



**“I’m going to  
call it what it is.  
Genocide.”**

## The last living Nuremberg Trial prosecutor recalls his work on the Einsatzgruppen Trial.

**T**his fall marks the 75th anniversary of the conclusion of the Nuremberg Trials. Capturing the world's attention, the trials saw more than 200 German government, business, medical, and military leaders tried for war crimes over the course of several months and numerous tribunals. In a landmark moment in international law, the trials brought together judges from four countries, marking the first time nations came together to prosecute crimes against humanity. The trials recognized genocide as a crime, paved the way for the Geneva Convention, and helped lead to the Universal Declaration of Human Rights.<sup>1</sup>

The Bolch Judicial Institute at Duke Law School recently honored the last living Nuremberg prosecutor, **BENJAMIN B. FERENCZ**, with the inaugural Raphael Lemkin Rule of Law Guardian Medal. The medal is awarded to individuals who have helped to protect and advance the rule of law; it is named for Raphael Lemkin, a leading scholar of 20<sup>th</sup>-century human rights law who developed both the term and the concept of genocide. Lemkin fled

Europe during World War II and later joined the Duke Law faculty. He was an eminent scholar of war crimes and secured passage of the Genocide Convention at the United Nations.

During the Nuremberg Trials, Ferencz served as a principal trial lawyer for the United States, working under chief prosecutors Justice Robert Jackson and Telford Taylor. He led the prosecution of 24 Nazi war criminals in the Einsatzgruppen Trial, one of the subsequent Nuremberg Trials held by the United States in military courts in the U.S. occupation zone in Germany.<sup>2</sup> Ferencz led the investigation of death squads responsible for more than a million murders, visiting concentration camps, gathering evidence of the Nazi campaign to commit genocide, and succeeding in securing convictions of all the defendants in his case. Ferencz then dedicated his life to building a framework of international justice for deterrence, prevention, and accountability for mass atrocities.

**DAVID F. LEVI**, the director of the Bolch Judicial Institute, presented Ferencz with the medal and hosted a

discussion for Duke Law faculty and students about Ferencz's life and work on the trials. **MICHAEL P. SCHARF**, a Duke Law graduate, co-dean of Case Western Reserve Law School, and managing director of the Public International Law & Policy Group, moderated. What follows is a transcript of their talk, edited for length and clarity.

**SCHARF:** It is a pleasure to participate in a colloquy with my dear friend, Ben Ferencz. It's a friendship that goes back 30 years since he was a young kid of 70. Let's start with some biographical background. Ben, you were an immigrant from Transylvania who grew up in Hell's Kitchen, New York City. How did you end up at Harvard Law School?

**FERENCZ:** Well, I want to first thank all those involved in getting me here to celebrate and recall Raphael Lemkin.

My trip to Harvard Law School was very simple. I went from Transylvania, which no longer exists. My sister was born in the same bed I was, a year and a half earlier. She was born a Hungarian; I was born a Romanian. ►

I realized it didn't make any difference what your language is, but how you treated people. There was also more anti-semitism in Transylvania, so I informed my parents — I was nine months old, "We better get out of town. And how about putting me into the Harvard Law School?"

That's sort of a shortcut, but we landed at Hell's Kitchen, past the Statue of Liberty. We were very poor, that's why we had fled the country. None of my parents had gone to college or something resembling it, but my eighth grade teacher called my mother and said, "This is a gifted boy." And my mother and I both looked at each other — we never got any gifts, I didn't know what she was talking about. Neither did my mother. He said, "He should go to college."

College? We didn't know anybody that went to college. My mother said, "Oh, whatever you say, as the family, we'll do that for him. But we have no money." He said, "Well, we'll get you into a special high school, Townsend Harris High, the only one of its kind in the country. It's on a college curriculum, and if he passes the course there, he'll automatically be admitted to City College."

And so since it didn't cost anything, we were able to afford it. And off I went to Townsend Harris High School — for boys only, of course. And from there I went to City College. And since I was very short, which some of you may have noticed, I knew I had to be better in something because people were always picking on me. I thought, "I've got to go to the best law school." And I inquired and I discovered that Brooklyn was not really the best law school — Harvard was.

So I sent an application to Harvard and, much to our surprise, they said, "You're in."

**"We've been instructed to set up a war crimes branch. What's a war crime?"**

**I explained: "It's the truth."**

**They knew about conduct unbecoming a gentleman, they knew about desertion — but they had never heard of war crimes.**

They gave me my first exam in criminal law. And based on that they gave me a full scholarship. So there I was in the Harvard Law School with a full scholarship.

**SCHARF:** It's a story, Ben, of immigrants from all over who came here and were self-made and worked harder than anybody else and went farther. I want to know how you got from Harvard Law School, as good as it is, to being the youngest prosecutor at Nuremberg and the chief prosecutor of the largest mass murder trial in history, the Einsatzgruppen Trial.

**FERENCZ:** Well, you skipped a minor point. There was this thing called World

War II, and it had broken out when I was in my third year at law school. I went down with all the other students into Harvard Square to volunteer in the Air Force. They wouldn't accept me — they said I couldn't reach the pedals. I said, "I'll navigate it." And they tested me. And they said, "if we told you to bomb Berlin, you'd probably end up in Tokyo." So I was not qualified for anything I wanted to get into. The Marines said, "you don't look like a Marine."

Eventually I became a buck private in the 115th AAA gun battalion. I landed on the beaches of Normandy. I got five battle stars when the war was all over, for not having been killed in any of the major battles, beginning with Normandy beach, and for march-

ing the line going to the Siegfried Line [a German defensive area during World War II]. I crossed the Rhine River driving a little Jeep. And I was there for the final Battle of the Bulge.

So I had these five battle stars for not having been killed, which is very interesting, especially given my work at Harvard. While I went to Harvard, I had to earn a living. I was hired by Professor Sheldon Glueck, who was doing a book on war crimes, and I was doing the research for him. So when we got into the Army, they of course recognized this great talent, a great graduate of the Harvard Law School and expert in war crimes — so they put me in the artillery, where I knew nothing! I was supposed to be a typist in the artillery. I didn't know how to type either.

However, in due course, the Army had been told to set up war crimes trials. And this was when the Justice Jackson international military tribunal was already on. Justice Jackson was the American representative, and the other three occupying powers — France, Russia, and the Soviet Union — were the other components. I was still in the Army while the trial there started. When it was over I was honorably discharged as a sergeant of infantry. The Army wanted me to go back, and I said, "Me? Go back into the Army? You'd have to declare war on Germany again and be losing."

So they said, "We'll give you a simulated rank." I said, "What does that mean?" They said, "Well, you won't have to be in the Army, but we'll give you a simulated rank, the rank of a full colonel." And I said, "How long do I have to stay?" They said, "We'll leave it up to you; anytime you want to quit, you can quit."

Aha! That was my chance. I went out to the Pentagon and I called my girlfriend — another immigrant,

a Hungarian girl — who had been patiently waiting while I went off to law school and so on. And I said, "How would you like to go to Europe for a brief honeymoon?" And she said, "I'd love it." So that was my proposal. Because I wouldn't get married until I could support a family.

So there I was, and the war was over, and I had come home with 10 million other GIs looking for a job. I had experience in the Army as a war crimes investigator — I'm quite sure I was the first war crimes investigator. In headquarters, General Patton and I had entered the camps with the troops. Of course you had to move very quickly, otherwise the evidence was destroyed. I saw the horrors, the bodies lying on the ground. You couldn't tell if they were dead or alive. Eyes crying out for help, bones stacked up in front of the crematorium, like cordwood waiting to be burned. The SS fleeing, disease everywhere, rats and humans groveling in piles of garbage looking for a bite to eat. So I don't blame you for skipping the gruesome parts, but they haven't left me yet.

**SCHARF: What I found particularly interesting is the fact that your stint as a research assistant for Professor Glueck was part of what paved your way for this incredible adventure. Let me fast-forward to your experience as the chief prosecutor of the Einsatzgruppen Trial. What can you tell us about that?**

**FERENCZ:** Einsatzgruppen is a German word. "Einsatz" is action, and "gruppe" is a group. [Einsatzgruppen were Nazi death squads responsible for mass killings, usually by shooting.] After the primary trials, the United States had decided to have some subsequent proceedings to the International Military

Tribunal in order to explain to the public how a civilized country like Germany could tolerate all the horrors which were being revealed. So the United States decided they were going to set up their own trials, and the French and the British went their own way. The Einsatzgruppen Trial was one of those trials.

One day in the artillery, somebody tapped me on the shoulder and said, "You have to report to General Patton's headquarters." I went there and met the judge advocate, and he said, "We've been instructed to set up a war crimes branch. What's a war crime?" I explained: "It's the truth." They knew about conduct unbecoming a gentleman, they knew about desertion — but they had never heard of war crimes.

I said, "Sit down, I'll explain it to you." From my research at Harvard, I was an expert on war crimes. And I was the first man in the U.S. Army to do war crimes work.

The first types of reports we got were Allied flyer cases. Allied flyers, British and American, were flying over German-held territory and were shot down or crashed, and they were almost invariably lynched by the German mob on the ground. They were beaten to death. These were the first types of cases we had. About the same time, we got reports into headquarters about people coming out of work camps, looking like they are all starving.

Off I went in my Jeep. The first camp I got to was the Fort Camp of Buchenwald. The scene was incredible. The human mind can't grasp it. Dead bodies piled up and all that. People just — dead and more dead, the crematorium growing with everything in it.

I started investigating, which meant, first of all, seizing all the documents. I didn't have any insignia on my uniform. I refused to put it on. I couldn't ►



do the job as a private or as a corporal or even as a sergeant. I pretended I was personal representative to General Patton. I would come into the camp with MRI written on the front of my Jeep, always alone. I'd go to the commanding officer, and I'd say "I'm here on General Patton's orders, carrying out a policy of the United States President. I need 10 men immediately." The rule was: "Nobody goes in or out without my permission."

If they hesitated, I said, "Now. Move. Move it!" And they would immediately surround me in the office, which was always manned by inmates themselves. So I'd come into the office, talk to the inmates — and I heard some interesting stories there — and seize the records or whatever they had. The Germans were very methodical. They kept exact records on everything they did. They killed so many. They said so. They had daily reports being sent, top secret, to Berlin, where they were consolidated from the different Einsatzgruppen and the special squads, whose assignment was to kill without pity or remorse, every single Jewish man, woman, and child.

When the war was over, and the United States had decided to put on additional trials, I got a telegraph from the Pentagon: "Dear Sir." In three years, they had never called me sir. "Sir, they'd like you to go back into the Army." I said, "What for?" They said "well, we're having these additional trials coming up and you've got the experience. You've got the Harvard background and criminal law and all that. And we need you."

And as I said, I agreed then to go back for a honeymoon. I was referred to General, then-Colonel, Telford Taylor. And he interviewed me. He said, "I've been ordered by the President to set up these subsequent proceedings. I've

I have in my hand a million cold-blooded murders. You're not going to let these bastards go.

been checking up on your record, but I'm concerned because you're occasionally insubordinate."

And I said, "No, that's not correct, I'm not occasionally insubordinate, I'm *usually* insubordinate. I never obey an order which I know is stupid or illegal." And I said, "Well, I've been checking up on you, too." He was also a Harvard lawyer. And I said, "I don't think you'll give me that kind of order." He said, "You'll go with me."

He hired me to go back to Germany. When we got to settling what I was supposed to do there, he said, "Look, we're going to have additional trials, and we need evidence. We have a suspect in custody, but we have no evidence. So your job is to go and collect the evidence that will convict the people we already have in custody."

So I divided it up into military people, SS people, and industrialists who were working people to death, as well as doctors who were performing medical experiments. I quickly put together a staff of about 50 people and went to Berlin, where we had set up headquarters, because that's where the Nazi center was.

One day one of my researchers comes in, and he hands me a whole batch of papers. He says, "Look what I got." It's sort of loose-leaf binders.

It's situational reports from the Soviet Union.

These were special units that had been created to kill all the Jews, men, women, and children. Every day, they reported how many they killed and where it was. I took a little adding machine and I began adding them up. When I reached a million killed, I took a sampling. I got on the next plane down to Nuremberg and met with Telford Taylor, who was then a general. I said, "we've got to put on a new trial."

He said, "You can't, because Pentagon has already approved a trial. All the lawyers have been assigned. They're all busy working. We're never going to get approval for a new trial."

"Well," I said, "You can't let these guys go. I have in my hand a million cold-blooded murders. You're not going to let these bastards go." He said, "Well, can you do it in addition to your other function?" I said, "Sure." He said, "Okay, you do it."

**SCHARF:** Ben, how old were you at that time?

**FERENCZ:** I was 27 years old. I'd never been in a courtroom. Never tried a case.

**SCHARF:** During the trial, you quoted Raphael Lemkin, whose medal you are

given today. Lemkin coined the term “genocide” and you were the first prosecutor in history to use the term in a court of law.

**FERENCZ:** That’s correct. I did that because he had a really sad story to tell. We remained friends for many years after that. But, I thought, in tribute to him, I’m going to call it what it is. Genocide. And I did so in the second or third paragraph of my opening statement, which began: “It is with sorrow and with hope that we here disclose a deliberate slaughter of more than a million innocent and defenseless men, women, and children.”<sup>3</sup> The sorrow was for the victims. The hope was for the future.

And so I cast my goals in the opening sentence of the Einsatzgruppen trial. I was 27 years old. The opening was in September 1947. Most of you were not born yet.

**SCHARF:** It was the biggest murder trial in history. And you convicted everybody.

**FERENCZ:** Yeah. So the first question is: Who do you select? It’s a very important question. The Einsatzgruppen consisted of four different segments of about 3,000 men. I had 24 defendants because I was limited to the number of people who could be tried by the international military tribunal. In other words, if you didn’t have a seat in the courtroom you were free. It was the most ridiculous thing. But I was limited.

I said, “Now, how am I going to bring justice?” We’ve got 24 defendants and a million people murdered. You cannot balance the scales of justice with these, no matter if you chopped them up into a million pieces and fed them to the dogs. So I said, “Well, if I could have this trial

mean something, it would have to be more than just executing these select few.” They had murdered the people because they didn’t share the race or the religion or the ideology of their executioners. If I could lead the trials to saying, “Well, what happened here was a crime against humanity — it was genocide.” If we were to have meaning to this trial, it must be to ensure the right of all human beings to live in peace and dignity, regardless of their race, or creed, or religion, or color. That’s what I asked for. The case represented a plea of humanity to law. My emphasis was on that, and I got that judgment.

All the defendants were convicted, and 14 of them were sentenced to death. Four of them were actually executed. It was a historic trial from every point of view. I rested my case in two days. Two days! I didn’t want to talk to any of the defendants. I made it a specific point. I had their daily reports signed on the bottom. They sent their reports to Berlin, where they were

consolidated and distributed to all levels of the Nazi hierarchy. I had a distribution list, 99 people, who later said they never heard of it. Baloney. They never heard of it? I’ve got them here.

I didn’t want to talk to the defendants. But I told my investigators to interview all the defendants. I said, “I want to know everything about them, the day they were born until the day we’re going to hang them.” But I’m not going to talk to them, because I’m going to have this document here, top secret: Your name is SS General so-and-so? It says you killed 90,000 Jews. What have you got to say? That’s your name? Okay, yeah. It’s final. Weigh that.

So I made short thrift of them, really.

**SCHARF:** History records that you did convict them on the strength of their own records. You know, if that was the end of your story, people would celebrate you as a great hero. But you were just getting started. After the Einsatzgruppen Trial, you went on to ▶

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play a key role in the German reparations program to the victims of the Holocaust.

**FERENCZ:** Well, it occurred to me before the trial was over that there's a sequence we have to follow in a time of war. First, you have to end the war. I mentioned I got five battle stars; I was in every major battle. Secondly, you have to bring to justice those who caused the war, and those who committed crimes in the war. That was the Einsatzgruppen, in the international military tribunal trial, and then there were some other national trials. But what about the victims?

When we went to Rome to draw up the new statute of the court, I had no official position, but I was the first speaker. I said, "I have come to Rome to speak for those who cannot speak: the victims. What are we doing for the victims? We can't just walk away." From the very beginning, I was aware of the sequence of the different events. After taking care of the victims, you have to prevent it from happening again. And I'm still working on that.

We got a lift from Chancellor Konrad Adenauer, a devout Catholic, when in 1952 he made a public speech saying that terrible crimes have been committed by us against the Jewish people, and that we have an obligation to try to make amends. It was on that basis that we then went into serious discussion with various Jewish organizations and others to implement that.

**SCHARF:** I'm going to fast forward to your life after the work you did for the reparations. You then devoted many years to the creation of a permanent international criminal court. And a minute ago you mentioned going to Rome during the negotiations of that court and talking about the victims.

# Everybody has something they can do. If a little guy from Transylvania can do what I have done, why can't you?

You also mentioned that you gave closing arguments in the very first trial before the International Criminal Court. How did that come about?

**FERENCZ:** I got a call one day from the [ICC's first] prosecutor, Luis Moreno Ocampo of Argentina. He said, "Ben, we'd like you to make the closing arguments." I said "Sure, of course I'll do it."

This was the first case by the International Criminal Court, which was the next goal when the International Military Tribunals finished its trial against Hermann Göring and company — they all went home. So what do you do with the rest of them? I had my Einsatzgruppen boys, who murdered a million people in cold blood. You're not going to just say "go home." So they decided to have a whole series of additional trials. And Telford Taylor was appointed by the President to take over where Jackson left off.

So I went and I repeated the arguments that I had made in the Einsatzgruppen Trial. And that's why they wanted me there — to call the crime against humanity.

**SCHARF:** In addition to prosecuting war criminals, you've also spent most of your life advocating for mod-

ern international courts to be able to prosecute the crime of waging an aggressive war. You have wanted to make war itself a crime. Why is this important to you?

**FERENCZ:** I had reached a conclusion personally that the only way to stop war crimes is to stop warmaking itself. The stupidest thing we can do is to go to war — to settle or try to settle our disputes by the use of armed force. It's the stupidest thing, first of all, because we have nuclear weapons. And now, even those are obsolete — we have cyberspace. There are many nations today — the United States, we are the proudest, the strongest, the best — that can kill everybody. And we're still talking about using armed force? Are you crazy?

**SCHARF:** Ben, I think a lot of people would say that you're an idealist. But I think that it is your idealism mixed with realism about this issue that keeps people having an honest conversation about the use of force. And thank goodness for you. You're a living legend. You're a rock star in the field of international criminal law. Can you offer some pieces of wisdom that you've gained from all of this experience?

**FERENCZ:** I'm finished. I'm not worrying about my welfare. I've had it. But you can no longer rely on war as an instrumentality to settle disputes. It's prohibited by the UN charter.

Today, we increased our defense budgets by billions and billions of dollars. We don't have any money left to pay for education, or for the care of the aged, or urgent needs, which drives people to take actions which we call terrorist. Instead of using the money to help the people who are needy to address their justified complaints, you build more weapons to kill more people. That's stupid. It's just plain stupid. And I don't care what they want to call me — crazy or an idealist. That's not being idealistic. That's using your common sense. How long can we continue to do that? Are we heading to kill everybody?

I don't expect to be around for another 101 years, but I do rely on the young people, and I tell them never give up. I've got three pieces of advice: One, never give up; two, never give up; three, never give up.

**SCHARF:** You've made such an impact to the world. Do you feel that students these days can have a significant impact? What can they do?

**FERENCZ:** Everybody has something they can do. If a little guy from Transylvania can do what I have done, why can't you?

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Watch the full interview with Ferencz and learn more about the Raphael Lemkin Rule of Law Guardian medal at <https://judicialstudies.duke.edu/programs/lemkin-rule-of-law-guardians/>.

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- <sup>1</sup> *10 Things You May Not Know About the Nuremberg Trials*, History Stories, <https://www.history.com/news/10-things-you-may-not-know-about-the-nuremberg-trials>. Note that the primary trial of the high-ranking Nazi officials concluded in 1946, though additional trials continued in the U.S. through 1949.
- <sup>2</sup> *Subsequent Nuremberg Proceedings, Case #9, The Einsatzgruppen Case*, The United States Holocaust Memorial Museum, <https://encyclopedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings-case-9-the-einsatzgruppen-case>.
- <sup>3</sup> *Ferencz Opening Statement at Nuremberg*, BenFerencz.org, <https://benferencz.org/articles/pre-1970/ferencz-opening-statement-at-nuremberg/>.



**MICHAEL P. SCHARF**

is co-dean at Case Western Reserve Law School and Managing Director of the Public International Law

and Policy Group. He has led USAID-funded transitional justice projects in Uganda, Cote d'Ivoire, Libya, and Turkey (for Syria), and maritime piracy projects in Kenya, Mauritius, and the Seychelles. During the elder Bush and Clinton Administrations, he served in the Office of the Legal Adviser of the U.S. Department of State.



**BENJAMIN FERENCZ**

is the last living Nuremberg Trial prosecutor and an icon in the field of international justice. After serving as chief

prosecutor in the Einsatzgruppen Case, he assisted in reparation and rehabilitation efforts for victims of Nazi crimes, worked to negotiate the Reparations Agreement between Israel and West Germany and the first German Restitution Law in 1953, and practiced law in the United States.