

# OBITUARIES

## The legacy of the late Ben Ferencz: Prosecutor of the Nuremberg Trials and a pioneer of the International Criminal Court

Dr Tony Meacham\*

### Introduction

Benjamin Ferencz is not a name that comes to mind readily for many people, yet his work in helping develop an international rule of law, together with advocating for an international criminal court was instrumental in establishing accountability for individual crimes of an international nature. The media in obituaries and articles quietly observed the recent death of the American lawyer Benjamin Ferencz in April 2023.<sup>1</sup> While his passing was without fanfare, his life was of quiet achievement devoted to developing international law generally, and international criminal law principles in particular. He was said to be a man who sought ‘Peace through Law’.<sup>2</sup> Ferencz was the last surviving prosecutor of the Nuremberg Tribunals, dying at the age of 103. The *New York Times* said of him that “[I]n addition to convicting prominent Nazi war criminals, he crusaded for an international criminal court and for laws to end wars of aggression.”<sup>3</sup> He was also known as an “advocate for atrocity victims, rather than as a prosecutor of atrocity perpetrators”.<sup>4</sup>

Benjamin B. Ferencz, was born in the Carpathian Mountains of Transylvania, in 1920 in Șomcuta Mare, which was then in Hungary, later to become part of Romania. His family fled due to anti-Semitic persecution when he was a boy<sup>5</sup> and he was raised in the Hell’s Kitchen area of Manhattan in New York, USA. Here he formed his first views on the law and crime, remarking that he “would rather be on the side of the law, than on the side of the criminals.”<sup>6</sup>

He graduated from Harvard Law School in 1943. Following an interest in criminal law, he became a Crime Investigator for the New York Legal Aid Society, gaining insight into the victims of crime, and an appreciation of the criminal justice system and the work of defence attorneys.<sup>7</sup> Shortly afterwards he joined the military, becoming part of an artillery battalion preparing for the invasion of France.<sup>8</sup> He landed at Normandy at Omaha beach on D-Day in 1944. As his battalion entered Germany, he encountered for the first time possible war crimes.<sup>9</sup>

As Nazi atrocities were uncovered, Ferencz was transferred to a newly created war crimes branch of the army to gather evidence of these crimes. As a war crimes investigator, he visited prisoner camps such as Buchenwald where he encountered scenes of emaciated inmates, the smell of burnt flesh from

---

\* Assistant Professor in Law, Coventry University

<sup>1</sup> Owen Bowcott, ‘Benjamin Ferencz obituary’ *The Guardian* (11 April 2023)

<sup>2</sup> Oliver Beauvallet, *Justice Info* ‘Benjamin Ferencz: The Man Who Sought Peace Through Law’ (13 April 2023) < Benjamin Ferencz: the man who sought peace through law (justiceinfo.net)> accessed 17 May 2023.

<sup>3</sup> Robert D. McFadden, ‘Benjamin B. Ferencz, Last Surviving Nuremberg Prosecutor, Dies at 103’ *The New York Times* (8 April 2023).

<sup>4</sup> Gregory S. 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* 239–283, 240.

<sup>5</sup> Owen Bowcott, ‘Benjamin Ferencz obituary’ *The Guardian* (11 April 2023).

<sup>6</sup> Harvard Law School, ‘Benjamin B. Ferencz, Interview by Harvard Law School Dean Martha Minnow’, 1 October 2013, <www.youtube.com/watch?v=skmQgtaFjRM> accessed 30 June 2023.

<sup>7</sup> Gregory S. 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* 239–283, 240.

<sup>8</sup> “A diminutive corporal in the American army, some five feet two inches in height”, John Cooper, ‘Obituary: Benjamin Ferencz’, *The Jewish Chronicle* (4 May 2023) < <https://www.thejc.com/news/news/obituary-benjamin-ferencz-4GRzXOFPgkTogCuYOJ63If>> accessed 3 July 2023.

<sup>9</sup> Paul Gradwohl, ‘Benjamin Berell Ferencz, American Nuremberg trials prosecutor, has died’ *Le Monde* (11 April 2023) <Benjamin Berell Ferencz, American Nuremberg trials prosecutor, has died (lemonde.fr)> accessed 30 June 2023.

a crematorium and of the SS guards running away. He wrote that he had been “indelibly traumatized” by the scenes that he had witnessed. He went on to recall, “Few had enough strength to muster a smile of gratitude. My mind would not accept what my eyes saw. It built a protective barrier to enable me to go on with my work in what seemed an incredible nightmare. I had peered into Hell.”<sup>10</sup> He also had some experience investigating war crimes in the last months of the war in formerly occupied France and in Germany visiting villages where pilots had been shot down, and in his words, “almost invariably beaten to death by the German mob” in what was called the ‘allied flier cases’ where downed pilots had been killed by villagers.<sup>11</sup>

In 1945, he returned to New York prepared to practice law. The next year Ferencz was sent to Berlin to set up a group of investigators that had the brief to find evidence of war crimes in the ruins and buildings of what remained of the ‘Foreign Ministry, the Treasury, the SS offices, the Army, the Navy’. In other zones, the occupying powers would do similarly. Ferencz had found it quite remarkable that many records remained as “[t]he Nazis had tried hard to destroy their records, but they were so methodical in their record-keeping that much was left” and in some nearby villages such as Dahlem there were “subterranean chambers blocks long, holding some 10 million Nazi files.” From such sources, documents relevant to the current and future trials of Nazi leaders at the International Military Tribunal were collated.<sup>12</sup>

## The Nuremberg Trials

His death brings our attention to the beginnings of the contemporary system of international law that seeks consensus between states to address crimes of a scope beyond that of solution by domestic law. The end of the World War II left the victors with a need bring to account the leaders of Nazi Germany, those who had instigated harm through the crime of aggression in international customary law.

The nature and scope of this aggression required a revised thinking<sup>13</sup> on how to assess, curtail and prevent future such acts. Immediately following the war however there was no clear legal framework on how to do so. The Charter of the International Military Tribunal<sup>14</sup> and the Nuremberg trials<sup>15</sup> that followed gave a legal basis for the first time, and brought liability and accountability to the individuals who instigated that aggression, rather than their states. However, Justice Robert Jackson emphasised caution “[t]hat four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”<sup>16</sup>

Ferencz had an important role in the Nuremberg trials. When he joined, the trials of senior Nazi figures such as Hermann Goering were already in progress, with Telford Taylor, a Harvard lawyer in charge. Ferencz became the chief prosecutor in what became known as the “Einsatzgruppen case” that was conducted between 1947 and 1948. It involved 24 SS<sup>17</sup> officers charged with mass murders that occurred in the then Soviet Union. The *Einsatzgruppen* was a special SS task force that followed the German army as it moved into the former Soviet Union. Their brief was ‘security’ but in actuality they

---

<sup>10</sup> Benjamin B. Ferencz, ‘Investigating Nazi Concentration Camps’, BenFerencz.Org < Investigating Nazi Concentration Camps | Benjamin B. Ferencz (benferencz.org) > accessed 26 June 2023.

<sup>11</sup> BBC Hardtalk 6 October 2021 <BBC World Service - HARDtalk, Ben Ferencz, prosecutor at the Nuremberg Nazi Trials> and < [https://archive.org/details/BBCNEWS\\_20230414\\_033000\\_HARDtalk](https://archive.org/details/BBCNEWS_20230414_033000_HARDtalk) > accessed 26 June 2023.

<sup>12</sup> Hekelina Verriijn Stuart and Marlise Simons, ‘The Prosecutor: Interview with Benjamin Ferencz’, in Heikelina Verriijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 13.

<sup>13</sup> Kirsten Sellars, *Crimes against Peace and International Law* (Cambridge University Press 2013), 40.

<sup>14</sup> United Nations, <[https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2\\_Charter%20of%20IMT%201945.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf)> accessed 17 May 2023.

<sup>15</sup> 20 Nov 1945 – 1 Oct 1946.

<sup>16</sup> Claudia Hyde, ‘Reflecting on Nuremberg’s Legacy, 75 Years on’, *Holocaust Memorial Day Trust* (18 November 2020) <<https://www.hmd.org.uk/news/reflecting-on-nurembergs-legacy-75-years-on/#:~:text=During%20the%20Nuremberg%20trials%2C%20US,man%20must%20live%20in%20fear.>> accessed on 3 July 2023.

<sup>17</sup> *Schutzstaffel* (protection squad). Originally Adolf Hitler’s protection unit.

were to remove those thought to be ‘dangerous’, such as Jews, Gypsies and Communists. Ferencz became involved in this case through receiving extensive and almost complete detailed records covering a two year period from 1941 onwards. The documents recorded in detail as the army advanced the places and means by which people were killed and who had been in charge. Ferencz recalled “I sat down in my office with a little adding machine, and I began to count the people that were murdered in cold blood. When I reached a million, I said that’s enough for me. I flew from Berlin to Nuremberg, to see Telford Taylor, who by then was a general. And I said, we’ve got to put on another trial.” Such a large job required additional staff and resources, with Ferencz not wishing that such events go unanswered. In his words, “I offered to handle it. Taylor asked if I could do it in addition to my other activities. I said sure. So, I thereby became the chief prosecutor in what was later called the biggest murder trial in human history.”<sup>18</sup> Benjamin Ferencz was then just 27.

Although the records showed that there were 3,000 men in the *Einsatzgruppen*, only 24 were tried as there was only enough room in the dock for that number. Only a sample could be tried. When it was observed that this group had operated primarily in the Soviet Union, Ferencz was asked whether he had considered passing his accumulated evidence to the Soviets. His response was brief: “Not a chance, no chance whatsoever.” He explained that at the time relations between the Soviet Union and the US were not good and that the Soviet way of dealing with prisoners was to “disappear them” and not give them a fair trial, according to Russian he met. Additionally he had witnessed the Dachau trials whilst collecting information for prosecutions, which were run at much the same time as Nuremberg. Ferencz considered that “the Dachau trials were utterly contemptible. There was nothing resembling the rule of law. More like court-martials.”<sup>19</sup> He therefore chose to conduct the trials at Nuremberg.

Ferencz’s opening statement at Nuremberg is as valid today as it was in 1945.

It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenceless men, women, and children. This was the tragic fulfilment of a program of intolerance and arrogance. Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by international penal action man's right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law.<sup>20</sup>

His evidence collated to try this case has been said to be so persuasive that witnesses were not necessary.<sup>21</sup> Additionally, no witnesses called by the prosecution because Ferencz felt that “the worst testimony you can get is eyewitness testimony.” Called upon to explain, he said that

We had camps full of displaced persons all over Germany. I could have called any 50 people and said, here are my 22 defendants, do you recognize any of them, did you see any of them commit crimes? All fifty of them would tell me, yes. And they would believe it. I didn’t need that. I had the reports, and I could prove the validity of the reports, although they challenged them, of course.<sup>22</sup>

---

<sup>18</sup> Heikelina Verrijn Stuart and Marlise Simons, ‘The Prosecutor: Interview with Benjamin Ferencz’, in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 14-15.

<sup>19</sup> Heikelina Verrijn Stuart and Marlise Simons, ‘The Prosecutor: Interview with Benjamin Ferencz’, in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 16-17.

<sup>20</sup> Trial of the Major War Criminals. vol. IV. 494. Nuremberg, 1947. <<https://www.archives.gov/iwg/research-papers/trial-of-war-criminals-before-imt.html>> accessed 28 June 2023.

<sup>21</sup> United States Holocaust Memorial Museum, ‘Ben Ferencz and the fight for International Justice’ <<https://encyclopedia.ushmm.org/content/en/article/ben-ferencz-and-the-fight-for-international-justice>> accessed 19 June 2023.

<sup>22</sup> Heikelina Verrijn Stuart and Marlise Simons, ‘The Prosecutor: Interview with Benjamin Ferencz’, in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 17.

The prosecution rested its case after two days, although the defence took months.

These recollections of Benjamin Ferencz do read of a methodical and careful lawyer, keen to ensure that trials were fair. Each defendant had their day in court supported by two lawyers paid for by the court. On the opening day of the trial he had declared that ‘every man in the dock had had committed horrendous crimes with full knowledge and intent’. Ferencz was quite clear of his intent as prosecutor that “If these men be immune, then law has lost its meaning, and man must live in fear.”<sup>23</sup> He was however not immune to the testimony or ignorant of what had been allegedly done by those in the docks. After listening to one such defendant who had refuted the evidence and denied the accusations, he felt outraged to the point where “We had the records of every day that man was out murdering, and he had the gall to say that. I was ready to jump over the bar and poke my fingers into his eyes.”<sup>24</sup>

Despite not requesting specific sentences, the outcome of the case was that all were found guilty with 14 sentenced to death.<sup>25</sup> When asked about why he had specifically advocated this sentence, Ferencz replied that “I’m not against the death penalty. I felt very deeply about this, I could never figure out a sentence that would fit the crime. It was so grotesque, a crime of such magnitude. You could not balance the lives of these 22 people in the dock against the million they had killed. There was no way to find any balance or justice.”<sup>26</sup>

### Nuremberg as victor’s justice

The Nuremberg trials were not without critics of the process then and since. Some have suggested that the Nuremberg trials were a victor’s justice, a concern that the trials were political in nature and not serving substantive justice, doing away with standards of proof used in national criminal courts.<sup>27</sup> Ferencz said simply

No, they were not. If we wanted victors’ justice, we would have gone out and murdered about half a million Germans. The top people, Robert Jackson,<sup>28</sup> Telford Taylor,<sup>29</sup> and many of us at the Nuremberg court were not trying to get revenge, but to show how horrible it was, in order to deter others from doing the same. And to be just, not to convict anybody unless there was absolutely clear proof of their guilt. This was the main principle. It wasn’t perfect. But Nuremberg firmly and properly defined aggression as an international crime. It helped to develop crimes against peace and crimes against humanity.<sup>30</sup>

On the allegation of the Nuremberg trials charging defendants on crimes that did not exist prior to the tribunals,<sup>31</sup> criminalising actions that were legal in international law at the time they were committed, Ferencz simply stated, “The judgment included 55 pages analysing the validity of the law. But it can be

---

<sup>23</sup> Claudia Hyde, ‘Reflecting on Nuremberg’s Legacy, 75 Years on’, *Holocaust Memorial Day Trust* (18 November 2020) <<https://www.hmd.org.uk/news/reflecting-on-nurembergs-legacy-75-years-on/#:~:text=During%20the%20Nuremberg%20trials%2C%20US,man%20must%20live%20in%20fear.>> accessed on 3 July 2023.

<sup>24</sup> Hekelina Verrijn Stuart and Marlise Simons, ‘The Prosecutor: Interview with Benjamin Ferencz’, in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 19.

<sup>25</sup> International Nuremberg Principles Academy, ‘Ben Ferencz turns 100’, (2020) <<https://www.nurembergacademy.org/news/detail/f3f4eedd2f2097fe04750689bc25f243/ben-ferencz-turns-100-334/>> accessed 18JUN2023.

<sup>26</sup> Hekelina Verrijn Stuart and Marlise Simons, ‘The Prosecutor: Interview with Benjamin Ferencz’, in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 21-22.

<sup>27</sup> Gary Bass, ‘Victor’s Justice, Selfish Justice’ (2002) 69(4) *Social Research* 1035, 1036; James Meernik, ‘Victor’s Justice or the Law?’ (2003) 47(2) *Journal of Conflict Resolution* 140, 159.

<sup>28</sup> Associate Justice Robert H. Jackson of the United States Supreme Court.

<sup>29</sup> Principal prosecutor at Nuremberg.

<sup>30</sup> Hekelina Verrijn Stuart and Marlise Simons, ‘The Prosecutor: Interview with Benjamin Ferencz’, in Heikelina Verrijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 24.

<sup>31</sup> Retrospective laws, penalising conduct that was lawful when it occurred, also known as *ex post facto* laws.

put briefly. The prosecution had not invented the crime of murder, or mass murder. And the judges wrote: ‘Certainly no one can claim that there is any taint of ex post factoism in the law of murder.’<sup>32</sup> The Court made quite clear that the defendants were not remote from the crimes of which they were accused:

...in this case the defendants are not simply accused of planning or directing wholesale killings through channels. They are not charged with sitting in an office hundreds and thousands of miles away from the slaughter. It is asserted with particularity that these men were in the field actively superintending, controlling, directing, and taking an active part in the bloody harvest.<sup>33</sup>

## Post-Nuremberg

Ferencz on reflection said that, “The most important achievement of the Nuremberg trials was the confirmation that war-making is no longer a national right, but has instead become an international crime. That great historical step forward in the law must be sustained.”<sup>34</sup> To that end Ferencz continued the work begun in Nuremberg.

After the Nuremberg trials, Ferencz developed the international treatment of criminal acts. He began with the example of General Dr Otto Ohlendorf, one of the six SS generals tried by him at Nuremberg. Ferencz recalled that Ohlendorf was “an intelligent, well-educated man, who had made some good legal arguments, trying to show he had no criminal intent. He did his duty as he saw it, without questioning Hitler who had said that Germany was about to be attacked by the Russians. That was the excuse they all used.” Ohlendorf’s defence was based on the argument that his actions were based on superior orders and ‘self-defence’. Self-defence the General explained was anticipatory attacks on multiple countries to pre-empt the attacks on Germany they expected as told to them by his superiors. The argument went that he could not challenge his Head of State, someone with more information than he had.<sup>35</sup>

Ferencz observed “genocides are committed in presumed defence of some particular ideal; whether it be religion, ideology, race, self-determination, or nationalism. These are the things that usually motivate people to go out and kill and prepare to be killed.” He resolved to change the way people think. He did acknowledge however strongly held and indoctrinated ideals can be difficult to change. One such idea is that of sovereignty, which he considered an ancient and obsolete notion, in the sense that “a sovereign state can do whatever it wishes within its own borders” and that “[n]o nation and no person should be above the law.”<sup>36</sup>

After the war and the Nuremberg Trials, Ferencz joined Telford Taylor as a partner in a law firm in New York, but became critical of the United States and its involvement in the Vietnam War. Disillusioned with private law practice, he devoted his time to writing about aggression in international law and the achievement of world peace.<sup>37</sup>

---

<sup>32</sup> Heikelina Verriijn Stuart and Marlise Simons, ‘The Prosecutor: Interview with Benjamin Ferencz’, in Heikelina Verriijn Stuart and Marlise Simons, *Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam University Press, 2009), 24.

<sup>33</sup> Nuremberg Military Tribunal, *United States of America vs. Otto Ohlendorf, et al.* (Einsatzgruppen trial).

<sup>34</sup> Benjamin B. Ferencz, ‘Enabling the International Criminal Court to Punish Aggression’ (2007) 6 *Wash U Global Stud L Rev* 551, 566.

<sup>35</sup> Henry T. King Jr., Benjamin B. Ferencz & Whitney R. Harris, ‘Origins of the Genocide Convention’ (2007) 40 *Case W Res J Int’l L* 13, 22-25.

<sup>36</sup> Henry T. King Jr., Benjamin B. Ferencz & Whitney R. Harris, ‘Origins of the Genocide Convention’ (2007) 40 *Case W Res J Int’l L* 13, 26.

<sup>37</sup> ‘Obituary: Benjamin Ferencz’, *The Jewish Chronicle* (4 May 2023) <<https://www.thejc.com/news/news/obituary-benjamin-ferencz-4GRzXOFPGkTogCuYOJ63IF>> accessed 3 July 2023.

## The International Criminal Court

Ben Ferencz was instrumental in the creation of the International Criminal Court (ICC), which was established by the Rome Statute in 1998. He was quite clear as to its purpose: “As part of the movement toward a more just and humane world, those responsible for aggression must learn that they will no longer be immune, but will be held accountable by an International Criminal Court acting in the name of all peace-loving nation.”<sup>38</sup>

Gordon, makes clear that the trial of the *Einsatzgruppen* had a marked effect upon the subsequent atrocity trials such as Adolf Eichmann (1961), Slobodan Milošević (2006) and Radovan Karadžić (2016).<sup>39</sup> He quotes B Leebaw who said that of the Nuremberg trials, ‘the trials were primarily concerned with determining the guilt or innocence of individual defendants . . .’<sup>40</sup> Ferencz had convinced the trial manager at Nuremberg, Telford Taylor, to base the trial on victim considerations (especially the number of victims and the widespread and systematic nature of their deaths). This he made clear in his opening statement at Nuremberg that he was there as a voice of the victims. This led directly to the victim-based approach in the Eichmann trial, and in the temporary courts for the former Yugoslavia and Rwanda. From there the strategy was followed in the ICC, where Ferencz’s approach was followed and the Rome Statute’s creation benefited from his counsel in developing its normative framework. Additionally, Gordon emphasises that “Ferencz was a pioneer in, first, restitution, and then compensation for atrocity victims. Article 75 of the Rome Statute provides for victim reparations, ‘including restitution, compensation.’”<sup>41</sup>

When asked whether the creation of the ICC helped prevent crimes against humanity, the war crimes, Ferencz stated that “It has helped, but not enough. Certainly, the existence of laws prohibiting certain behaviour has some deterrent effect, but we have to bear in mind that for centuries we have glorified war making ever since David hit Goliath in the head with a rock, and we have glorified the parades and the marching. No politician appears without its flags flying on all sides and the bands going and marching and I was a soldier and I know when they gave me all the battle stars and they gave me all the decorations and all that stuff. We’ve got to reverse those thousands of years of practice because the World has changed. We’re not throwing rocks anymore. We’re going to kill everybody from cyberspace. We can cut off the electrical grid of any city on this planet. Are you all crazy? You’re standing here watching it happen, but students don’t have money to pay tuition, refugees have no homes to go to, and the old people are dying because they can’t afford the medical care and you’re pouring billions of dollars every day into killing machines.”<sup>42</sup>

### His thoughts on the contemporary world

Ferencz emphasised that “The primary lesson of Nuremberg was that individuals, regardless of rank or station, could be held criminally responsible by an international tribunal. Medieval notions of sovereignty had become obsolete in the modern world. No nation or person could be above the law.

---

<sup>38</sup> Benjamin B. Ferencz, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 Wash U Global Stud L Rev 55, 566.

<sup>39</sup> H. Earl, 'Legacies of the Nuremberg ss-Einsatzgruppen Trial after 70 Years', (2017) 39(1) *Loyola Los Angeles International and Comparative Law Review* 95, 97 as cited in Gregory S. 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* 239–283, 268.

<sup>40</sup> B. Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge University Press, Cambridge, 2011), 35.

<sup>41</sup> Gregory S. 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* 239–283, 267.

<sup>42</sup> BBC Hardtalk 6 October 2021 <BBC World Service - HARDtalk, Ben Ferencz, prosecutor at the Nuremberg Nazi Trials> and <[https://archive.org/details/BBCNEWS\\_20230414\\_033000\\_HARDtalk](https://archive.org/details/BBCNEWS_20230414_033000_HARDtalk)> accessed 26 June 2023.

Law must apply equally to everyone.”<sup>43</sup> Even after he had turned 100, Benjamin Ferencz was still contributing to international discourse on the rule of law.

Not every development in the development of the ICC went his way. Ferencz was concerned about the US Trump administration’s antipathy to the ICC. The then National Security Advisor John Bolton in September 2018 had threatened the ICC with US sanctions if it were to prosecute US servicemen over alleged abuse of detainees during war in Afghanistan. Bolton had “called the court ‘illegitimate’<sup>44</sup> and vowed the US would do everything “to protect our” citizens”<sup>45</sup> A report by the ICC in 2016 had said that there was a reasonable basis to believe that torture had been committed by the US military during the Afghanistan conflict.<sup>46</sup>

Ferencz felt it necessary to comment on this matter in response to Bolton’s words, stating that “I believe a few words are in order about what the ICC is and what it is not. Contrary to the current administration’s anti-ICC rhetoric, the court is neither unaccountable nor anti-American. It is a treaty-based organization whose statute has been ratified by 123 countries, including 27 of our 28 NATO allies.” In respect of the US and other non-members of the ICC, he stated that:

The ICC recognizes the primacy of the national courts of all nations, including the United States. Its operating statute provides that countries which are willing and able to prosecute their own citizens may do so in their own domestic courts and that such rights supersede the jurisdiction of the ICC. ... It is only where national courts fail in their obligation to genuinely and impartially investigate their own nationals that the ICC may move forward in exercising its jurisdiction.<sup>47</sup>

He went on to emphasise that the ICC’s operating structure has safeguards and limitations to ensure that the ICC does “not become some sort of supra-national court run amok” noting that judges and prosecutors are elected for fixed terms by a governing assembly representative of the ICC’s membership.<sup>48</sup>

More generally in response to John Bolton’s statements he emphasised the scope of the ICC:

The ICC recognizes the primacy of the national courts of all nations, including the United States. Its operating statute provides that countries which are willing and able to prosecute their own citizens may do so in their own domestic courts and that such rights supersede the jurisdiction of the ICC.

It is only where national courts fail in their obligation to genuinely and impartially investigate their own nationals that the ICC may move forward in exercising its jurisdiction. It is a court of last resort designed to assure that otherwise voiceless victims of atrocity

---

<sup>43</sup> Benjamin Ferencz, ‘Will We Finally Apply Nuremberg's Lessons?’ Ben Ferencz.com September 2010 < Will We Finally Apply Nuremberg's Lessons? | Benjamin B. Ferencz (benferencz.org) <https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>> accessed 26 June 2023.

<sup>44</sup> The US has to date refused to join the ICC.

<sup>45</sup> BBC, ‘John Bolton threatens ICC with US sanctions’, BBC 11 September 2018, <<https://www.bbc.co.uk/news/world-us-canada-45474864>> accessed 26 June 2023.

<sup>46</sup> ICC, ‘Report on Preliminary Examination Activities (2016)’, International Criminal Court, 24 November 2016, [211], 47 <The Office of the Prosecutor (icc-cpi.int)> accessed 26 June 2023.

<sup>47</sup> Benjamin Ferencz, ‘Nuremberg Trial Prosecutor’s Warning About Trump’s War on the Rule of Law’ Ben Ferencz.com 20 July 2020 < <https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>> accessed 26 June 2023.

<sup>48</sup> Benjamin Ferencz, ‘Nuremberg Trial Prosecutor’s Warning About Trump’s War on the Rule of Law’ Ben Ferencz.com 20 July 2020 < <https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>> accessed 26 June 2023.

crimes may ultimately have their day in court, whether it be before national courts or before the ICC itself if necessary.<sup>49</sup>

## Conclusion

Reflecting on the Nuremberg trials, Ferencz emphasised that:

At Nuremberg, the United States and its allies tried Nazi leaders who dragged their nation into war to the tune of Deutschland Uber Alles. They considered themselves a law unto themselves, and it was their undoing. The Nuremberg Trials were intended ... to help establish a rule of law to deter future international crimes, regardless of who the perpetrators might be.<sup>50</sup>

Benjamin Ferencz was determined to not have the Nuremberg trials to be a unique process, and for the development of international law to restrain or mitigate the effects of war. Indeed, he expressed quite clearly that "I prefer law to war under all circumstances." He was quite clear that tribunals and courts were not a complete solution:

To be sure, punishing aggression will not, by itself, eliminate wars, but it is an important component of a vast matrix which encompasses social justice, disarmament, and a system of effective enforcement. If peace is to be protected, it is essential that all national leaders be aware that individuals responsible for the crime of aggression will be held criminally accountable before the bar of international justice-no matter how long it takes.<sup>51</sup>

Ferencz acknowledged that the ICC is not without its own faults. "It is a relatively young institution<sup>52</sup> that relies on the cooperation of countries around the world to bring perpetrators to justice. It is a challenging task, as not all countries make the cooperative effort that they should. But it is much too early to suggest that we should throw out the baby with the bathwater by condemning or by threatening the ICC. To do so is to repudiate Nuremberg and the rule of law for which so many around the world have sacrificed."<sup>53</sup>

To emphasise the need for courts such as the ICC, Benjamin Ferencz reflected that:

Nuremberg taught me that creating a world of tolerance and compassion would be a long and arduous task. And I also learned that if we did not devote ourselves to developing effective world law, the same cruel mentality that made the Holocaust possible might one day destroy the entire human race.<sup>54</sup>

Although Benjamin Ferencz is now gone, his work from Nuremberg to the ICC and beyond remains. We must all be thankful for the work to which Benjamin Ferencz devoted his long life.

---

<sup>49</sup> Benjamin Ferencz, 'Nuremberg Trial Prosecutor's Warning About Trump's War on the Rule of Law' Ben Ferencz.com 20 July 2020 < <https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>> accessed 26 June 2023.

<sup>50</sup> Benjamin Ferencz, 'Nuremberg Trial Prosecutor's Warning About Trump's War on the Rule of Law' Ben Ferencz.com 20 July 2020 < <https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>> accessed 26 June 2023.

<sup>51</sup> Benjamin B. Ferencz, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 Wash U Global Stud L Rev 551, 566.

<sup>52</sup> It is 25 years in July 2023 since the passage of the Rome Statute treaty that established the ICC.

<sup>53</sup> Benjamin Ferencz, 'Nuremberg Trial Prosecutor's Warning About Trump's War on the Rule of Law' Ben Ferencz.com 20 July 2020 < <https://benferencz.org/articles/2010-present/nuremberg-trial-prosecutors-warning-about-trumps-war-on-the-rule-of-law/>> accessed 26 June 2023.

<sup>54</sup> United States Holocaust Memorial Museum, 'Ben Ferencz and the fight for International Justice' <<https://encyclopedia.ushmm.org/content/en/article/ben-ferencz-and-the-fight-for-international-justice>> accessed 19 June 2023.