THE NUREMBERG LEGACY AND THE INTERNATIONAL CRIMINAL COURT—LECTURE IN HONOR OF WHITNEY R. HARRIS, FORMER NUREMBERG PROSECUTOR

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We are assembled today in honor of Whitney R. Harris, a great American, a great advocate of the rule of law and international justice. We are also assembled here today, and tomorrow, to reflect on the International Criminal Court (ICC) and its fight against impunity until the present day. It is quite a noteworthy coincidence that this year we celebrate both the 100th birthday of Whitney R. Harris[1] and the 10th birthday of the International Criminal Court (ICC).[2]

The "Symposium on the International Criminal Court at Ten" which takes place tomorrow is, in my view, the most important conference on the "ICC at Ten" being held in the U.S. this year—not in Washington or New York, not at Harvard or Yale Universities—but here in St. Louis, organized by the Whitney R. Harris World Law Institute and Professor Leila Sadat. In my opinion, the citizens of this beautiful city, the members of Washington University, have reasons to be proud of this. And as it was someone from this city who was the first to fly over the Atlantic, to good old Europe, let me add: This is really the "Spirit of St. Louis."

Now, a flashback to the summer of 1998, to Rome:

At the U.N. building nearby the Colosseum, delegates from all around the globe are having five decisive weeks of negotiations on the future International Criminal Court. The stakes are high, the negotiations often difficult, even heated. Each morning, though, when I sit at the bench of the German delegation, I observe the same scene: punctually, at 9:00 a.m., a white-haired, quite distinguished man, certainly in his 80s, enters the room and takes a seat reserved for non-governmental organization (NGO)

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1. Whitney R. Harris, 12 August 1912–22 April 2010.

2. On July 1st, 2002, the Rome Statute of the ICC entered into force, upon being ratified by 60 States. *See generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], *available at* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

observers. This person, then unknown to me, about six and a half feet tall, blue-grey eyes, with an appealing face, a face full of character, somehow exudes an aura of authority. When I look at him, day-by-day, more and more curious, I think to myself, quite instinctively, what a noble appearance. As the members of the U.S. delegation—I know practically all of David Scheffer's people—speak with him quite often, always with all signs of respect, I assume that this NGO delegate is probably American.

Then my guessing is over: Professor Whitney R. Harris, President of the Committee of former U.S. Nuremberg Prosecutors, has himself taken the initiative to discuss with me, the head of the German ICC delegation, the current situation in the negotiations.

I am deeply impressed—yes, fascinated. It becomes obvious that Mr. Harris, unlike some other delegates, is fully aware of the current situation, including certain differences of view among states present at the conference. My interlocutor sees the German delegation in a special role, with a special responsibility to ensure the success of the conference.[3] Time and again in our meetings—which soon are becoming a regular feature—he stresses two points in particular: firstly, the conference must create the treaty basis for a future international criminal court; secondly, its criminal law must include crimes against peace, or in modern language, the crime of aggression.[4] Time and again, he admonishes me; he emphasizes that Germany must insist on an effective and credible court, that the German delegation should not accept a foul compromise. In the meantime, he has become some kind of ally and informal adviser; the conversations with him are both inspiring and encouraging.

Then, on 17 July 1998, after a last dramatic tussle, comes the breakthrough—the climax.

After the decisive vote on the Rome Statute,[5] our founding treaty, there is some kind of explosion, an enormous outpouring of emotions of relief among those present, unparalleled for such a conference: screams, stamping, exultation without end, tears of joy and relief; hard-baked

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3. On the role of the German Delegation during the Rome Conference, see RONEN STEINKE, THE POLITICS OF INTERNATIONAL CRIMINAL JUSTICE 92–128 (2012); Lucrecia Garcia Iommi, Thinking Institutions in 3-D: Ideas, Interests, and Power in the Creation of the International Criminal Court 309–26 (2012) (PhD Thesis, Notre Dame University); KAROLINE FEHL, LIVING WITH A RELUCTANT HEGEMON: EXPLAINING EUROPEAN RESPONSES TO US 'UNILATERALISM' 108–47 (2011).

4. *See* Rome Statute, *supra* note 2, arts. 5(d), 8*bis*, 15*bis* and 15*ter*.

5. The Rome Statute was adopted with 120 votes in favor, 7 against, and 21 abstentions. As the final vote was unrecorded, it is not known with certainty which States voted in favor, against, or abstained. However, David Scheffer, the then Head of the US-Delegation named the USA, Iraq, Israel, Libya, Cuba, Syria and China. *See* DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 224 (2012).

delegates and journalists who have frowningly watched the entire conference hug each other in a state of euphoria. And a German delegate, normally a level-headed man, jumps up and down like a rubber ball and keeps punching me in the ribs, completely breathless, "Herr Kaul, Herr Kaul, we've done it! We're getting an international criminal court!"

And then, in all this "*Tohuwabohu*," in all this chaos of clapping and screaming, something strange, something unexpected happens: I see Professor Harris standing up, and with a serious face, he begins to walk towards the German delegation, across the entire conference hall. While he is striding towards us, maybe forty yards, undisturbed by the cheering delegates, I realize that he is constantly looking at me. Even today, this scene is still in my head. I see his walk in some kind of slow motion; I ask myself why? What does he want?

A moment later, he shakes my hand and says—I do not recall his exact words—this is a great day for the entire world. It is a breakthrough, the fulfillment of many hopes. In a foreseeable future, we will have a world criminal court. He believes that the German delegation has played a decisive role—that without Germany, the crime of aggression would not have been included in the treaty.[6]

I admit, I am shaken, confused, and touched at the same time. That this prominent former U.S. Nuremberg prosecutor is acknowledging the work of my people and of myself is almost too much. Finally, Mr. Harris takes me by the shoulders. Then he says: "Now you must promise that from now on we will remain in close contact." Still shaken, I promise.

Then comes a further sentence, almost an order: "And from now on, you call me Whitney, understood?"

When he embraces me briefly to say goodbye, I feel, for the first time, the special heartiness and warmth of Whitney, which were so characteristic of him.

Well, this is the beginning of a lasting friendship with Whitney, a relationship for more than a decade, with countless exchanges and contacts—with meetings in Germany, in Berlin, in Nuremberg, in St. Louis and elsewhere. And it is so wonderful that the friendship with

6. On the German delegation's role for the inclusion of the Crime of Aggression, see, *inter alia*, PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATIONS, GLOBAL INST. FOR THE PREVENTION OF AGGRESSION & LICHTENSTEIN INST. OF SELF-DETERMINATION AT PRINCETON UNIV., HANDBOOK: RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS TO THE ROME STATUTE OF THE ICC (2012); Hans-Peter Kaul, *Is it Possible to Prevent or Punish Future Aggressive War-making?*, 1 FICHL OCCASIONAL PAPER SERIES 1 (2011); STEFAN BARRIGA & CLAUS KRESS, CRIME OF AGGRESSION LIBRARY: THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION (2012).

Whitney soon includes Anna Harris and Elisabeth, my wife, and also Leila Sadat.

THE CONTINUING SIGNIFICANCE OF THE NUREMBERG TRIALS

There is no doubt: Whitney was one of the foremost pioneers of the Nuremberg Trials—and I am convinced not only of their continuing historic significance, but also of their significance for the world of today and tomorrow.[7] Today, we realize, and it is obvious, that these trials were based on a breakthrough, on some kind of intellectual and legal quantum leap of enormous significance. Notwithstanding the involvement of the three other victorious powers, Nuremberg is in essence an American invention, a contribution of men like Justice Robert H. Jackson, Telford Taylor, Whitney Harris, Benjamin Ferencz and others. Their ideas and actions made a difference; they provided lasting international awareness for the necessity of the rule of law in international relations. All these innovative ideas, the contribution of the Nuremberg Trials and of the underlying principles, have had a decisive and on-going influence on international law. Thus, without Nuremberg, there would have been no ad hoc tribunals; without Nuremberg there would have been no International Criminal Court. There would be no recognition for the principle that is universally recognized today: nobody is above the law. There can be no impunity for grave crimes, which concern the international community as a whole, regardless of the rank or nationality of the perpetrators in question.[8] And, above all, Nuremberg achieved, for the first time, clarity about a fundamental principle: aggressive war, which had been a national right throughout history, should henceforth be punished as an international crime.[9]

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7. Hans-Peter Kaul, *From Nuremberg to Kampala—Reflections on the Crime of Aggression*, *in* PROCEEDINGS OF THE FOURTH INTERNATIONAL HUMANITARIAN LAW DIALOGS 59, 67–69 (2011).

8. *See* Universal Declaration of Human Rights art. 7(1), G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (Dec. 10, 1948), which states, "All are equal before the law and are entitled without any discrimination to equal protection of the law."

9. *See* Principle VI of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Rep. of the Int'l Law Comm'n., 2d Sess., June 5–July 29, 1950, U.N. Doc. A/1316; GAOR, 5th Sess., Supp. No. 12 (1950) (stating that "The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)."); *see also* Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOBAL STUD. L. REV. 551, 565 (2007).

When truly historic events take place, historical developments, which may shape the future of humanity or at least affect entire nations, regularly many people, sometimes thousands or more, are personally involved.

Experience shows that in such situations you can essentially distinguish between two types of reactions, two types of people involved: most, the great majority, will, while the events are on-going, do their job as usual; however, when it is over, they will go on living as before, leaving this chapter behind them.

On the other hand, however, a few individuals involved will, while the events are still on-going, not only contribute to them to the best of their abilities, but they will already then think about the higher meaning, the implications of what is happening, think about possible consequences and conclusions for the future—and they will continue to analyze these historic events once they are over.

I have personally seen this phenomenon, for example, during the months and years of the process of German reunification in the last century in which I myself was deeply involved. Likewise, I am convinced that Whitney, even when he was still working very hard in Nuremberg in 1945–46, he was already thinking about the implications and likely consequences of the International Military Tribunal (IMT), of the lessons of the trials for the future. Yes, I believe that he was aware that history was taking place, that he would later be a witness of history.

Thus, his intellect, his knowledge of history, of law, and his analytical mind enable him to act as the first eloquent advocate of the Nuremberg legacy. Already in 1954, he publishes this book, "*Tyranny on Trial*,"[10] the first authoritative account of the Nuremberg trial. When I eventually read it, after my return from the Rome Conference, it is a revelation, an eye-opener. What a comprehensive legal and historic account, what an objective account of the Nazi crimes and their prosecution in Nuremberg, indeed! What a compelling summary of the lessons to be drawn for the future! It is therefore that today this book can be found in most libraries all over the world. When, in 2008, a translation into German is published,[11] hundreds of Germans in Nuremberg, in Marburg, and in Frankfurt absolutely wants his autograph—and Whitney patiently signs every single book people presents to him.

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10. WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945–1946 (rev. ed. 1999).

11. WHITNEY R. HARRIS, TYRANNEN VOR GERICHT: DAS VERFAHREN GEGEN DIE DEUTSCHEN HAUPTKRIEGSVERBRECHER NACH DEM ZWEITEN WELTKRIEG IN NÜRNBERG 1945–1946 (Christoph Safferling & Ulrike Seeberger trans., 2008).

THE NUREMBERG LEGACY AND THE CRIME OF AGGRESSION

To prevent war, to end and to repress further crimes against peace, and to fight against further uses of aggressive armed force, this was and continues to be one of the main lessons and challenges emanating from Nuremberg. If you look at the writings and speeches of Robert H. Jackson, Telford Taylor, Whitney Harris, Benjamin Ferencz and others, it becomes clear that all leading Americans involved in the Nuremberg Trials are united in this common conclusion; they are united in their abhorrence for the aggressive use of armed force.

This is the Nuremberg legacy. This is of the greatest importance for generations to come.

It is equally significant for the future work of the ICC, when the Court, after 2017, will have, at least to a certain extent, jurisdiction with regard to future crimes of aggression.[12] In Germany, the ratification law on the crime of aggression amendments has already been approved by the Cabinet of Chancellor Angela Merkel; the draft law is already in the Bundestag.[13]

What I am trying to explain to you—Whitney, again, in his 2004 book "The Tragedy of War"[14] was capable of brilliantly summarizing his lifelong conviction in one single phrase: "The crime of waging aggressive war must be recognized, defined and punished when it occurs, for war is the greatest threat to the survival of civilization."[15] As some of you may know, I have often quoted this statement of Whitney, in speeches, articles, and interviews.[16] I have used it to emphasize the absolute necessity to criminalize aggressive uses of armed force. As somebody who was born during the Second World War, who grew up amidst ruins and destruction, who gradually understood the terrible consequences of the aggressive wars started by Adolf Hitler and his followers against so many nations, I continue to believe:

War—this is the ultimate threat to all human values; war is sheer nihilism. It is the total negation of hope and justice. Experience shows that

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12. *See* PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATIONS, *supra* note 6, at n.6.

13. On November 29th, 2012, the German Parliament (Bundestag) in its final reading unanimously approved the ratification bill on the amendment of the Rome Statute in order to include the Crime of Aggression. This step now enables the final ratification procedure to be completed in due course. For more information on the status of the ratification, see Plenarprotokoll 17/211, Deutscher Bundestag: Stenographischer Bericht 211. Sitzung, Nov. 29, 2012, at 25915, *available at* http://dip21.bundestag.de/dip21/btp/17/17211.pdf (Ger.).

14. WHITNEY R. HARRIS, THE TRAGEDY OF WAR (2004).

15. *Id.* at 118.

16. *See*, *inter alia*, Hans-Peter Kaul, *supra* note 6, at n.6.

war, the injustice of war in itself, begets massive war crimes and crimes against humanity. In my nine years as a Judge of the ICC, I have seen that, as in the past century, a terrible law still seems to hold true: war, the ruthless readiness to use military force, to use military power for power politics, regularly begets massive and grievous crimes of all kinds.

EQUAL LAW FOR ALL, EQUALITY BEFORE THE LAW

Let me now turn to another principle of the Nuremberg legacy—and again you will see how Whitney and Robert H. Jackson were thinking along the same lines: "*Equal Justice under Law.*" This principle is engraved above the main entrance of the U.S. Supreme Court Building in Washington D.C. The principle of "equal law for all, equality before the law" is a general principle of law recognized by all nations. In Rome, the eternal city, where the ICC Statute was born, you can read on the façade of the Constitutional Court "*La legge e equale per tutti*"—the law is equal for all.

Yet, what is less known is that before Nuremberg the four allied victorious powers were seriously divided regarding the question of how to deal with the leaders of the Third Reich after German capitulation. This concerned in particular two questions, two fundamental questions, which, in the end, were essentially answered according to the ideas and principles of Robert H. Jackson. If this had not been the case, the course of history would have been, in all likelihood, dramatically different.

On 23 April 1945, three weeks before the end of WWII, during negotiations in London, the U.K. Government handed over an aide-mémoire to the U.S.[17]—today, I have it here in my hands, but in 1945 it was, of course, classified as "top secret."

This British memorandum openly pleads for summary executions of all Nazi leaders without trial. Let me quote one sentence, "*execution without trial is the preferable course.*"[18]

It is reported that the delegates of Stalin were quite sympathetic to this proposal. Prior to the establishment of the IMT, the Soviet General Iona T. Nikitchenko, who later became a Judge at the Nuremberg Trials, expressed the Soviet position in rather unambiguous terms: "*If . . . the judge is supposed to be impartial, it would only lead to unnecessary delays.*"[19]

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17. International Conference on Military Trials: Aide-Mémoire from the United Kingdom, Apr. 23, 1945, *available at* http://avalon.law.yale.edu/imt/jack02.asp.

18. *Id*. para 2.

19. *See* HARRIS, *supra* note 10, at 17.

In this critical situation, it is Robert H. Jackson who, together with the U.S. delegation, and against all odds, eventually managed to achieve agreement on the Charter of the IMT in Nuremberg.

A second, similarly serious, difference in view concerned proposals to the effect that the IMT and the criminal norms and procedures applied there should be used only one single time, only in this special tribunal against the German perpetrators, without any further validity and consequence for international law. Again, it was Robert H. Jackson who rejected this approach and underlined the general validity of the applicable norms, including the principle of "equality before the law, equal law for all."

It is well known what Robert Jackson said in his opening speech in 1945:

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. . . . And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.[20]

It is this statement in particular which demonstrates that the objective for the Nuremberg Trials was not, in contrast to the continuing allegations of some, a mere exercise of victors' justice. Quite to the contrary, this statement demonstrates quite clearly that the principles applied in Nuremberg should constitute the basis for a new legal order for all states and men, with equal law for all.

There is further proof and further evidence for this. On October 17th, 1946, a week after the Nuremberg Judgement, Jackson reports to President Truman: "*These standards by which the Germans have been condemned will become the condemnation of any nation that is faithless to them. By the Agreement and this trial, we have put International Law squarely on the side of peace as against aggressive warfare . . . .*"[21]

Telford Taylor, for his part, affirms in 1949 in Washington: "Nuremberg was part of the process of enforcing law—law that long

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20. Jackson's opening statement is published in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98–155 (1947). It is also available on the web, as part of the full record of the proceedings before the IMT, through the Avalon Project at Yale Law School at http://avalon.law.yale.edu/subject_menus/imt.asp.

21. Rep. by Justice Robert H. Jackson, to Pres. Harry S. Truman, International Conference on Military Trials: London, 1945 (Oct. 7, 1946), *available at* http://avalon.law.yale.edu/imt/jack63.asp.

antedated the trials, and that will endure into the future; law that binds not only Germans and Japanese, but all men."[22]

Four years after Nuremberg, the powerful process of development of international law that was set in motion by Jackson, Taylor, and other outstanding American lawyers in Nuremberg, is confirmed by the United Nations. In 1950, the U.N. General Assembly adopts the Nuremberg Principles,[23] thereby recognizing them as rules of international law, which shall be respected by all members of the U.N.

Today, we are again acknowledging the Nuremberg legacy; we are honoring Whitney as one of the American heroes of Nuremberg.

THE IMPORTANCE OF THE NUREMBERG TRIALS FOR GERMANY

At this point, let me comment on the importance of the Nuremberg Trials for Germany and the German people. It is well known that initially there was very little understanding for these trials; the political parties in post-war Germany needed a long time, probably too long, to come to terms with Nuremberg.[24] There were, however, also many Germans who, already in 1945, found it an absolute necessity that the leaders of the Nazi Regime should be brought to justice. Fritz Bauer for example, a brilliant high-ranking German-Jewish jurist exiled in Sweden, published already in 1943, his programmatic book "Die Kriegsverbrecher vor Gericht,"[25] meaning "the war criminals must be brought to justice"—but it is another irony of history that he was allowed to return to Germany only in 1949; in 1963, he became the Chief Prosecutor in the Auschwitz Trials held in Frankfurt.[26] Like him and others, I am persuaded that the Nuremberg Trials were an absolute necessity, a historic must. Also, in interviews I

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22. Statement from Telford Taylor on the Nuremberg Trials for the International News Service (May 9, 1949), *available at* http://www.columbia.edu/cu/lweb/eresources/exhibitions/treasures/html/188b.html.

23. Special Rapporteur J. Spiropoulos, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, Int'l Law Comm'n, U.N. Doc. A/CN.4/22 (Apr. 12, 1950) (endorsed by the U.N. General Assembly resolution 488(V) of 12 December 1950 (Formulation of the Nürnberg principles)).

24. For a comprehensive overview of how post-war Germany dealt with Nuremberg, see Claus Kress, *Versailles—Nuremberg—The Hague: Germany and International Criminal Law*, 40 INT'L LAW. 15 (2006).

25. FRITZ BAUER, KRIGSFÖRBRYTANA INFÖR DOMSTOL (DIE KRIEGSVERBRECHER VOR GERICHT) (1945). The book was first published in Sweden in 1943; in 1945 a translation both into German and Danish was published by the Zurich-based Europa Verlag; *see also* IRMTRUD WOJAK, FRITZ BAUER 1903–1968: EINE BIOGRAPHIE (2009).

26. *See, inter alia*, REBECCA WITTMANN, BEYOND JUSTICE: THE AUSCHWITZ TRIAL (2005); DEVIN O. PENDAS, THE FRANKFURT AUSCHWITZ TRIAL, 1963–1965: GENOCIDE, HISTORY, AND THE LIMITS OF THE LAW (2006).

have stated many times that these dramatic encounters in Nuremberg, this shocking look into the mirror of the Nazi crimes—it was necessary for the German people, as some kind of catharsis in order to enable Germany to prepare itself for a new beginning.

Why do I speak to you, this distinguished American audience, about the enormous influence the Nuremberg Principles have had on international law, have had on the emergence of democracy and the rule of law in post-war Germany? Because I also want to convey to you how much the historic work, the lifelong commitment of brilliant American jurists present at Nuremberg have enhanced the standing and respect that the United States enjoyed in Germany and in the world. Often, I am not certain that many Americans really understand the historic achievements of Jackson, Whitney, and others, and what these men have done internationally for their own country—the United States of America.

In 2005, their historic role and contributions to the Nuremberg trials are again recalled in Nuremberg itself, at a German-American conference commemorating the 60th anniversary of the opening of the trial against the twenty-one major German war criminals.[27] For Elisabeth and me, this is a most welcome opportunity to meet Whitney and Anna again. It is clear to all in Nuremberg that Whitney Harris and Benjamin Ferencz are the most prominent participants, indeed the guests of honor of this unusually large conference. If my memory serves me right, a large number of distinguished U.S. citizens have also come to Nuremberg at the initiative of the Robert H. Jackson Institute in Jamestown, New York.

Whitney, then ninety-two, delivers, again, the opening speech in historic courtroom 600,[28] humanity's courtroom indeed. When Whitney speaks, eloquent and gripping as ever, with his beautiful baritone voice, you can feel once more that as a Nuremberg Prosecutor, he has looked into the eye of mass murder, destruction and evil; that he has prosecuted, *inter alia*, Ernst Kaltenbrunner, the head of the Reich Main Security Office, and has interrogated Rudolf Höß, the commander of the Auschwitz concentration camp; and that he has seen and witnessed the terrible consequences of aggressive wars and all related crimes. Again, Whitney stresses the indispensable necessity to uphold the rule of law. He

27. A collection of all the contributions to this conference can be found in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945: 60TH ANNIVERSARY INTERNATIONAL CONFERENCE (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006) [hereinafter THE NUREMBERG TRIALS].

28. Harris, *Tyranny on Trial—Major German War Criminals at Nuremberg, Germany, 1945–1946*, *in* THE NUREMBERG TRIALS, *supra* note 27, at 106.

concludes by stating that the main message of Nuremberg "is a law-ordered world in which nations live at peace."[29] Then, he acknowledges the ICC as the long awaited realization of the Nuremberg Principles. "Because of Nuremberg there is hope for a better tomorrow."[30]

Those who are present will not forget this evening.

THE ICC AND THE U.S.

The next day, it is my task as an ICC judge, working at The Hague since 2003, to report on the current situation of our Court. At that time, in July 2005, our situation is not exactly favorable, not easy indeed. In 2005, please remember, the Bush Administration in Washington is on the warpath against the ICC. Some in Washington is pursuing a systematic campaign to undermine, to marginalize, and to discredit our Court, also to discourage States to ratify the Rome Statute. To this effect, even special anti-ICC legislation is pushed through—legislation, which is soon nicknamed the "Hague Invasion Act."[31] Thus, for the Court the overall situation existing then is not exactly good.

And I, what shall I say? At first, I am tempted to use that high-profile event to strongly denounce all these anti-ICC activities by the then-U.S. administration; I am inclined to say that I regard these hostile activities as a total negation of the Nuremberg legacy, of the work of Jackson, Whitney and all the others.

But then, I think about my eight years in the U.S., in Washington and in New York, and about all the good experiences I made in this great country. So, I decide to renounce on my criticisms. Instead, I end my speech with a hopeful note:

> [T]he International Criminal Court needs the support of the United States of America, this great country, which time and again had a decisive role in bringing about the fall of tyranny and re-establishing the rule of law. The Court needs American support, morally, politically, materially and in other ways. It remains also our hope that one day the Judges may have an American colleague on the bench, maybe somebody with the stature of Justice Jackson

29. *Id.* at 109.

30. *Id.* at 110.

31. The Act is officially entitled, American Service-Members' Protection Act ("ASPA") and constitutes a U.S.-federal law that was signed into Law by George W. Bush and passed by Congress in August 2002. *See* American Service-Members' Protection Act, Pub. L. No. 107-206.

> or Whitney Harris, whom they may elect as the first American President of the International Criminal Court.[32]

The audience is probably half American, half German—they respond with kind applause.

And Whitney? Well, he smiles. Apparently, he does not dislike what I just said. He seems to find it interesting that someone like Jackson or himself might, one day, be the first American President of the ICC.

In the afternoon of the same day, Whitney, Anna, Elisabeth and I drive to the Grand Hotel Nuremberg, destroyed to a significant extent in the war, now rebuilt to its full splendor. In 1945–1946, the Grand Hotel served as the temporary home and accommodation of Whitney. The Hotel's so-called "marble room," a beautiful art-deco dining hall with eighteen marble columns, was the place where U.S. officers, members of the Prosecution teams, including Whitney, loosened up, where they wined and dined and even danced to live music; where they relaxed from the stress and the horrors of the hearings and trials. Whitney tells us that he was often there—and you see that he thinks about what it was like to be in this marble room at the age of thirty-three or thirty-four, you see that he liked to be there, sometimes with famous bands from the U.S. playing from the balcony of this hall. We have a good time as Whitney tells us about his life as a young man in Nuremberg.

On April 22nd, 2010, Whitney passes away. Some months later, on November 21st, 2010, the Memorium Nuremberg Trials,[33] just above courtroom 600, is inaugurated. I mention this in passing because Whitney is alive in this museum day by day. In its video room, you can see, several times a day, a thoughtful interview with Whitney—he explains his ideas about peace and international justice. Since its opening, the new museum has become an instant success; it attracts tens of thousands of visitors each year, very many from the U.S.

Courtroom 600, where Jackson, Whitney, and others made history, will be the centerpiece of the emerging Nuremberg Principles Academy.[34] The Academy will be formally established next summer, with the support of the German Government, the Federal State of Bavaria and the City of Nuremberg. The mandate of this new institution is to internationally

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32. Hans-Peter Kaul, *The International Criminal Court: Key Features and Current Challenges*, *in* THE NUREMBERG TRIALS, *supra* note 27, at 245, 249 (internal citations omitted).

33. For further information, see MEMORIUM NURNBERGER PROZESSE MUSEEN DER STADT NURNBERG, http://www.memorium-nuremberg.de (last visited Feb. 10, 2013).

34. For further information, see *id*. (available through http://www.museums.nuremberg.de/academy/index.html).

promote the Nuremberg Principles. As the ICC constitutes the most far-reaching realization of the Nuremberg Principles, it is only natural that the Academy's work will focus in particular on all kinds of support activities for our Court.

LESSONS FOR THE PRESENT AND THE FUTURE

Speaking about the Nuremberg legacy, another great achievement of Whitney I have to acknowledge is the symposium titled "Judgement at Nuremberg." On the 60th anniversary of the Judgement of the IMT at Nuremberg this symposium was held here at Washington University in St. Louis from September 29th to October 1st, 2006, exactly in this hall where we are today. Whitney, Leila, and others put heart and soul into this outstanding conference, which gives me again the chance to meet Whitney, Anna, and others. The proceedings of this unusual, yes unique conference were published in this edition of the "Washington University Global Studies Law Review."[35] I continue to cherish this book. I would wish that at least some of the lessons from Nuremberg, some of the fine considerations and legal principles summarized in this volume, would guide modern practical policy of States. If this were possible, our world would certainly be a more peaceful, a more just place.

What I want to emphasize is the quality, profoundness, and impartial fairness of the speeches and of the contributions at this symposium. This concerns in particular the contributions of Whitney,[36] Ben Ferencz,[37] and Henry T. King Jr.,[38] the three Nuremberg Prosecutors, which Whitney and Leila again brought together. The entire conference is future-oriented. In my view, I hardly ever participated in a conference attempting so seriously to identify the lessons for the present and the future to be drawn from the terrible crimes and catastrophes, which had to be dealt with at Nuremberg. Henry T. King reminds all present that Nuremberg was designed to replace the law of force with the force of law. Benjamin Ferencz speaks about the task to educate young minds, from the very beginning, that war is not glorious. Whitney, in his epilogue to the conference, affirms that the

35. *Symposium—Judgment at Nuremberg*, 6 WASH. U. GLOBAL STUD. L. REV. 483, 483–771 (2007).

36. Whitney R. Harris, *A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court*, 6 WASH. U. GLOBAL STUD. L. REV. 689 (2007).

37. Benjamin B. Ferencz, *A World of Peace Under the Rule of Law: The View From America*, 6 WASH. U. GLOBAL STUD. L. REV. 663, 671 (2007).

38. Henry T. King Jr., *Without Nuremberg—What?*, 6 WASH. U. GLOBAL STUD. L. REV. 653 (2007).

time has come, that the world must turn from punishing aggressions of the past to preventing aggressions in the future. He, again, welcomes and acknowledges the ICC as a new world court capable of bringing to justice persons guilty of aggressive war, war crimes, and crimes against humanity, including genocide.

As we are commemorating Whitney today, his insights, his principles, and his spirit continue to be with us; I would even say that some of us, including myself, continue to be under his spell.

What then was the magic that surrounded Whitney, which had such a profound impact on so many of us?

Many answers to this question are possible, quite eloquent responses have already been given each time he was honored, or awarded yet another prize or distinction.

From my perspective, please allow me to say the following: Whitney was an unusually talented, appealing, yes attractive man, this in the most comprehensive sense. He was remarkable in terms of intellect, character, principles, and attitude, and he possessed a natural righteousness coming from the heart. He was appealing to men and women alike, distinguished and sympathetic as he was. You may say he had it all; he had it all, a rare combination of talents, a sharp mind, but also success in life. In my view he was somehow—I now use a German saying—"*Ein Liebling der Götter*," which means a favorite of the gods.

He was not only distinguished and sympathetic, but yes, a beautiful man, even in his eighties. I remember that former U.S. Senator Christopher Dodd during the 2006 symposium told us that his father, another distinguished U.S. Prosecutor in Nuremberg, always said that the thing that annoyed him the most about Whitney was that he was the best looking man in every room he entered.[39]

This is certainly correct; on the other hand, this alone cannot explain why Whitney made such a deep impression on so many.

In the end, I believe it was, beside all his unusual talents and qualities, his exceptional, totally unusual, natural generosity and kindness. Whoever spoke with Whitney could be certain that he would listen in an open, friendly, and supportive manner. Whoever asked for his advice could be certain that he would answer in a fair and honest manner, respectful in his modest, down-to-earth, personal style. Thus his manner would not give any indication of Whitney's extraordinary life and achievements.

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39. Christopher J. Dodd, *Nuremberg: Past, Present and Future*, 6 WASH. U. GLOBAL STUD. L. REV. 645, 645 (2007).

I, myself, had the privilege to have a wonderful father whom I admired and loved so much. Unfortunately, he died already in 1966, from all the sufferings and sicknesses he had caught as a prisoner of war in Russia from 1945 to 1949. I was only twenty-three years old and, from then on, I had to care for my mother to the best of my abilities.

Well, during the friendship with Whitney, since 1998, I often had the feeling that he treated me almost like a son; and I myself became aware that, somehow, for Whitney I had the same feelings of respect and admiration that I once had towards my father.

Finally, let me recall once again the very special, if not historic visit of Whitney and Anna to Berlin in October 2000. Whitney himself has spoken about this special visit to the German capital numerous times, in interviews, articles, and publications.[40] There are signs that he regarded this visit as one of the finest hours in his life. The story of this memorable stay in Berlin—Anna and I were present—is as follows:

Whitney had told me repeatedly, time and again, that he absolutely wanted to be in Berlin when Germany would ratify the Rome Statute of the International Criminal Court. Thus, it was his special wish to be present when the German Parliament would vote on the ratification law for the future International Criminal Court. On October 27th, 2000, Whitney, elegant and distinguished as ever, sits on the gallery of the Reichstag reserved for the guests of honor, the only one on this gallery above us. I myself am sitting behind Chancellor Schroeder and Foreign Minister Fischer, on the bench reserved for the senior civil servants. When the ICC law is adopted, Deputy Foreign Minister Vollmer takes the floor and says,

> Dear Colleagues,
>
> As many of you are already aware, we have as guest of honor Whitney R. Harris, a former Nuremberg Prosecutor and aide of Robert H. Jackson. May I propose that we rise from our seats in honor of his work and all what Nuremberg has done for the German people.[41]

All parliamentarians from all parties, from the left to the right, rise. The records of the German Bundestag note a "standing ovation and long applause."[42]

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40. *See*, *inter alia*, Harris, *supra* note 28, at 110; Harris, *supra* note 36, at 701.

41. Plenarprotokoll 14/128, Deutscher Bundestag: Stenographischer Bericht 128, Oct. 27, 2000, at 12358, *available at* http://dip21.bundestag.de/dip21/btp/14/14128.pdf (Ger.).

42. *Id.*

On the same day, on October 27th, 2000, this newspaper piece, a wonderful portrait article on Whitney, is published all over Germany in the *Süddeutsche Zeitung*, one of our leading national dailies. Its title is "*Der letzte Zeuge*,"[43] meaning the last witness—because Whitney is then indeed the last man standing of the former IMT U.S. Prosecutors at Nuremberg.

Later, in the evening, Whitney, Anna, and I celebrate this special day in the Hotel Adlon, opposite The Brandenburg Gate and the Reichstag. When we have a glass of wine, Whitney pauses a little bit and then he says, as if talking to himself:

"*Hans-Peter, that Germany has now become such a steadfast supporter of international justice, this is full circle, this is a sign that our legacy lives on.*"

Yes, Whitney, your spirit and your legacy live on and will endure.

You have shared your dramatic experiences and your vision for the future with us—we feel inspired and encouraged by you.

You have shown us that power built on contempt of international law and aggression will not stand—we continue to hear you.

You have given us your warmth, your never failing kindness, and your generosity—we are so grateful and we miss you.

Ladies and gentlemen, let us again remember, let us again honor Whitney R. Harris—a great American, a great citizen of St. Louis, and a true champion in the struggle for peace, law, and justice in the world, which, as Whitney has said, is eternal!

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43. Stefan Ulrich, *Der letzte Zeuge*, SÜDDEUTSCHE ZEITUNG, Oct. 27, 2000, at 13.