

## Lectures and Occasional Papers - 2002 No.1

### A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court

- [Foreword](#) – *Stephen H. Legomsky*
- [A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court](#) – *Whitney R. Harris*
- [Postscript](#) – Justice Robert H. Jackson on "My dear Whit" *John Q. Barrett*

#### FOREWORD

The Whitney R. Harris Institute for Global Legal Studies is pleased to inaugurate our new Occasional Paper Series. As its name implies, the Series will not follow a fixed schedule. Whenever an Institute speaker or project yields a written product that we believe will be of sufficient general interest, the plan is to publish an "occasional paper" and to disseminate it in both print and electronic form.

We think it especially fitting to inaugurate the new Series with a superb paper by our distinguished benefactor, Mr. Whitney R. Harris. Entitled "A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court," the paper was delivered by Mr. Harris on February 7, 2002, at the ceremony held to re-name the Institute for Global Legal Studies in his honor. Perhaps even more fitting, no themes better capture the mission of the Institute than the threads that hold this paper together – international justice and the rule of law.

To describe Whitney Harris, I start with a simple observation: While millions of people have done small things to make the world a better place, only a handful have done big things. And by big things, I mean the kinds of things that have discernibly altered the course of human history.

Mass violations of the most basic human rights – atrocities so unspeakable that one can scarcely imagine human beings capable of perpetrating them – have been with us since ancient times. Until 1945, however, no multinational tribunal ever possessed the power to try high government officials or anyone else accused of such acts. The International Military Tribunal at Nuremberg was the world's first such court. The allies were determined to bring war criminals to justice. They were equally determined that every accused receive a fair trial.

In his opening statement, Chief Counsel Robert Jackson summed up the task at hand with characteristic eloquence:

That 4 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 ever has paid to Reason.

Whitney Harris has devoted his entire professional life to making power pay tribute to reason. His life's work has reflected one simple but forceful idea – that the key to civilization is the rule of law.

Mr. Harris was a member of the prosecuting team at the International Military Tribunal at Nuremberg. Some regard him as Justice Jackson's right hand. He personally prepared and presented the case against the Chief of the Gestapo, Ernst Kaltenbrunner. Later, as a professor at the Southern Methodist

University School of Law, Whitney Harris wrote his classic treatise on Nuremberg, *Tyranny on Trial*, now in its 3<sup>rd</sup> edition.

Having graduated Phi Beta Kappa and magna cum laude from the University of Washington, Mr. Harris went on to receive his law degree at the University of California, graduating Order of the Coif. He then served with distinction in the United States Navy during World War II.

His other accomplishments are too numerous to list, but here are a few: Whitney Harris has been the Executive Director of the American Bar Association, after having chaired its International Law section and before going on to chair its Administrative Law section. He has written other books, including one on family law and one on legal services and procedures, as well as numerous articles. He has been the President of the St. Louis Civic Ballet, President of the Japan-American Society of St. Louis, and active in a range of other civic organizations.

Today, at age 89, Whitney Harris remains a tireless crusader for a world-ordered society. He was an NGO delegate to the 1998 Rome Conference for an International Criminal Court and since then has worked mightily on the ratification campaign. At the invitations of the German Bundestag and the UK Parliament, Mr. Harris participated in ceremonies to celebrate those countries' formal ratifications. Meanwhile, he continues to travel the United States and the world in his campaign for additional ratifications.

Whitney Harris is a special person. He is part of both the history and the continuing evolution of international criminal justice, and he has long been a special friend to Washington University, the School of Law, and our Institute. We are grateful, proud, and joyful that the Institute will forever bear his name.

This Institute officially opened its doors in November 2000, after a full year of intensive planning. Through a multi-pronged program of education, research, and public service, the Institute's goals are to prepare our students for the global society in which they will live and work and to contribute actively to the solutions of the most vexing world problems. Our activities include international conferences; a speaker series; an international salon series in private homes; a series of international debates and accompanying publications; a cradle-to-grave advising program for prospective, current, and future students interested in international careers; an American Red Cross volunteer program that enables our law students to teach international humanitarian law to area high school students; a fellowship program for sending our students to the Hague Academy of International Law; various human rights externships; producing literature on ongoing issues and activities; and advising and supporting all the various other international operations of the School of Law. This Occasional Paper Series is our newest initiative.

I take the liberty of closing with a personal note. After three highly fulfilling years of directing what is now the Whitney R. Harris Institute for Global Legal Studies, I shall be stepping down from this position on July 1, 2002. It has been an honor and a pleasure to work with people like Whitney Harris and the many others – far too numerous to list here – who have given so generously of their time and thoughts. I particularly appreciate the unwavering support and confidence of Dr. Mark S. Wrighton, Chancellor of Washington University, and the Ethan A.H. Shepley University Professor Joel Seligman, Dean of the School of Law. I have been craving far more time for teaching and research but plan to stay very much involved in the work of the Institute. In the meantime, I take comfort in knowing that the Institute will soon be in the capable hands of its incoming director, Professor John O. Haley, the Wiley Rutledge

Professor of Law. I am confident that under Professor Haley's leadership the Institute will continue to grow and prosper.

For more information on the Whitney R. Harris Institute for Global Legal Studies, please visit our website at </harris/pages.aspx?id=1709>.

Stephen H. Legomsky

Charles F. Nagel Professor of International and Comparative Law and Director of the Whitney R. Harris Institute for Global Legal Studies  
Washington University School of Law

### **"A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court"**

It is a great honor to be here for this meeting of the Institute for Global Legal Studies and I wish Washington University the greatest success in the expansion of the study of law to embrace international affairs as well as our domestic laws.

The genesis of the trial of the major German war criminals at the end of World War II was the Moscow Conference of October, 1943, at the conclusion of which, a statement was signed by President Roosevelt, Prime Minister Churchill, and Premier Stalin declaring the determination of the three powers to hold Germans individually responsible for crimes committed by them in the course of the war. The statement did not declare whether such offenders would be punished by executive action or pursuant to the judicial process. In Britain, Lord Chancellor Simon and Prime Minister Churchill were of the view that major war criminals should be disposed of by executive action. This view was echoed in the United States by Secretary of the Treasury Morgenthau, who proposed to President Roosevelt that German arch criminals be shot upon capture and identification. Secretary Morgenthau was opposed in the Cabinet by Secretary of War Henry L. Stimson who believed that leading Nazis should be brought to trial before an international military tribunal. Stimson's views ultimately prevailed and a memorandum recommending a trial was prepared for the use of President Roosevelt at the three-power Yalta Conference in February 1945. The memorandum stated that condemnation of German war criminals after a trial would command maximum public support and receive the respect of history and it noted that use of the judicial method would make an authentic historic record of Nazi crimes.

Supreme Court Justice Robert H. Jackson was appointed by President Truman on May 8, 1945, as the United States Chief of Counsel charged with obtaining the agreement of the Allies to a trial of the major German war criminals before an international military tribunal. He entered upon this daunting task with unswerving determination. He succeeded in persuading the British to accept the proposal to punish German war criminals after trial by an international military tribunal established for that purpose. Representatives of the United States, Great Britain, France and the Soviet Union met in London on June 26, 1945, for the purpose of drafting an agreement to establish an international military tribunal for the trial of major war criminals, a charter for the tribunal, and an indictment of the principal leaders of Nazi Germany. The London Agreement was adopted on August 8, 1945.

The charter created the International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis. The charter set forth three basic crimes charged to the defendants: the crime of initiating and waging aggressive war, war crimes, and crimes against humanity

committed in the course of war. In addition, under the American prosecution theory, the defendants were charged with engaging in a common plan or conspiracy to commit all of these crimes. It was the American theory that Adolf Hitler and his associates sought to gain control of the German State, establish a dictatorship, and lead the German people into domination of Europe by force of arms. This was the basic common plan and all who joined with Hitler necessarily supported these criminal objectives and were liable for the crimes committed in furtherance of the conspiracy.

The trial opened on November 20, 1945. The president of the tribunal, Lord Justice Lawrence, of Great Britain, set the tone for the proceedings of that day and all the days to follow when he said, "The trial which is now about to begin, is unique in the history of the jurisprudence of the world and it is of supreme importance to millions of people all over the globe. For these reasons, there is laid upon everybody who takes any part in this trial the solemn responsibility to discharge their duties without fear or favor in accordance with the sacred principles of law and justice. The four signatories have invoked the judicial process. It is the duty of all concerned to see that the trial in no way departs from these principles and traditions which alone give justice its authority and the place it ought to occupy in the affairs of all civilized states."

The indictment was read at length into the record, after which the defendants were called upon to enter their pleas. Ley was dead by his own hand and the tribunal had postponed proceedings against Krupp von Bolen because of his physical incapacity. Bormann was absent and a "not guilty" plea was entered for him. Kaltenbrunner was hospitalized and later made his personal plea of "not guilty." All other defendants were present in court and entered "not guilty" pleas. In his opening statement, which has become a jurisprudential classic, Justice Jackson began by stating: "The privilege of opening the first trial of history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish, have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated.@"

Following his opening speech, Justice Jackson directed the presentation of evidence by the various members of his staff on the common plan, individual defendants, and indicted organizations. The defendants were represented by counsel of their choice, including former members of the Nazi party. For the most part, this representation was rigorous and professional. Defense counsel contended that the case should be dismissed because the laws under which the tribunal proceeded had been enacted after the alleged crimes had been committed. The tribunal ruled that the proceeding was not ex post facto since the charter of the tribunal was merely declaratory of existing principles of international law. In some cases, vigorous defense was rewarded, as in the case of Karl Doenitz, whose defense counsel proved by affidavit from Admiral Nimitz that the United States had engaged in undeclared submarine warfare in the Pacific Theater; thereby undermining this charge against Doenitz.

The principal repressive agency of the Nazi regime was the Reich Main Security Office, or RSHA. Both intelligence and special police agencies were combined in this office. Although I was a line officer in the Navy during most of the war, I had served in the Office of Strategic Services or OSS during the last months of its duration. Since I had acquired some knowledge of the Nazi intelligence system while serving in OSS, I was assigned the case against the Gestapo and SD, two organizations within the Reich Main Security Office, and against the chief of that office, the defendant, Ernst Kaltenbrunner. I was provided an office in the drafty Palace of Justice, a second-hand typewriter, a German secretary, and told to prove the case against these defendants.

The major crime against humanity charged to the defendants was the extermination of the Jews in Europe, along with Gypsies and other unwanted minority groups. This crime was primarily the responsibility of the Gestapo and the SD, within the government, and the SS, within the party, thus, proving this part of the lawsuit fell significantly into my hands. From the outset, a primary source of evidence of Nazi crimes was captured German documents. Incriminating orders were frequently given wide distribution and fell into Allied hands. I had collected documents through British intelligence in Great Britain while serving in OSS. Colonel Robert Storey, who served as executive trial counsel to Justice Jackson, had assembled a large collection of documents in Paris, primarily through U.S. military sources. All these incriminating documents were assembled in Nuremberg, classified, translated and made available to both prosecution and defense counsel. They were a reservoir of evidentiary material.

At the beginning of the trial, we had scarcely any actual proof of the Nazi extermination of the Jews of Europe. In preparing the case against the Gestapo and SD and Kaltenbrunner, I repeatedly searched the document room seeking evidence on this crime. One document which I stumbled upon was a letter written by an SS man, Becker, the operator of a gas van in the eastern territories, to Walter Rauff, the head of the motor vehicles department of the Gestapo, in which he complained of the malfunctioning of gas vans under his control which caused the victims to suffocate and die in agony rather than fall gently to sleep as intended.

Shortly before the trial began, I learned that the British had under interrogation in London, Otto Ohlendorf, the head of Amt III of the RSHA, which dealt with matters of intelligence inside Germany. I asked that the British send Ohlendorf to Nuremberg so that I might interrogate him on the organization of the RSHA, of which my defendant, Kaltenbrunner, was the chief. The British did so and I began my interrogation of Ohlendorf by asking him about his activities during the war. He said that except for 1941, he had served as chief of AMT III of the RSHA. Naturally, I asked what he had done during that year. When he replied that during 1941 he had been in command of Einsatzgruppe D, I recalled the Becker letter which had been written from an Einsatzcommando and I was inspired to ask "Well, Ohlendorf, how many men, women, and children did you kill during that year?" And he replied, "90,000." That broke the case on the extermination program of the Gestapo and SD through the murderous activities of the Einsatzgruppen in the eastern territories and we were able to establish through the testimony of Ohlendorf and others that approximately 2,000,000 persons, mainly Jews, were murdered by these units of the RSHA. It was the initial proof of the Holocaust.

Much later in the trial, after we had rested our case, I received a report that the British had taken into custody Rudolf Hoess, the former commandant of Auschwitz concentration camp who had been hiding out as a farmer near Flensburg. I requested that he be brought to Nuremberg where I interrogated him over a period of three days, reducing his testimony to an affidavit, a duplicate original of which is in my collection on the Third Reich of Germany in Olin Library, in which Hoess confessed to the deaths of two and a half million persons at Auschwitz. Hoess told me that in May 1941, Heinrich Himmler, the head of the Nazi Police and SS, had called him to Berlin. Himmler told Hoess that in addition to the great war then beginning with the Soviet Union there was a secondary war - the war against the Jews. Himmler said that if Germany did not destroy the Jews in the course of the war, then Germany would itself be destroyed by the Jews. He directed Hoess to return to Auschwitz where he was to establish facilities for the destruction of Jews who would be sent there by Adolf Eichmann, the head of the Jewish section of the Gestapo. Hoess constructed the huge gas chambers and crematoria used to destroy the victims brought to Burkenau, a new section of Auschwitz constructed for the purpose of gassing and burning

the bodies of Soviet POW's and Gypsies, as well as Jews, brought to the camp. The affidavit which I took from him completed the proof of the Holocaust.

There was, however, an evidentiary problem. We had rested our case, how were we to get this incredible evidence into the record? The difficulty was surmounted for us by Dr. Kauffmann, Kaltenbrunner's attorney. His defense all along had been that when Himmler appointed Kaltenbrunner head of the RSHA he had instructed Kaltenbrunner to confine his activities to matters of intelligence and to leave the administration and utilization of concentration camps to Heinrich Mueller, the chief of the Gestapo. To buttress this assertion, he contended that Kaltenbrunner had never set foot in a concentration camp. When it appeared that Rudolf Hoess would affirm this contention with respect to Auschwitz, the most diabolical of all Nazi camps, Kauffmann called Hoess to the stand as a witness for the defense, enabling us to introduce the incriminating affidavit in its entirety. The Einsatzgruppen chief Ohlendorf was tried, convicted, and sentenced to hang by a subsequent American tribunal. Hoess was tried, convicted, and sentenced by a Polish tribunal to hang on the grounds of Auschwitz. When I was last there the gallows still stood on which he met his fate.

The defendants were given the benefit of both the common law and civil law systems of jurisprudence. As in the common law, they were permitted to testify under oath in their own defense. And all, save Rudolf Hess, did so. At the conclusion of the trial, each of the defendants, including Hess, was allowed to make an unsworn statement to the tribunal in his own defense as permitted under the civil law. Convictions were required to be supported by evidence of guilt beyond a reasonable doubt.

Justice Jackson commenced his final address to the Tribunal with a warning and a prophecy. "It is common to think of our own time as standing at the apex of civilization from which the deficiencies of preceding ages may patronizingly be viewed in the light of what is assumed to be progress. The reality is that in the long perspective of history the present century will not hold an admirable position unless its second half is to redeem its first. These two score years in the twentieth century will be recorded in the book of years as one of the most bloody in all annals. Two world wars have left a legacy of dead which number more than all the armies engaged in any war that made ancient or medieval history. No half century ever witnessed slaughter on such a scale, such cruelties and inhumanities, such wholesale deportations of peoples into slavery, such annihilations of minorities, the terror of Torquemada pales before the Nazi inquisition. These deeds are the overshadowing historical facts by which generations to come will remember this decade. If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization."

Justice Jackson summarized the evidence supporting the guilt of individual and organization defendants and then concluded his summation with the following peroration: "It is against such a background that these defendants now ask this tribunal to say that they are not guilty of planning or executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of the trial as blood-stained Gloucester stood by the body of his slain king. He begged of the widow as they beg of you: 'Say 'I slew them not.' And the queen replied, 'then say they are not slain, but dead they are.' If you were to say of these men that they are not guilty it would be as true to say that there has been no war, there are no slain, there has been no crime."

On the afternoon of October 1, 1946, the International Military Tribunal convened in final session. Every chair in the courtroom was occupied except the 21 chairs of the prisoners' dock. The four judges and

their alternates sat on the bench; defense counsel faced them across the room. To the left were the four tables of the prosecuting staffs. I sat at the American prosecution table. Behind us members of the press and guests packed the visitors' gallery. The defendants were to be brought into the courtroom one at a time to hear the sentences pronounced against them.

At ten minutes before three, the panelled door in the back of the prisoners' dock slid silently open. The defendant, Hermann Goering, stepped out of the elevator which had brought him from the ground floor where the defendants waited. Goering put on a set of headphones which had been handed to him by one of the white-helmeted American guards. The president of the tribunal began to speak, Goering signaled that he was unable to hear through the headphones and there was an awkward delay while the technician sought to correct the difficulty. A new set of headphones was produced and once again Goering quietly awaited the words which were to decide his fate. "Defendant Hermann Wilhelm Goering on the counts of the indictment on which you have been convicted, the International Military Tribunal sentences you to death by hanging." The number two Nazi turned on his heel and passed through the paneled door into the waiting elevator.

The door closed and there was a hum of whispered voices in the courtroom as those present awaited the arrival of the next defendant, Rudolf Hess. Hess, who had flown his Messerschmidt to England in a futile effort to persuade the British to abandon the fight with Germany was sentenced to imprisonment for life. The other defendants appeared in turn and received their sentences. Twelve, including Martin Bormann, who had been tried in absentia, and my defendant, Ernst Kaltenbrunner, received death sentences. Three, Hans Fritzsche, Hjalmar Schacht, and Franz von Papen were acquitted and the remaining seven received varying terms of imprisonment.

After delivering the sentences the tribunal adjourned *sine die*. Appeals were taken by all of the defendants to the Allied Control Council, except Kaltenbrunner. The appeals were uniformly denied at the meeting of the Council on October 10. Imprisonment was to be in Potsdam Prison in Berlin. Executions were to be at the prison at Nuremberg where the trials took place. I had been designated by Justice Jackson as his personal representative at the executions and was present in the Palace of Justice on the fateful night of October 15-16, 1946. Shortly before midnight, the electrifying word was released that Goering had cheated the hangman by taking poison while lying ostensibly asleep upon the bed in his cell. Death thus came to Goering by his own hand as it had come to Hitler, Himmler and Goebbels before him, even as the prison officer was walking to the cell block to give formal notice of the executions to take place that night.

At eleven minutes past one o'clock in the morning of October 16, the white-faced former foreign minister Joachim von Ribbentrop stepped through the door into the execution chamber and faced the gallows on which he and the others condemned to die by the tribunal were to be hanged. His hands were unmanacled and bound behind him with a leather thong. Ribbentrop walked to the foot of the thirteen steps leading to the gallows platform. He was asked to state his name and answered "Joachim von Ribbentrop." Flanked by two guards and followed by the chaplain he slowly mounted the stairs. On the platform he saw the hangman with a noose of thirteen coils and the hangman's assistant with a black hood. He stood on the trap and his feet were bound with a webbed army belt. Asked to state any last words, he said "God preserve Germany, God have mercy on my soul. My last wish is that German unity be maintained, that understanding between East and West be realized, and that there be peace for the world." The trap was sprung and Ribbentrop died at 1:29 a.m. In the same way, each of the

remaining defendants approached the scaffold and met the fate of common criminals. All, except the wordy Nazi philosopher Rosenberg, uttered final statements.

After the executions, the body of each man was placed upon a simple wooden coffin. A tag with the name of the deceased was pinned to coat, shirt, or sweater. With the hangman's noose still about the neck, each hanged man was photographed. The body of Hermann Goering was brought in and placed upon its box to be photographed with the others. In the early morning hours, two trucks carrying the eleven caskets left the prison compound at the Palace of Justice, bound for a Munich crematory. There, during all of that day, the bodies were burned one after the other. It was reported that in the evening, the eleven urns containing the ashes were taken away to be emptied into the River Isar. The dust of the dead was carried along in the currents of the stream to the Danube and thence to the sea.

Thus ended the Hitler tyranny. The tyrant and his chief cohorts were gone. They had sought to achieve greatness in history but they inscribed their names in sand and clean waters fell upon the beach and washed them out. They had intended to establish a new order for Europe but they built upon pillars of hate and what they stood for could not stand.

After Nuremberg, the prosecution of war criminals continued in other judicial forums. In the Far East, the Tokyo Military Tribunal conducted a trial of major Japanese war criminals in which the Nuremberg pattern was closely followed. Several trials were instituted by United States military courts. Twelve subsequent trials were conducted by three-judge American tribunals following the Nuremberg pattern. De-nazification proceedings were instituted against thousands of former Nazis by German tribunals. And as the years passed, cases were brought against Nazi war criminals in various national courts. Foremost among these was the trial of Adolf Eichmann, the head of the Jewish section of the Gestapo. It was he who rounded up the Jews of Europe, arranging for them to be sent by rail to extermination centers, principally Auschwitz to the east. Eichmann escaped to Argentina after the war where he lived under the pseudonym Ricardo Clement.

In May, 1960, fifteen years after the end of the war, Eichmann was apprehended by Israeli agents and spirited to Israel where he was brought to trial for his role in the extermination of European Jews. In the first televised trial of history, Eichmann testified from a bullet-proof glass booth. His defense that he merely carried out orders to bring European Jews to Auschwitz and other destinations in Poland and was not responsible for what happened to them upon arrival fell upon deaf ears. The man in the glass booth was convicted and executed for his role in the Nazi program of genocide.

On August 8, 1993, the Supreme Court of Israel overturned the conviction of John Demjanjuk, who had been extradited from the United States and charged with crimes against humanity allegedly committed at Treblinka concentration camp by a guard known as "Ivan the Terrible" upon the grounds that the evidence was insufficient to overcome conflicting evidence that the crimes had been committed by Ivan Marchenko, a different person.

The longest trial in modern French history, involving six months of testimony, concluded in Bordeaux, France in 1998 with the conviction of Maurice Papon, eighty-seven years of age, of ordering the arrest and deportation of 1,690 French Jews during the Nazi occupation, the great majority of whom were murdered at Auschwitz. The conviction was particularly significant since Papon was a refined and highly educated member of the French elite who rose to become a cabinet minister after the war. Papon was the first and last Vichy official to be prosecuted for the deportation of Jews from France. Addressing the

jury of nine civilians and three judges, Papon argued that it would be a humiliation for France to be linked with Nazi Germany in its responsibility for Jewish genocide. The jury accepted the implications of that humiliation by finding Papon guilty of complicity in the deportation of the victims while absolving him of their deaths at Auschwitz, accepting his plea that while he had reason to believe that the deportees would meet a cruel fate he did not know they would be killed under a program of extermination instituted against the Jews by the Nazis. Papon was sentenced to ten years in prison rather than the twenty year sentence sought by the prosecution. At his age, it was, in fact, a life sentence.

One of the crimes proved at Nuremberg was the massacre of 335 civilians, including 71 Jews, in the Ardeatine caves outside of Rome, ordered by Hitler to avenge the ambush killing of 32 German soldiers. Former SS captain Eric Priebke, 84 years of age, was extradited to Italy from the southern Andean resort of Bariloche in Argentina, where he had been under house arrest since June, 1994, to stand trial for his participation in this crime. He did not deny his involvement in the murders and was found guilty by the military court and sentenced to ten years. In 1998, the Italian military appeals court upheld the conviction and raised his sentence, at age 85, to life. Former SS Major Karl Haas, also age 85, likewise received a life sentence for his participation in the massacre.

There were other trials in the last few years, including particularly one involving Dinko Sakic, 76, who was in charge of running the Jasenovac concentration camp in Croatia where thousands of Serbs, Jews and Gypsies died under a Nazi puppet regime. But for the most part now these trials are ended. Prosecutors are seldom able to locate reliable witnesses to crimes allegedly committed half a century ago. And the accused are old, frequently in ill health, and realistically unable to defend themselves. The judicial inquest of Germany is over. This is a time in history when the world must turn from punishing aggressions of the past to preventing aggressions in the future. And there is little time for this to be done if human life on planet earth is to endure.

The declaration of the Nuremberg principles was not sufficient to assure peace through law in the post-World War II era. After Nuremberg, adversaries changed and the capacity for world destruction vastly multiplied. Nazism was destroyed and its evil philosophy discredited. But the democratic nations in the West faced the growing power and truculence of Soviet Russia and its allies in the East. The dropping of the first atomic bomb upon Hiroshima on August 6, 1945, assured the end of World War II and brought into reality the incredible destructive power of nuclear weaponry. On October 4, 1956, the Soviet Union put Sputnik, the first man-made satellite, into orbit around the earth, and the opening of the Atomic Age, with its potential for the total destruction of humankind, brought reality to Justice Jackson's prophecy. The world was facing Armageddon at the end of only the twentieth century after the birth of Christ.

Thus began the era of the Cold War in which Western nations stood off the Soviet Union and its allies. I know this period well for I was legal advisor to U.S. Military Governor General Lucius D. Clay until after the Berlin blockade was laid down by the Soviets.

Throughout the years of the Cold War, which did not end until November 9, 1989, when East and West Berliners openly breached the Berlin Wall, the world was apprehensive of the possibility of a Third World War in the twentieth century between the Soviet Union and the United States and their respective allies. The conflicts in Korea and Vietnam, in which the United States was directly involved, demonstrated the dangers inherent in the developing discord between communist and capitalist

societies. In the international setting which then prevailed, there was no possibility of a judicial assessment of aggression or individual responsibility for crimes committed in the course of these confrontations. The danger of war between great powers increased as conflicts arose among lesser nations with which they were allied or whose interests they supported or felt compelled to defend.

The turn toward peace between East and West was initiated by the rise to power in the Soviet Union of Mikhail Gorbachev who succeeded Constantine Chernenko as general secretary of the Communist Party in 1985, and as president of the Soviet Union in 1988. His political acumen and skill enabled him to gain support in the Soviet Union for his plans of restructuring (perestroika), openness (glasnost), and democratization of the Soviet Union.

Prospects of peace among great powers did not, however, reflect a world without conflict. Petty tyrants continued to commit crimes after the pattern of the German dictator. The urgency of establishing legal controls over post-Hitler tyrants became clear when on August 2, 1990, Iraqi military forces, under the orders of the Iraqi dictator Saddam Hussein, attacked Kuwait with the declared objective of incorporating it as the nineteenth province of Iraq. In addition to waging aggressive war, Saddam was responsible for the commission of war crimes in the launching of Scud missiles against civilian centers in Israel and Saudi Arabia, and the despoliation of oil properties in Kuwait, and with crimes against humanity in the killing, torturing, raping and forcible removal of Kuwaiti civilians. The war of aggression waged by Saddam Hussein against Kuwait was repulsed by a coalition formed under the authority of the Security Council of the United Nations but no criminal charges were brought against Saddam because an international criminal court was not in existence and the world community was unwilling to try him in absentia before an ad hoc tribunal as Martin Bormann had been tried in Nuremberg, despite efforts of a committee of former Nuremberg prosecutors, which I organized, in adopting a resolution published in the Congressional Record calling for his trial.

In 1991, Yugoslavia disintegrated into the political and ethnic groups from which it had been formed, leading to armed clashes. The following year, acts of genocide and inhumanity led to the establishment by the Security Council on May 25, 1993 of the International Criminal Tribunal for the former Yugoslavia with the mission of bringing to an end the commission of war crimes in that region by insuring that persons guilty of atrocities would be brought to justice. The tribunal was authorized to prosecute individuals responsible for war crimes, genocide, crimes against humanity, and serious violations of international humanitarian law in the former Yugoslavia after January, 1991. The first president of the tribunal, Antonio Caseese, declared that the purposes of the tribunal were threefold: "to do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace." Recently, for the first time in history, a duly-elected and acting head of state, Slobadon Milosevic, the former president of Yugoslavia, was indicted by this tribunal for the commission of war crimes and crimes against humanity. He has yet to be brought to trial, but the threat of personal punishment undoubtedly contributed to his surrender in Kosovo and his stunning defeat at the polls by President Kostunica.

Reports of incredible mass murders in Rwanda led the Security Council to establish a second tribunal on November 18, 1994 to deal with genocide, war crimes, and crimes against humanity in that war-ravaged nation. At a conference on the Nuremberg Trial at the University of Connecticut in 1995 in which I participated, then-President Clinton declared that by successfully prosecuting war criminals in the former Yugoslavia and Rwanda we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. Of even greater

significance was his endorsement of the creation of a permanent international criminal court declaring that the establishment of such a court would be the ultimate tribute to the people who did such important work at Nuremberg.

Shortly after the Nuremberg judgment was handed down, an international congress of lawyers met in Paris under the sponsorship of the Mouvement National Judiciaire Francais. The congress, which consisted of lawyers from twenty-two countries, including all of the prosecuting powers before the International Military Tribunal called for the establishment of an international criminal court. Judge Henri Donnedieu de Vabres, the French judge on the International Military Tribunal, proposed the following year that a criminal chamber of the International Court of Justice should be empowered to hear certain cases and that in addition a permanent international criminal court should be established. The General Assembly considered the proposal for an international criminal court when drafting the convention on the prevention and punishment of the crime of genocide but failed to approve it. On the day it adopted the genocide convention, however, December 18, 1948, the General Assembly requested the international law commission to undertake a study of a permanent international criminal court.

Thus began a long period of international negotiations culminating in a General Assembly resolution of December 17, 1996, calling for a diplomatic conference of plenipotentiaries to meet in 1998. The conference convened in Rome on June 15, 1998. I participated as a NGO delegate. Deliberations concluded on the following July 17, with the adoption of the statute for the international criminal court by a vote of 120 in favor to 7 against, with 21 abstentions. The United States voted against the treaty along with Iran, Yemen, Qatar, Libya, Israel and China.

Treaty process requires that a treaty first be signed and later ratified by the number of nations prescribed to make the treaty operative. Under the ICC treaty, nations were given until the end of 2000 to sign the treaty subject to subsequent ratification. On December 31, at the final moment, President Clinton directed our chief negotiator at Rome, David Scheffer, to sign the treaty on behalf of the United States. This has been done and our participation will become effective if and when the signed treaty is submitted to the Senate of the United States and is ratified by a two-thirds vote in the Senate. Sixty nations must ratify the treaty before it becomes effective. Twenty-seven have ratified to date.

On October 27, 2000, Germany became the twenty-third nation to ratify the treaty. I was present in the restored Reichstag building when the matter of ratification came before the Bundestag, Germany's lower house, and was assigned a front row seat in the gallery. All the top leaders of the government were present, including Chancellor Schroeder, Secretary of State Fischer, Minister of the Interior Schily, Minister of Justice Daubler-Gmelin, and Vice-Minister of Justice Vollmer, since in addition to ratification of the treaty an amendment to the constitution had to be voted upon which required an absolute majority of two-thirds of the members of the Bundestag. The second and third readings of the treaty were combined so that this would constitute the final and decisive vote.

The opening speech by Minister of Justice Daubler-Gmelin stressed that the basic purpose of the treaty was to displace the law of force by the force of law. Representatives of all political parties addressed the Bundestag in support of the treaty. The concluding speech was by Vice-Minister Justice Vollmer who introduced me from the floor, a great honor since no other person was similarly recognized during the proceeding. Vollmer strongly supported the treaty and urged that it not be weakened to gain the support of other nations, even including the United States. When the question of ratification was presented to the floor, the vote in favor of the treaty was 531 to none. The vote on a related

amendment to the constitution was 528 to none with 3 abstentions. Germany, half a century after its Nazi leadership had been brought to trial by the ad hoc military tribunal at Nuremberg, has now recognized and adopted as its own by unanimous vote of the Bundestag, the basic legal principles of that historic trial, confirming the superiority of the rule of law over despotism and humanitarian crimes.

Among leading nations in addition to Germany which have ratified the treaty are Italy, France, Canada, and Great Britain. The bill was introduced in the House of Lords by the Parliamentary Under-Secretary of State, Baroness Scotland of Asthal, who said "My Lords, I cannot overstate the historic importance of the creation of the International Criminal Court. To quote Kofi Annan, the Secretary General of the United Nations on the subject, 'People all over the world want to know that humanity can strike back--that whatever and whenever genocide, war crimes or other such violations are committed, there is a court before which the criminal can be held to account, a court that puts an end to the global culture of impunity.' The bill before us today will put into practice the government=s commitment to that principle. It will pave the way for us to implement our obligations under the Rome Statute of the International Criminal Court and to ratify it."

The Rome Statute is a treaty establishing for the first time in world history an international criminal court complementary to national criminal law jurisdictions capable of bringing to justice persons guilty of aggressive war, war crimes, and crimes against humanity including genocide. It recognizes that crimes occur in the world which require the availability of an international judicial forum for trial and punishment.

At Rome in 1998 A.D., the first statute for an international criminal court was enacted. It was the product of the efforts of many persons, beginning with the drafting of the charter of the International Military Tribunal at Nuremberg more than half a century before the conference. But 50 years is just an hour in mankind=s struggle for justice. Revision of the Rome Treaty must be considered after seven years of trial with its law and procedures. Seven hundred years may pass before mankind is able to eliminate war in the world and establish a system of universal justice. Rome was the beginning, the end may never come. For like Rome itself, the struggle for peace, law, and justice in the world is eternal.

Whitney R. Harris

Washington University School of Law

February 8, 2001

#### **Postscript - Justice Robert H. Jackson on "My dear Whit" *John Q. Barrett*<sup>2</sup>**

Copyright © 2002 by John Q. Barrett. All rights reserved.

I am pleased and humbled to stand in for a man who would very much want to be part of this occasion. This man—Justice Robert H. Jackson—definitely is a presence at this event and in this distinguished Institute, however, because he was, and his spirit is, a vital part of our honoree's life and accomplishments.

In the summer of 1945, Lieutenant Whitney R. Harris, United States Navy, was working for the Office of Strategic Services (OSS) in London.<sup>1</sup> During those months, he began to assist Justice Jackson's staff informally. Jackson was in London to negotiate the agreement through which the victorious Allies determined that the principal surviving Nazi leaders would be brought to justice *justly*. Harris immediately helped and impressed the Jackson team. He was, as you know, invited to join it and did,

resulting in his very distinguished work as Trial Counsel before the International Military Tribunal at Nuremberg.<sup>2</sup>

In the years since Nuremberg, Whitney Harris has very graciously, but also correctly, emphasized Jackson's central role and primary responsibility for the accomplishment we call "Nuremberg."<sup>3</sup>

If Jackson could be with us, he would very graciously, but also correctly, share much of that credit with his younger colleague Whitney Harris.

One account of Whitney's contribution at Nuremberg comes from a candid and private letter that Jackson wrote from Nuremberg to his friend Ed Stettinius in spring 1946. The former Secretary of State then was working on the establishment of the United Nations. In this letter, Jackson summarized Whitney Harris's Nuremberg work as follows:

Harris has had primary responsibility for preparing material both for our direct case against some of the defendants and for their cross-examination. His work has been uniformly commended. I have had occasion to be closely associated with him in a number of efforts. His personality is agreeable and he is comfortable to work with. He is industrious and his professional work is of a high order. His experience here should be of great help in any future work abroad.<sup>4</sup>

This perspective also is captured in Jackson's handwritten inscription in a copy of his book, *The Case Against the Nazi War Criminals*:

*For Lt. Whitney Harris in appreciation of his long hours of help to me in the ordeal of Nurnberg and with friendship and esteem of Robert H. Jackson*  
Nurenberg July 1946<sup>5</sup>

In the years following Nuremberg, Justice Jackson followed and admired Whitney Harris's accomplishments as a law professor and scholar at Southern Methodist University. Jackson explicitly encouraged Whitney to write the book that became *Tyranny on Trial* because he was "sure" that Whitney would "be in a position to give a much more accurate account of [Nuremberg] than those" that had appeared before Whitney took his turn.<sup>6</sup>

In February 1954, just weeks before he suffered the major heart attack that started the final decline in his health,<sup>7</sup> Justice Jackson wrote the introduction to Whitney Harris's landmark book, *Tyranny on Trial*. Jackson did not do this writing job out of mere loyalty. Indeed, he had insisted on first reading "every word" in Whitney's manuscript before agreeing to endorse the project—"Not only specific conflicts but differences of tone or approach might exist," he wrote Whitney privately, "although I would not expect it."<sup>8</sup>

Once Justice Jackson started reading Whitney Harris's manuscript, he in fact only had to read "sketchily" before he announced that he would "get to work" on an introduction.<sup>9</sup> "You have done a most painstaking job," Jackson wrote to Whitney, "and I wonder how you have ever found time to do it. It will be a very useful book."<sup>10</sup> When the book appeared in print that fall, Jackson made of point of noting it—"By the way Whitney's book is off the press. Looks pretty good."<sup>11</sup>—in his final note to his son Bill Jackson, an attorney who was his father's executive assistant and Whitney Harris's younger colleague at Nuremberg. Thus, when Justice Jackson's book introduction describes author Whitney Harris as "by

scholarship and experience admirably qualified,<sup>12</sup> it is not just that compliment, but really the fact of the introduction itself, that begins to capture Jackson's great regard and affection for Whitney.

Whitney Harris once wrote—to Justice Jackson—that he was "the man for whom I have the greatest respect among all men I have known."<sup>13</sup> On this occasion, it is equally appropriate to note that the man we honor today was, to "Bob"<sup>14</sup>Jackson, "[m]y dear Whit."<sup>15</sup>

\* Professor of Law, St. John's University School of Law, New York City. This postscript is based on remarks that I delivered on February 7, 2002, at the dedication of the Whitney R. Harris Institute for Global Legal Studies at the Washington University School of Law in St. Louis. I am grateful to Whitney Harris, Anna Harris and Nancy Jackson for their generous assistance and friendship.

1 Harris, a native of the State of Washington, had received his undergraduate degree from the University of Washington and his law degree from the University of California at Berkeley School of Law (Boalt Hall). After his 1936 admission to the California Bar, Harris practiced law in Los Angeles until he enlisted in the Navy in early 1942.

2 At the trial before the IMT at Nuremberg, Whitney Harris, who had been promoted to the rank of Lieutenant-Commander, United States Navy, presented the case against defendant Ernst Kaltenbrunner, who became Chief of the Reich Main Security Office and the *Sicherheitsdienst* (SD or Security Service) in January 1943 and, as such, was responsible for the gravest of Nazi crimes, the extermination of the Jews of Europe. See IV Trial of the Major War Criminals before the International Military Tribunal, Official Text in the English Language ("Blue Set") 288-311 (proceedings of Jan. 2-3, 1946). Harris also obtained compelling evidence of the crime we now call the Holocaust through his interrogations of various witnesses, including Otto Ohlendorf, the head of *Einsatzgruppen D*, and Rudolf Hoess, commandant of the Auschwitz concentration camp. Harris's presentation of the case against Kaltenbrunner was the prosecution's first presentation of evidence against an individual defendant. I Drexel A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account* 492-94 (Lanham, New York & Oxford: University Press of America, 1999). At other points in the trial, Harris located critical evidence, assisted Justice Jackson in the cross-examination of defendant Hermann Goering, prepared material for the cross-examination of other defendants and witnesses, himself cross-examined the former Reich Plenipotentiary for Denmark, Dr. Karl Werner Best (who was called as a witness by counsel for the Gestapo, a defendant organization) and introduced newly-discovered documents against the Gestapo, the SD and individual defendants. See, e.g., XX Blue Set 141-54 (proceedings of Aug. 1, 1946); see generally I Drexel A. Sprecher, *Inside the Nuremberg Trial* 637; II Drexel A. Sprecher, *Inside the Nuremberg Trial* 728, 1199-1200. Harris also wrote the trial briefs against Kaltenbrunner, the Gestapo and the SD. For his work at Nuremberg, Lieutenant-Commander Harris was awarded the Legion of Merit, the highest military award given any trial counsel.

3See, e.g., Whitney R. Harris, *Justice Jackson at Nuremberg*, 20 Int'l Lawyer 867 (1986).

4 Robert H. Jackson letter to Edward R. Stettinius, Jr., Apr. 19, 1946. This document, from Whitney R. Harris's personal papers, is quoted here with his permission.

5 Handwritten inscription in Robert H. Jackson, *The Case Against the Nazi War Criminals* (New York: Alfred A. Knopf, Inc., 1946). In his own writings, Jackson preferred and used the German name of the

city, *Nurnberg (or Nürnberg)*. Whitney R. Harris's personal copy of this book is quoted here with his permission.

6See Robert H. Jackson letter to Whitney R. Harris, Oct. 14, 1952, in Container 14, Robert Houghwout Jackson Papers, Manuscript Division, Library of Congress, Washington, D.C. ("RHJ Papers Container 14").

7 Jackson suffered a major heart attack on March 30, 1954. He suffered a fatal heart attack on October 9, 1954.

8 Robert H. Jackson letter to Whitney R. Harris, Jan. 5, 1954. This document, from Whitney R. Harris's personal papers, is quoted here with his permission.

9 Robert H. Jackson letter to Whitney R. Harris, Jan. 27, 1954. This document, from Whitney R. Harris's personal papers, is quoted here with his permission.

10*Id.*

11 Robert H. Jackson letter to William E. Jackson, Sept. 9, 1954. Copyright © 2002 by the Estate of William E. Jackson. All rights reserved. Quoted here by permission of Nancy R. Jackson.

12 Robert H. Jackson, *Introduction*, in Whitney R. Harris, *tyranny on trial xxx* (Dallas: Southern Methodist University Press, 1954) (essay dated February 1954).

13 Whitney R. Harris letter to Robert H. Jackson, Nov. 5, 1952, in RHJ Papers Container 14, *supra* note 6.

14*E.g.* Robert H. Jackson letter to Whitney R. Harris, Jan. 27, 1954 (signature). This document, from Whitney R. Harris's personal papers, is quoted here with his permission.

15 Robert H. Jackson letter to Whitney R. Harris, Jan. 5, 1954 (salutation). This document, from Whitney R. Harris's personal papers, is quoted here with his permission.