

1990

THE NUREMBERG PRECEDENT AND THE PROSECUTION OF STATE-SPONSORED MASS MURDER

Benjamin B. Ferencz

Follow this and additional works at: [https://digitalcommons.nyls.edu/
journal_of_international_and_comparative_law](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law)



Part of the [Law Commons](#)

Recommended Citation

Ferencz, Benjamin B. (1990) "THE NUREMBERG PRECEDENT AND THE PROSECUTION OF STATE-SPONSORED MASS MURDER," *NYLS Journal of International and Comparative Law*: Vol. 11 : No. 3 , Article 2.

Available at: [https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol11/iss3/
2](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol11/iss3/2)

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

THE NUREMBERG PRECEDENT AND THE PROSECUTION OF STATE-SPONSORED MASS MURDER

BENJAMIN B. FERENCZ *

Today, in the course of about twenty minutes, I will deal with the issue of accountability for state-sponsored mass murder in light of the Nuremberg Trials. Seeing the special concerns of the sponsors, I will also address human rights issues as well as the Holocaust.

It is well known that an international military tribunal presided over the Nuremberg Trials.¹ This tribunal was the first of its kind to act pursuant to a charter, the London Charter, that defined the crimes which were the subject of the prosecution.²

The first mentioned were crimes against peace, otherwise known as aggressive war.³ Next came war crimes. The third referred to crimes against humanity.⁴ The inclusion of this crime among the others represented a great step forward in the struggle against state-sponsored mass murder. For the first time in legal history, it became an international crime for a state to murder its own citizens. Before Nuremberg, this type of murder was quite common. In fact, foreign nations objecting to

* Adjunct Professor of International Law, Pace University School of Law; Executive Director, Pace Peace Center; B.S.S., 1940, City College of New York; J.D., 1943, Harvard Law School.

1. See F. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955*, 1, 21, 30, 92, 98, 133, 137 (1989); R. CONOT, *JUSTICE AT NUREMBERG* 15, 18, 19, 24, 66, 69 (1989); B. FERENCZ, *A COMMON SENSE GUIDE TO WORLD PEACE* 7, 15 (1985); Kutner, *A World Genocide Tribunal—Rampant Against Future Genocide: Proposal for Planetary Preventative Measures Supplementing a Genocide Early Warning System*, 18 VAL. U.L. REV. 373, 375 (1984); Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 399 (1989); Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1, 4 (1985); Mueller, *Four Decades After Nuremberg: The Prospect of an International Code*, 2 CONN. J. INT'L L. 499, 499-500 (1987).

2. See F. BUSCHER, *supra* note 1, at 21 ("The London Agreement specifically called for a fair trial and incorporated Stimson's 'rudimentary aspects of the bill of rights' into the Nuremberg Procedure."); B. FERENCZ, *supra* note 1, at 17; Kutner, *supra* note 1, at 375; Lawrence, *supra* note 1, at 499-500.

3. B. FERENCZ, *supra* note 1, at 16; Kutner, *supra* note 1, at 376; Lawrence, *supra* note 1, at 399. On defining aggression, see B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION—THE SEARCH FOR WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS* (1975).

4. B. FERENCZ, *supra* note 1, at 16.

such conduct were not allowed to intervene, but could only send a "diplomatic note" to the offending state. If the Armenians, for instance, were being massacred by the Turks, some foreign government could write them and say, "We understand that there are disorders in your country which we view with concern and alarm," but they did not have to get an answer, and there was nothing that legally could be done to stop the crimes.

After Nuremberg, state-sponsored murder was declared to be a crime against humanity under international law. This was not the invention of law but rather a codification of emerging law. In his opening statement at Nuremberg, Justice Robert Jackson, who was on leave from the United States Supreme Court to be the chief prosecutor for the United States at the International Military Tribunal (IMT), said, "That 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."⁵ In other words, the very fact that we would put the Nazis on trial after the enormous crimes which had been committed was itself a great achievement showing respect for law.

This was not an easy decision to make. The British, for example, who always were noted for their fair play, were in favor of just taking them out and shooting them. That position had, in fact, been accepted by Anthony Eden and Winston Churchill, who had convinced Roosevelt of the wisdom of this position at a meeting which took place in Quebec.⁶ It took some doing, therefore, to decide that there would be trials. The greatest accomplishment, in fact, of Nuremberg was to take a hated enemy who had committed the most atrocious crimes and say, "You are entitled to a fair trial." Jackson warned: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."⁷ Jackson further observed: "To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."⁸

5. See generally R. CONOT, *supra* note 1.

6. Quebec was a meeting of allied powers in early September 1943. See R. CONOT, *supra* note 1, at 13-14; Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 837 (1990).

7. B. FERENCZ, *supra* note 3, at 71.

8. B. FERENCZ, *supra* note 1, at 16; see also Address by Robert H. Jackson to the American Society of International Law (Apr. 13, 1945).

Thus, Nuremberg was an attempt, on an international scale, to do justice in accordance with law. Such a characterization, however, does not dispose of the question: What is justice and what is the law in the area of accountability for state-sponsored mass murder?

After the IMT, we had twelve subsequent trials in which we tried the entire hierarchy of German life,⁹ it being quite obvious to us that the killing of six million people and the commission of all the other atrocities could not be accomplished without a conspiracy implicating the entire German administration and apparatus. The trials included those against industrialists who worked people to death, doctors who performed medical experiments on people who were innocent victims, lawyers who perverted their loyalty to law by sentencing people to death for no reason, the foreign service, the SS, and the army as well.¹⁰

I was also the chief prosecutor at another of these trials where 22 defendants, members of the so-called SS *Einsatzgruppen*, or special extermination squads, were convicted of murdering over a million people.¹¹ A million people is a figure which is naturally difficult to grasp. If you can imagine that everyone you ever met in your life, every relative, every friend, every child, every mother, every parent, everyone you have ever seen was taken out to the woods, machine-gunned and dropped into a ditch, you would not reach a million people. The lead defendant was a man by the name of Otto Ohlendorf, a general in the SS.¹² He testified that their job was to assemble the presumed enemies of the Reich, first the Jews and gypsies, and then the Communist officials, take them out to the woods, machine-gun them, and drop them into a ditch. Later the Nazis became more efficient—they worked their presumed enemies to death. They sorted them out and sent them out to the extermination factories where they could take every bit of the human body and use it—the gold teeth, the hair. They would boil down the fat and make soap and then sprinkle the ashes out for fertilizer.

When we asked Ohlendorf why he did it, he explained he was seeking a better world, a better Germany, a superior race, and that these victims were inferior people, to be regarded as vermin. When we asked why kill

9. See generally B. FERENCZ, *supra* note 1, at 17.

10. See generally V.H. BERNSTEIN, *FINAL JUDGEMENT: THE STORY OF NUREMBERG* (1947).

11. *Einsatzgruppen* are special task forces or action groups which served as out-and-out genocide forces for the Nazis. There were four such groups serving a sector of the Eastern front. V.H. BERNSTEIN, *supra* note 10, at 141-42; F. BUSCHER, *supra* note 1, at 165-67; R. CONOT, *supra* note 1, at 227-38.

12. V.H. BERNSTEIN, *supra* note 10, at 237; R. CONOT, *supra* note 1, at 233.

the children, he explained that if you kill the parents, of course, you have got to kill the children, otherwise the children will grow up and be enemies of the Reich. The Nazis were interested in permanent security. He pointed out that he was also a humanitarian; he never allowed his troops to take pleasure from what they did. He testified that when he saw them enjoying it, he sent them to the rear. He did not allow them to take infants and smash their heads against the wall, or against a tree, as other units did. He gave them instructions that a mother was to be allowed to carry her infant in her arms so that they could shoot right through the infant, kill both and save ammunition at the same time.

I make this point to emphasize that the people involved in what most would call mass murders, or state-sponsored mass murder, considered themselves idealists and humanitarians!

In my appeal to the court in that case, I confronted the problem of what punishment to ask for. After deep thought, I concluded that merely killing these twenty-two defendants would not compensate for the millions they had slaughtered. Therefore, I asked the court to affirm, by International Penal Law, the right to live in peace and dignity regardless of one's race or creed. I did this because it seemed to me that the reason they killed all these people was that they did not share their race, they did not share their creed. Thus, if we could establish, as a rule of law, the right of all human beings to live in peace and dignity regardless of their race, regardless of their political opinion or ideology, such a principle would lead to a more humane and peaceful world. The twenty-two defendants were all convicted; conviction, however, was just the beginning.

We tried at Nuremberg to create the concept that all of humanity had an interest when crimes reached a certain magnitude that shocked the human conscience. It was no longer the State of New York or another state versus the defendant. It was all of humankind. A crime against humanity, genocide, was the classic example. The crime being so enormous, it offended not merely the victim, but all of humanity. Therefore, all of humanity had the right to be the plaintiff and to bring a complaint. Unfortunately, Nuremberg was the last international tribunal. It was dissolved. There has been no international tribunal recreated since then.

Nevertheless, I continue to be surprised at how much the spirit of Nuremberg is still with us. Yesterday, the *New York Times* lead editorial was "The Ghost of Freedom's Party: Giving Amnesty to Terrorist and Torturers."¹³ Although the Nuremberg tribunal set an imperfect

13. N.Y. Times, Apr. 2, 1990, at A16, col. 1 (editorial).

precedent, the spirit of Nuremberg is a challenge to today's authoritarian governments. Today, for example, they deal with the problems of war criminals in Argentina which, incidentally, some of my colleagues will discuss later.

While the Nuremberg precedent is present and alive, this does not mean that it is flourishing. International crimes such as genocide continue to be committed; Pol Pot is one example, another example can be found in Guatemala. The world is on the verge of other holocausts—much larger, nuclear holocausts. Our deterrent policy is that if some mad man in either the Pentagon or the Kremlin lets loose with a missile, we will retaliate by killing a hundred million innocent people who had nothing to do with it.

At Nuremberg, we said only the guilty would be punished and only after a fair trial. That was our sense of justice. Nevertheless, we tolerated and still tolerate a theory of deterrence which will enable state officials to kill hundreds of millions of people who have done no wrong, who may even be opposed to the aggressive actions of their government. This is the basis for our security. Is it moral? It is legal? This has caused me great concern and has motivated me to write many books dealing with world peace. A holocaust can take many forms—it does not have to be taking people out to a ditch and shooting them; they can be asphyxiated by nuclear gases, explosions and fire. Poison gas can be used. In today's newspaper, Iraq is bragging of its capacity to use missiles to kill people with poison gas. In fact, they have used it even though it is illegal. What has been our response?

So we have conflict in our society. On one hand, we have adherence to our old ways where the sovereign was supreme, where might made right. On the other hand, we have principles of Nuremberg reaching out for a more humane world, or a world under law. This challenges the lawyers, who in trying to meet this challenge have in some areas made progress and in many other areas have failed.

I have mentioned aggression. What is aggression? I wrote two volumes on the subject.¹⁴ The United Nations finally reached a consensus on the definition of aggression that would determine the minimum norms of human behavior.¹⁵ What is mass murder? Does that mean just shooting people? What does it mean? Blowing them up? What about acts of terrorism? The attempt to define terrorism utterly has failed in the United Nations. They say terrorism is a terrible thing. You must not do

14. B. FERENCZ, *supra* note 3.

15. B. FERENCZ, *supra* note 1, at 68.

it. It is illegal. If you are doing it for a noble purpose, however, such as "self-determination" or "freedom from alien domination," then it is not terrorism. Then, it is a pursuit of a lawful goal. The same is true with aggression and with crimes against diplomats. These loopholes written into the law make the law ineffective.

For forty years the United States government, which stood behind the prosecution of genocide in the first place, failed to ratify the Genocide Convention.¹⁶ This was a disgrace to our country, to us—its citizens, its politicians, its lawyers. When the convention finally was ratified, it was full of reservations and understandings rendering it absolutely useless.¹⁷ Nobody will ever be prosecuted in the United States for the crime of genocide. It is impossible under the existing statute; everybody who studied the question knows that.

Consideration of these difficulties could very well lead one to become discouraged. But if accountability for state-sponsored mass murder is to exist, certain fundamental ingredients are necessary. First, a clear definition of the crime involved must be formulated. There must be a tribunal to determine if the crime has been committed. Also, a system of effective enforcement must be created. These three ingredients—laws, courts and enforcements—are the true foundation of every civilized society. To the extent that such a foundation exists, society enjoys relative calm; to the extent that it does not, society faces chaos and destruction. Today, in the field of mass murder, definitions are lacking, no objective international court exists and no enforcement mechanism whatsoever is yet in place.

Is it all bleak and black? No, it is not. We are making tremendous progress in this area. The difficulty is that we all expect to see this progress in our lifetime, and that is too short, even for me. When I was prosecuting at Nuremberg I was twenty-seven years old. I am now seventy years old, and I see that great progress has been made. I look around me and I see that although the definitions of aggression and genocide are defective, apartheid has also been declared an international crime.¹⁸ Terrorism is now an international crime.¹⁹ Crimes against

16. See Mueller, *supra* note 1, at 499.

17. See LeBlanc, *The ICJ, The Genocide Convention and the United States*, 6 WIS. INT'L L.J. 43, 44 (1987); Leich, *Contemporary Practice of the United States Relating to International Law*, 79 AM. J. INT'L L. 116, 127 (1985).

18. B. FERENCZ, *supra* note 1, at 8; see also Bassiouni, *The Protection of 'Collective Victims' in International Law*, 2 N.Y.L. SCH. HUM. RTS. ANN. 239, 248 (1985).

19. F. BUSCHER, *supra* note 1, at 21; R. CONOT, *supra* note 1, at 493; B. FERENCZ, *supra* note 1, at 8, 46, 51, 66; Mueller, *supra* note 1, at 502.

humanity have been condemned, albeit with all their loopholes. All of these things I have seen in a relatively short period of time. In the area of courts, although there is no international criminal court, its formation is on the agenda of the United Nations.²⁰ Today, drafting is under way for a code of crimes against peace and security of mankind.²¹ This code, built on the Nuremberg principles, may incorporate other international crimes which have developed since that time. Finally, crimes dealing with environmental pollution are slowly beginning to emerge.²² In the area of courts we have a Court of Human Rights in Strasbourg,²³ as well as a court of human rights in Costa Rica. Indeed, in a very interesting case, the Valesquez Rodriquez case, four citizens of Honduras sued the government of Honduras in the Inter-American Court of Human Rights.²⁴ The claim was that the plaintiff's sons had disappeared off the streets of Honduras. They claimed that since this was in Honduras, their human rights had been violated, and it was the responsibility of the government to compensate the parents for the loss of their sons.²⁵

In a milestone for human rights, the court decided that the government of Honduras was responsible.²⁶ What a great step forward! The judge who was the prime moving party in the decision was a friend of mine by the name of Tom Buergenthal, himself a victim of the Nazi Holocaust. Today, besides being a professor, he sits on the Inter-American Court of Human Rights and is making law in the field of human rights.

Finally, the Caribbean countries, two months ago, all supported the creation of an international criminal court to deal with drug traffickers.²⁷

20. Mueller, *supra* note 1, at 501.

21. R. CONOT, *supra* note 1, at 520; McCaffrey, *The Fortieth Session of the International Law Commission*, 83 AM. J. INT'L L. 153 (1989); Mueller, *supra* note 1, at 502; Ferencz, *The Case for and Against Abduction Terrorists*, N.Y. Times, Jan. 28, 1986, at A8, col. 4.

22. *See Criminal Code Climax*, CHRISTIAN SCI. MONITOR, Apr. 22, 1980, at 24, col. 1.

23. 28 I.L.M. 291 (1989); *see Costs Applied in Closed Shop Case*, Fin. Times (London), Apr. 29, 1982, at 7, col. 1; *Deep Human Rights Issues in a Widening Europe*, The Independent (London), Sept. 20, 1990, at 13, col. 1.

24. Case 7920, INTER-AM. C.H.R. 68, OEA/ser. L./V./II., doc. 8 rev. 1 (1986).

25. *Id.* at 7.

26. *Id.* at 12.

27. 44 U.N. GAOR C.6 (Agenda Item 152) (38th-41st mtg.), U.N. Doc. A/C.6/44/SR.38-41 (1989).

The prospective court was referred to the International Law Committee. While the United States is now against it, its eventual survival depends upon the will of the people.

The development of international law, the codification of law, the creation of courts, even the emergence of a system of enforcement, are continuing processes. When this process is complete, one may begin to witness a world in which effective action against state-sponsored mass murder is possible. State-sponsored mass murder, however, will never be prosecuted in the present system of sovereign states. The state is not going to condemn itself. For example, this is the reason the United States is opposing an international criminal court in which the United States itself, or other nations, might become defendants. Other nations are equally at fault. In sum, the surrender of a certain amount of sovereignty is essential for security to exist for all.

If one believes in the principles of law, justice and humanity—which were expressed in Nuremberg—and that these are principles worth preserving, then that person must be alert to what is happening in this area. He or she must support every effort promotive of these principles and oppose everything subversive of these principles. If this is done, I believe society will, in the future, have more effective action against mass murder from whatever source and enjoy a more peaceful world.

Thank you very much.