

In Memoriam. Benjamin B. Ferencz, Nuremberg, and *Argentina 1985*¹

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Both were born to Jewish refugee families fleeing from Europe and rampant antisemitism. Both graduated with advanced degrees from Harvard. Both enlisted in the U.S. Army, one serving in (the notoriously antisemitic) General George Patton's headquarters, collecting evidence of war crimes after being transferred to a newly created War Crimes Branch of the Army, information that could be used in a court of law to prosecute persons responsible; the other joining military intelligence, helping to liberate the Ahlem concentration camp ("One of the most horrifying experiences of my life") and tracking down Gestapo officers and other Nazi saboteurs, for which he received the Bronze Star. One went on to be the last surviving prosecutor of the Nuremberg trials and a prestigious advocate for the creation and defense of the International Criminal Court (ICC); the second won a Nobel Peace Prize for the Vietnam war and went on to work, arm in arm, with racist Jesse Helms, the South Carolina Senator who introduced legislation the first man called the "deceptively named

¹ Martin Edwin Andersen covered the 1985 trial in Buenos Aires for *Newsweek* and the *Washington Post*. For nearly a decade the Latin America Specialist for Freedom House, he has forwarded to the ICC the case he later made while serving as a professor at the Pentagon's university on the knowing promotion by a cabal of Kissinger acolytes of former far-right death squad leaders and members of international terrorist organizations from Argentina and Chile in Defense Security Cooperation Agency (DSCA) programs at the National Defense University.

‘The Servicemembers Protection Act,’ designed to abort the ICC by imposing economic and military sanctions against states that supported the court.”

Benjamin Ferencz, who remained the highly respected Nuremberg prosecutor and international human rights champion, was 103 years old when he died April 7, 2023. “Today the world lost a leader in the quest for justice for victims of genocide and related crimes,” the United States Holocaust Memorial Museum in Washington tweeted.

It was due to Ferencz’s team’s research into Nazi archives in Berlin that extensive documentation was retrieved on the notorious *Einsatzgruppen*, SS killer squads that accompanied the German army into Poland and Ukraine, murdering millions of Jews, Romanis, Gypsies, and many others. The chief prosecutor in the cases of 22 defendants, including six SS generals, Ferencz got guilty verdicts against all of them for their part in more than one million murders. Although he had not asked the Court for the death penalty to be imposed, more than a dozen were sentenced to be hanged. “At the beginning of April 1948, when the long legal judgment was read, I felt vindicated,” Ferencz wrote later. “Our pleas to protect humanity by the rule of law had been upheld.”

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Henry A. Kissinger will be 100 years old on May 27th of this year.

Both lived to see Russian Federation tyrant Vladimir Putin— a Kissinger favorite, even after the invasion of Ukraine—the subject of a March 17, 2023 ICC arrest warrant. According to the ICC, Putin is “allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022.” (In May of 2022, Ukrainian President Volodymyr Zelenskyy denounced suggestions, such as that of Kissinger, that Ukraine should cede control of territory to Russia in order to secure peace, comparing such a move with the appeasement of Hitler’s Germany.)

Major media obituaries for Ferencz, while praising his demand for accountability for war criminals generally, and his advocacy of the creation of an ICC, almost universally fail to mention that he went toe-to-toe on on fundamental issues of mass murder and organized international crimes. Ferencz began his career in the U.S. Army as something akin to a whistleblower; his biographer noted that “he was

constantly at odds with the strict requirement to respond to orders he considered ‘unconstitutional’ or at least not in keeping with the proviso of the Declaration of Independence,” that all men are created equal and endowed by their Creator with inalienable rights to life, liberty, and the pursuit of happiness.

Also missing is the fundamental importance of Ferencz’s early work against the German Nazis and its direct relationship to what happened nearly five decades later in Latin America. It was there that Kissinger’s favored state terrorists, to whom he had given a “green light” for an outrage that extended to at least three continents and included the promotion of pioneer *narcomilitares*, were about to receive their due for the clandestine “disappearance” of thousands of people, including the elderly and the handicapped, and their subsequent torture in hundreds of concentration camps before being murdered. The generals proved ‘expert’ in disappearing Catholic nuns and in the theft of hundreds of newborn babies; less so when it lost a war in record time at the hands of a NATO ally that had provided singular heft at Nuremberg.

A factually true if somewhat simplified story, in 2023, *Argentina 1985*, nearly won an Oscar after receiving a Golden Globe for Best Non-English-Language Picture earlier in the year. The movie covered in gripping fashion the first time in Latin American history that a military dictatorship was brought to trial by civilian courts. “One of the most searing legal soul searches conducted by any society since the post-World War II trials at Nuremberg unfolds Monday with the opening of the trial of nine former top Argentine military leaders accused of massive human rights violations,” this author wrote in “Generals Face Judgment in Argentina,” published on April 21, 1985 by the *Washington Post*. Argentina federal prosecutor Julio Strassera, who together with assistant prosecutor Luis Moreno Ocampo are the main protagonists, and unlikely heroes, in *Argentina 1985*, said then that the hundreds of cases he was bringing to the court of people abducted, tortured, robbed or raped by Argentine security forces was evidence of what he said was “a copy of the Nazis’ ‘night and fog’ doctrine, based on a detainee losing all contact with friends and family.”

Bringing the generals to trial at a time the military again threatened to revolt, Strassera at the same time sought to put distance himself from the Nuremberg legacy. The common crimes his office was bringing before the court were lodged against individuals and not based on international (extra-territorial) law. The dirty “war” generals were unimpressed, with one uniformed retiree referring to what others saw as a “mini-Nuremberg” as rather a “Nuremberg in reverse,” where those defeated on the (grossly uneven and nefarious) battlefield would sit in judgment of a supposedly

victorious army. As testimony at the trial concluded, Moreno Ocampo, whose forefathers were counted among Argentina's military elite, highlighted the case he found to be most memorable in the trial. After most of the family she worked for had been kidnapped, a maid testified that she had hidden herself in a doghouse in an upstairs patio when intruders broke into the home. "When she tried to flee down the stairs, she too was grabbed," Moreno Ocampo recalled. Later, in the courtroom, she said that when she fled, she had been hoping to call the police. But when her captors took her outside, she found they had come in four squad cars. "When the police are the repressors, where does a citizen go to complain?" he asked.

Five years after the 1985 trials, Moreno Ocampo would stress that the "chief parallel between the trials in Argentina and Nuremberg is the massive nature of the crimes that occasioned both trials." Unlike Nuremberg, where international law reigned supreme, the Argentine prosecutors applied laws against homicide and murder as set down in his country's penal code, Moreno Ocampo noted. "Instead of a trial dealing with massive crimes, like genocide, we had to organize trials for an estimated ten thousand single homicides. I say estimated because we were not even certain of the exact number murdered or of the victims' identities." And yet, "The goal of our trials was similar to that of the Nuremberg trials: to bring about justice and respect for the law in an unlawful and unjust situation."

What is certain is that, putting aside the Israeli kidnapping in Argentina and subsequent prosecution in 1961 by the District Court of Jerusalem of Nazi war criminal Adolf Eichmann, a pivotal figure in the implementation of Hitler's "Final Solution," the prosecution in Buenos Aires of the dirty "war" generals was the first war crimes trial conducted since the Nuremberg Trials. It was, as one movie critic noted, "a landmark anti-fascist trial."

Writing in the *Foreign Affairs* July/August 2001 edition, Richard Nixon's one-time international "co-president" focused not on the nightmares recently faced by peoples of Argentina, Chile, Uruguay, Bolivia and elsewhere in his "The Pitfalls of Universal Jurisdiction." Instead, the arguably treasonous war criminal painted his own nightmare should an international criminal court like the ICC be established. Painting a tale of possible "inquisitions and even witch-hunts," Kissinger claimed the result could be a "tyranny of judges" or a "dictatorship of the virtuous." The champion of both secrecy and, where to his benefit, selected leaks of classified information, the alleged First Citizen railed that because of "the intimidating passion of its advocates," an international legal framework meant to both punish and deter future crimes against

humanity was being “spread with extraordinary speed and has not been subjected to systematic debate.”

Central to Kissinger’s argument was his claim that the “definitions of the relevant crimes are vague and highly susceptible to politicized application.” Venturing into even balder Nixon-speak was his claim that “defendants will not enjoy due process as understood in the United States.” The “one-sidedness” of the pursuit of universal jurisdiction “may undermine the political will to sustain the humane norms of international behavior so necessary to temper the violent times in which we live,” he added.

It was Ben Ferencz who quashed the Kissinger defense of the pre-9/11 status quo with prosecutorial perfection.

“Kissinger’s focus on the past exaggerates the dangers of the present and ignores the needs of the future,” Ferencz, J.D. Harvard 1943, wrote in the September 2001 edition of the *Brown Journal of World Affairs*. The former Secretary of State’s public endorsement of the Jesse Helms legislative screed, he wrote,

seemed more an act of political fealty than considered legal judgment since it relied on many arguments that were demonstrably false. ... Kissinger’s misperceptions about current international law lead him to the erroneous conclusion that if the U.S. does not ratify the ICC treaty Americans will be outside its reach and hence protected from malicious accusations. He fails to notice that without the protective shield of binding international law and institutions to enforce it, the military captive is completely at the mercy of his captors.

“U.S. insistence upon complete immunity for all U.S. nationals is viewed by many of our friends as a repudiation of vaunted U.S. ideals and an unacceptable affront to the rule of law that must apply equally to everyone,” Ferencz added.

Brandishing the Nuremberg legacy like few still alive could do, Ferencz noted:

Dr. Kissinger...argues, incorrectly, that the notion is of recent vintage. He gives scant weight to ancient doctrines designed to curb piracy or to a plethora of international conventions following the First World War. He fails to recognize that international law is found not only in treaties but also in general principles of justice and in customs which gradually obtain universal recognition. International law is not static but advances to meet the needs of a changing world.

Over half a century ago, Robert M. Jackson, on leave from the U.S. Supreme Court to become Chief U.S. Prosecutor before the International Military Tribunal at Nuremberg, declared: “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.”

Justice Jackson and Telford Taylor, his successor for a dozen subsequent trials at Nuremberg, repeatedly made plain that the law being mobilized to maintain peace in the future would apply to all nations equally.

...

Crimes like aggression, genocide and similar large-scale atrocities are almost invariably committed by or with the connivance of a national government and it thus becomes imperative to have available an international tribunal that could bring them to justice.

Cold war politics stymied all U.N. efforts to create an international criminal jurisdiction. Powerful nations remained unwilling to yield their sovereign rights to kill as they alone saw fit...a breakthrough finally came in Rome in 1998 where 120 nations voted in favor of an ICC to curb the incessant murders and persecution of millions of innocent people. The U.S. was one of 7 nations that voted No. ...

The tribunals set up by the Security Council of the United Nations in the 1990's, with strong U.S. support, to punish massive war crimes committed in former Yugoslavia and Rwanda, are belittled by Dr. Kissinger's argument that "It was never thought that they would subject past and future leaders of one nation to prosecution by the national magistrates of another state where the violations had not occurred."...

Kissinger scorns the judgment of Great Britain's esteemed Law Lords who confirmed the legal validity of the detention in England of Chile's former Head of State, Augusto Pinochet, who was accused of crimes committed against Spanish nationals in Chile. He ignores, for example, the widely hailed prosecution of Adolf Eichmann by Israel, for Holocaust crimes committed in Europe at a time when the state of Israel didn't even exist...

In 1776, the Declaration of Independence declared that "governments derive their just powers from the consent of the governed." The United Nations Charter speaks in the name of "We the Peoples..." The Universal Declaration of Human Rights, adopted in 1948 refers to "the equal and unalienable rights of all members of the human family..." and declares that it is essential "that human rights should be protected by the rule of law"...

[T]he best way to be sure that law will not be abused as a weapon to settle political disputes is to create a competent international court composed of highly qualified judges from many nations bound by rules that guarantee a fair trial under internationally approved standards and scrutiny.

Ferencz assured his primary reader, on an issue that certainly was in Kissinger's mind, that an international court would not retroactively seek justice for crimes committed before it came into existence. Three of the major issues wrestled with at Nuremberg—genocide, crimes against humanity and major war crimes—would be the focus of such a judicial forum. What he called the "supreme international crime-aggressive war" would only be addressed by the court in a nearly unanimous fashion later. "The prevention of massive crimes against humanity deserves equal protection of universal law." Ferencz concluded, "The crimes must be spelled out in advance and not condemned only retroactively."

“What it boils down to in the end,” the former Nuremberg prosecutor concluded, is that “the constant diplomat” Henry Kissinger “says he agrees with the goals of the international criminal court ... but he fails to recognize that the safeguards he seeks from an ICC are already in place.”

Two years later, the ICC’s first prosecutor, Luis Moreno Ocampo, took his oath before the court’s 18 judges in a Peace Palace ceremony in The Hague, after being unanimously selected by the court’s 90-member countries, including most of the United States’ most loyal allies. “The court, modeled on the tribunals for the former Yugoslavia and Rwanda, has jurisdiction over war crimes, crimes against humanity, and genocide committed after July 1, 2002, when the tribunal officially came into existence,” noted a story in the *Associated Press*. It was a model specifically singled out for scorn by Kissinger. Moreno Ocampo’s selection, the story noted, “pav[ed] the way for investigations into alleged perpetrators of war crimes across the world.” Twenty years later one of those under ICC investigation is Kissinger ally Putin.

Continued opposition to the ICC by the U.S. government was tempered by the fact that among the guests at Moreno Ocampo’s swearing in was Ferencz. “It is a new institution,” noted someone who in life deserved a Nobel Peace Prize, “created to bring a greater sense of justice to innocent victims of massive crimes who seek to live in peace and human dignity.”

The last word, perhaps, goes to someone who, reflecting Ferencz’s life-long commitment to speak truth to power, reflected on just how important the accountability highlighted in *Argentina 1985* by Nuremberg conscious prosecutors Strassera and Moreno Ocampo is today. An otherwise laudatory January 24, 2023 review of the film in *The New Yorker* by Argentine writer and academic Graciela Mochkofsky neglects the Nuremberg precedent entirely, although the movie—quoting the screen Strassera character—does not. While Mochkofsky mentions that Carlos Menem, the presidential successor to human rights champion Raul Alfonsín (who set the 1985 trial in motion), later pardoned those military leaders who were convicted, she neglects to add that the preeminent “guest of honor” at Menem’s inauguration was none other than Henry Kissinger.

What the article does contain is a reflection of concern for the “banana-ization” of the American republic, if not its clandestine wars, and its often-unappreciated domestic blowback. Mochkofsky quoted Harvard government professor Steven Levitsky as saying that *Argentina 1985* reminds us “just how important this kind of accountability is.”

“In part owing to what happened in 1985, Argentina ‘continues to have a political consensus that stands behind the rules of the game: not inviting the military, supporting elections,’ Levitsky said. ‘That’s why Argentina gets a higher democracy score from Freedom House today than the United States does, because none of the major political parties in Argentina will or would support a candidate who’s tried to overturn an election.’”

Mochkofsky concludes: “As both the real and the fictional Strassera told the court, ‘We have the responsibility to build a peace based not on forgetfulness but on memory, not on violence but on justice.’”

It is a lesson Benjamin Ferencz never ceased to teach as he championed the rights of victims, but not necessarily those of victorious nation states.