallels of his own mischief and vehemence in others.

His humour, experience, energy and infectious commitment made him an unforgettably influential public speaker, particularly for groups of students whom he could regale for hours at a time, without notes. This continued when he was well into his nineties. His enthusiasm, drive and unquenchable optimism were inspirational. At every opportunity he implored anyone involved in the pursuit of a more humane world to 'never give up', that the tide of indifference would eventually turn:

If you believe it is possible to have a more humane world, what we were fighting for in Nuremberg, and what I'm fighting for, then you've got to join the fight. Everybody can do something. Write a letter to the President. Call him up. Talk to your neighbour. Talk to your friends. Talk to your enemies. Talk to an audience at the Holocaust Museum. Do whatever you can. That's what I'm trying to do.<sup>63</sup>

Given the perilous state of the international legal order, his words have an enduring resonance. Over the course of a long life shaped by the trauma of the Second World War, Benjamin Ferencz, while a pragmatist who was all too aware of state indifference and hypocrisy, never lost hope in the power of international law to save humanity from the scourge of war. Neither should we.

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<sup>63</sup>See 'An Evening with Ben Ferencz in Discussion with Joan Ringelheim', *supra* note 12.