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A TRIBUTE TO HENRY KING

HENRY T. KING, JR., AT CASE, AND ON THE NUREMBERG CASE

John Q. Barrett[†]

Henry King was my teacher, colleague and friend for the past eight years. In particular, he was, through our work at conferences, with the Robert H. Jackson Center and in many private discussions, my “Nuremberg colleague” in the academic and historical senses of that phrase. Just over one year ago, I had the privilege of moderating a panel that turned out to be one of Henry’s final appearances with his fellow Nuremberg prosecutors Whitney Harris and Ben Ferencz.¹ The fraternity of former Nuremberg prosecutors is very exclusive, and it has been very special to me to be admitted to it, in somewhat *ex officio* fashion based on my work as a Jackson biographer and

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This text is based on my remarks at Case Western Reserve University School of Law’s September 9, 2009, memorial tribute to Professor Henry T. King, Jr., who died on May 9, 2009, just short of his 90th birthday. I am very grateful to Interim Dean Robert H. Rawson, Jr., Associate Dean Jonathan L. Entin, Professor Michael P. Scharf, Nancy M. Pratt and their colleagues at Case for inviting me to share thoughts about Henry with many others who also loved him. I also thank the following for excellent assistance with my various research questions: at the Jackson Center, Carol Drake, Jennifer Champ, Megan Sorenson and Adam Bratton; at the Documentation Center (*Dokumentationszentrum Reichsparteitagsgelände*) in Nuremberg, Henrike Zentgraf; at Columbia University, Sabrina Sondhi; and at Yale University, Jan Conroy, Kaitlin Thomas and Mark Branch.

¹ See John Q. Barrett, Whitney R. Harris, Henry T. King, Jr., & Benjamin B. Ferencz, *Nuremberg and Genocide: Historical Perspectives*, in PROCEEDINGS OF THE SECOND INTERNATIONAL HUMANITARIAN LAW DIALOGS 9–54 (Elizabeth Andersen & David M. Crane, eds., Am. Soc’y of Int’l Law, Studies in Transnational Legal Policy No. 40, 2009).

Nuremberg historian, through the friendship and generosity of Henry and each of its members.

I thank Henry's children, Suzanne Wagner and Dave King, and Case Western Reserve University—President Barbara Snyder, Dean Richard Rawson, Associate Dean Jonathan Entin and Professor Michael Scharf—for the invitation to speak this afternoon. I must report, however, that I had been invited to this event long before they contacted me. I previously was invited, repeatedly, by Professor Henry T. King, Jr.

Please understand that Henry did not want this event to occur—I guarantee you that. But Henry realized in recent years that his health was failing and that his time here was running out. He also hoped and assumed that his friends at this great University would, after his death, do right by his memory and convene a memorial event. Henry directed me to be there (here) on that (this) occasion. He charged me to speak about him and Case Western, and about him and Nuremberg.

HENRY KING AND CASE

Regarding Case Western Reserve University, I can make short work of my assignment. Case was Henry's primary professional home. It was his place of great teaching² and other achievements. He found much occupational and personal happiness here. He also, at times, felt underappreciated, which saddened him.

Henry King was sixty-three years old and a veteran adjunct law professor at Case Western when he joined its full-time law faculty in 1983. He continued teaching into old age—only mortality kept Professor King from returning to a classroom to teach this fall. He loved his students, and I am happy to see some of them here this afternoon. When Henry spoke with me and many other fellow teachers, he very quickly would steer our conversations to the topic of students and then brag about his. Henry also spoke often, and proudly, about the special Case colleagues with whom he had close relationships. Many are in this room: Jonathan Entin (Henry's suitemate); Erik Jensen; Hiram Chodosh; Michael Scharf; and Adria Sankovic. You all meant very much, and you each gave so much, to your friend and colleague Henry King.

Henry's worlds, interests and areas of expertise included corporate, commercial and international law. The last included modern humanitarian law and particularly Nuremberg and its

² On September 9th, I was pleased and not surprised to see, on a wall plaque in the CWRU School of Law lobby, that Henry King in 1998 received the Law Alumni Association's Distinguished Teacher Award.

legacies, which were Henry's teaching, research, writing and speaking passions and, indeed, his principal professional identity. His time at Case, from 1983 forward, was a period when Nuremberg and its international idealism and universality were very much eclipsed by the issues and camps of the Cold War. During that period, many people, including here at Case, were inclined to think of Nuremberg, and perhaps also to think of and to treat Henry, as more a relic, and as a veteran of something of less than lasting value, than a vital, thriving piece of the present and the future. That mindset and dismissiveness frustrated Henry King at many levels, including because he knew that his time, stacked up against the permanent significance that he believed Nuremberg embodied and would have, was finite and running out. Henry wanted to be here to see, and to play roles in, Nuremberg's future. Happily, that all came to pass, for both Nuremberg and Henry, and in some measure due to Henry, in the final years of his very active life.

HARRY KING AT NUREMBERG

Henry King was known, in his Nuremberg days (and earlier), as "Harry." I once asked him why. He said, very matter-of-factly, that Harry is a good name and a good nickname, that in the United States it unfortunately fell out fashion for juvenile reasons,³ and that he accordingly resigned himself to using his given name.

In winter 1946, Harry King, age 26 and in his third year of law practice, was married to the former Betty May Scranton. They came from the same town, Meriden, Connecticut. He told me more than once that she was "the most beautiful woman [he] ever saw." They were living in an apartment on Metropolitan Avenue in Parkchester, the Bronx, New York. Betty King had a secret job that Harry later learned was connected to the Manhattan Project. He was a graduate of Yale College (B.A. 1941) and Yale Law School (LL.B. 1943). He had been working as a young associate at a leading Wall Street law firm, Milbank, Tweed and Hope.

Earlier that winter, Harry King had decided to leave Milbank for a smaller firm where he could practice law without numerous layers of lawyers above him. On one Sunday in February 1946, Harry and Betty King had their friends Ted and Nancy Fenstermacher over for

³ Things might be different in the United Kingdom, which of course has a Prince Harry. On the other hand, in September 1945 a U.S. law professor turned U.S. Army officer named Joseph Dainow, who was working in London on Justice Robert H. Jackson's staff preparing evidence against the principal Nazi war criminals and within days would become one of Henry King's predecessor U.S. lawyers at Nuremberg, heard a "box-orator" in Hyde Park expound humorously on the difference between an heir apparent and an 'airy parent.

supper. Ted, Harry's classmate at Yale Law School, was still working as an associate at Milbank. During the evening, Harry told the Fenstermachers about his new practice and opportunities to be a lawyer of stature and significant responsibilities. The Fenstermachers probably exchanged glances and looked at their shoes. Then Ted said, "I hate to upstage you, but I am joining the U.S. prosecution staff at Nuremberg."

Ted Fenstermacher obviously won that friendly contest of "Can You Top This?" Later that evening, his news became the subject of Betty King's intense prodding of her husband to follow Ted's example—when Henry King told this story in recent years, he would recreate how his wife's comments dug into him by making a repeated, jabbing motion with his index finger. He recalled that she would not let him get a moment of sleep that night as she urged him on to Nuremberg.⁴

Harry King soon was in northern Virginia on the steps of the Pentagon. By the end of March 1946, he was hired by Brigadier General Telford Taylor, the Deputy Chief of Counsel who then headed the Subsequent Proceedings Division in chief prosecutor Justice Robert H. Jackson's Office of Chief of Counsel (OCC) for the Prosecution of Axis Criminality. The first Nuremberg trial—the four-nation prosecution, led by Justice Jackson, of the twenty-one principal Nazis (Hermann Goering, et al.) and six Nazi organizations before the International Military Tribunal (IMT)—then was ongoing. Taylor was assembling a legal staff to prosecute additional Nazi war criminals following the conclusion of that trial. (It turned out that that trial—what history recalls as *the* Nuremberg trial—was the one and only international proceeding. During late 1946 through spring 1949, Taylor and his staff prosecuted additional Nazi war criminals in Nuremberg, located in the U.S. occupation sector of the former Germany, in U.S.-only cases before U.S. military tribunals—the twelve Nuremberg trials that came to be known "the subsequent proceedings.")

In spring 1946, Harry King crossed the Atlantic Ocean from New York to Bremerhaven, in the occupation zone that had been Germany, on the United States ship *General Harry Taylor*. In May, he traveled from Bremerhaven to Nuremberg by coach train. He was a civilian employee (grade P-5) of the Occupation Military Government of the U.S. (OMGUS). He moved into the Grand Hotel, the center of U.S.

⁴ See *Nuremberg and Genocide: Historical Perspectives*, *supra* note 1, at 27. Betty King, writing after she and Harry had returned from Nuremberg in 1947, remembered it the same way: "I started working on Harry to do the same [as Ted]! It was a tough battle but successful in the end!"

prosecutorial staff work, meals and social activities⁵ that was located just outside the walls of Nuremberg's bomb-devastated old city. He lived there for about six months. At least in his early days in Nuremberg, Harry wore a "civilian uniform" because it gave him some authority and facilitated his movements past military guards.

In Harry King's first months in Nuremberg, he worked ad hoc on projects connected to the IMT trial.⁶ General Taylor also assigned him to work in the group of lawyers that would focus on preparing "the Organizational Cases" (cases against culpable individual leaders and members of the Nazi organizations that then were on trial, as entities, before the IMT), and on the "evidence against military and naval war criminals."⁷ Harry's group supervisor was Clark Denney and his other attorney colleagues were James Conway, Paul Niederman and the friend who had led him on this path, Ted Fenstermacher.⁸ Their work that summer included interviewing IMT defendants about others who were being investigated for possible prosecution. Harry King participated in interviewing, among others, IMT defendant Hermann Goering.⁹ King also interviewed defendant Albert Speer shortly before the IMT convicted and sentenced him to serve twenty years in prison.¹⁰ When Speer completed serving that sentence, Henry King renewed their contact. It became a relationship and even a kind of friendship that lasted until Speer's death in 1981.

⁵ On the evening of July 26, 1946, which was the evening of Justice Jackson's historic closing argument before the IMT, for example, Harry King organized a "Yale at Nuremberg" alumni dinner in a private room at the Grand Hotel. He and fellow Yale graduates Theodore F. Fenstermacher (LL.B. 1943), William Eldred Jackson (B.A. 1941) (the Justice's son and executive assistant), Robert Douglas King (B.A. 1937), Daniel J. Shiller, R. Spillner, H. Russell Thayer (LL.B. 1942) and R. Williams, wearing business suits, were served by a German waiter wearing tuxedo and black tie. At the end of this dinner, they sang Yale's unofficial alma mater, "Bright College Years" (which has lyrics that are set to, ironically, a 19th century German song) and then adjourned to the Grand Hotel's Marble Room for drinks and live entertainment. The dinner is captured in a photograph that was published, probably after Henry himself submitted it along with caption information, in Yale's alumni magazine. See YALE ALUMNI MAG., Oct. 1946, at 15.

⁶ On July 30, 1946, Justice Jackson, just hours before he left Nuremberg to return to Washington, D.C. (temporarily, before his September return to hear the IMT judgment), inscribed a photograph of himself "To Harry King[,] With warm personal regards and best wishes for future success. Robert H. Jackson[,] Nurnberg Germany."

⁷ Brig. Gen. Telford Taylor, Organizational Memo No. 1, 17 May 1946, at 2 (carbon copy), in Telford Taylor Papers, Arthur W. Diamond Law Library, Columbia University, New York, NY (TTP-CLS: Series 20 - Subseries 1 - Box 3 - Folder 34).

⁸ See *id.*

⁹ See Sworn Statement by Hermann Goering, Concerning Milch's Position as Inspector General of the Luftwaffe (Sept. 27, 1946), reprinted in 2 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 625 (1949).

¹⁰ In early 1947, Speer, who then was still a prisoner at Nuremberg, gave deposition testimony that was presented at the *Milch* trial where King was a prosecutor. See 15 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 370 n.2 (1949); *id.* at 811-16 (excerpting the trial transcript of Feb. 3, 1947).

Henry reflected for decades on the mystifying duality of Speer, whom Henry regarded as both a first order Nazi war criminal and as a cultured, reflective, decent man. Ultimately he tried to assess this in his 1997 book, *The Two Worlds of Albert Speer*.¹¹

At Nuremberg, an early prosecution in the Taylor/subsequent proceedings phase was *United States of America v. Erhard Milch* (Case No. 2), the trial of the former Field Marshal in the German Air Force Luftwaffe under Goering.¹² The *Milch* case was the only one of the twelve subsequent Nuremberg trials that was a single defendant prosecution.¹³ Harry King helped to build the case and to draft the charges, which accused Milch of war crimes and crimes against humanity. The indictment was filed on November 13, 1946, and served on Milch the next day. He was arraigned on December 20, 1946.

At the *Milch* trial, which began on January 2, 1947, and lasted through thirty-nine trial days until closing statements on March 25, 1947, Harry King was a principal assistant to lead prosecutor Clark Denney. The published trial excerpts show that King's trial work included presenting the prosecution's statement of Milch's activity in conceiving and heading the *Jaegerstab*, a special commission of top Nazi ministry experts that sought, beginning in 1944, to protect vital German aircraft production from Allied bombing raids by moving it underground, decentralizing it and repairing bombed plants quickly, all involving the use of slave labor.¹⁴ King also cross-examined defense witness Xaver Dorsch, who had worked under Speer in the Defense Ministry on aircraft fighter production plants using Jewish slave laborers from Hungary.¹⁵ On April 16,

¹¹ See HENRY T. KING, JR., WITH BETTINA ELLES, *THE TWO WORLDS OF ALBERT SPEER: REFLECTIONS OF A NUREMBERG PROSECUTOR* (1997).

¹² In 1949, the United States Government Printing Office published excerpts from the *Milch* trial record. See 2 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 353–898 (1949).

In the 1945–1946 IMT trial that came before the “subsequent proceedings,” including the *Milch* trial, lead defendant Hermann Goering had called his former assistant Milch to testify as a defense witness. See 9 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 44–53 (1947) (proceedings of Mar. 8, 1946). After examinations by counsel for various of Goering's co-defendants, Milch was cross-examined by Justice Jackson, then by a British prosecutor and then by the Soviet chief prosecutor. See *id.* at 75–134 (proceedings of Mar. 11, 1946).

¹³ See 15 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1149 (1949) (publishing a statistical table, including the respective numbers indicted, regarding the twelve trials held by the U.S. at Nuremberg during 1946–1949 pursuant to Allied Control Council Law No. 10).

¹⁴ See 2 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 524 (1949) (excerpt from the prosecution's statement, Jan. 13, 1947).

¹⁵ See *id.* at 589–94, 595 (Feb. 24, 1947).

1947, U.S. Military Tribunal No. II acquitted Milch of committing war crimes in connection with medical experiments (Count Two), convicted him of committing war crimes in connection with the use of slave labor (Count One) and, for those same acts involving non-German nationals in German-occupied countries, convicted him of committing crimes against humanity (Count Three).¹⁶ The next day, the Tribunal sentenced Milch to prison for life.¹⁷

Harry King's Nuremberg had those legal and historical experiences and accomplishments.¹⁸ It also had personal dimensions.

¹⁶ See *id.* at 773–96 (Opinion & Judgment of the United States Military Tribunal II, Presiding Judge Robert M. Toms, Judge Fitzroy D. Phillips and Judge Michael A. Musmanno, Apr. 16, 1947).

¹⁷ See *id.* at 796–97 (Apr. 17, 1947). In June 1947, Milch's sentence was affirmed by Major General Frank A. Keating, Deputy Military Governor of the U.S. Zone of Occupation, see *id.* at 887, and that fall the Supreme Court declined, by a 4–4 vote, to hold a hearing to consider Milch's petition for a writ of habeas corpus. See *Milch v. United States*, 332 U.S. 789 (1947) (mem.) (Jackson, J., taking no part in the consideration or decision of this application).

Milch ultimately served far less than a life sentence. In 1951, General Thomas T. Handy, U.S. Commander in Chief in Europe, and John J. McCloy, U.S. High Commissioner for Germany, following the recommendation of a U.S. clemency review board, reduced Milch's sentence to fifteen years. See John J. McCloy, Order with Respect to the Sentence of Erhard Milch (Jan. 31, 1951), reprinted in 15 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1171 (1949); Statement of the High Commissioner for Germany (Jan. 31, 1951) ("The Board has recommended a reduction of [Milch's] sentence from life to fifteen years. This is a sharp reduction considering the high responsibility of this man, but I am prepared to follow it."), reprinted in *id.* at 1181; see also Jack Raymond, *21 Nazi Criminals Saved from Death*, N.Y. TIMES, Feb. 1, 1951, at 1. In 1954, Milch was released from prison after serving a total of less than nine years. See N.Y. TIMES, July 4, 1954, at 3 (an unheadlined, one paragraph, thirteen line wire service story, based on a July 3 "disclos[ure]" in Germany and published in the U.S. on Independence Day Sunday); cf. *Nazi Marshal Released*, HARTFORD COURANT, July 4, 1954, at 9 (reporting, in a similarly brief wire service report from Germany, that Milch showed up at a social welfare office in Ratingen, Germany that summer stating that he had been released "on the condition he 'get a job and go to work,'" and that U.S. officials had refused to comment on his release). Milch subsequently lived and worked in Germany until his death more than seventeen years later. See *Erhard Milch, 79, Luftwaffe Chief*, N.Y. TIMES, Jan. 29, 1972, at 32 (obituary); Jim Landers, *Field Marshal Erhard Milch, 79, Dies*, WASH. POST, Jan. 31, 1972, at C3 (same).

¹⁸ Telford Taylor's written recommendation of Henry King following his Nuremberg work seems generic in form and unreserved in its endorsement:

Mr. Henry T. King was employed as an attorney in the Office of Chief of Counsel for War Crimes from 19 April 1946 to 22 August 1947.

During this period, I had full opportunity to observe and evaluate Mr. King's legal work and to form a personal judgment thereon. Mr. King participated in both the preparation and court presentation in the case against former Fieldmarshal Erhardt [sic] Milch, and also contributed substantially to the preparation of other important cases in the office. In my opinion, he has unusual legal ability, and is industrious and energetic in putting his ideas into execution. I am glad to recommend him as professionally qualified to undertake difficult and important legal assignments.

Memorandum from Telford Taylor, Brigadier General, USA, Chief of Counsel for War Crimes, To Whom It May Concern, 10 September 1947 (carbon copy), in Telford Taylor Papers, Arthur W. Diamond Law Library, Columbia University, New York, NY (TTP-CLS: Series 5 -

After an initial four solo months in Nuremberg, Harry was not alone for his time there. In spring 1946, he had applied for, and that June he received, U.S. government permission for his overseas dependent, his wife Betty in New York, to join him in the U.S. occupation zone in Europe. Following that permission, Betty still had to endure a long wait for travel orders. (She also had to receive twenty-one inoculation injections.) Once her orders came through, she had to make repeated visits to Fort Hamilton in Brooklyn for "processing." Finally, in late October 1946, Betty sailed from Staten Island, New York, to Europe on the *U.S.S. George W. Goethals*. Her Atlantic Ocean crossing, on rough seas while living in close quarters with many other women and children who were seasick, took two weeks. Steering past mines, the ship reached Bremerhaven. By train, Betty then reached Harry at the Fürth train station, adjacent to Nuremberg, in November 1946.

When Betty King arrived in Nuremberg that fall, she somehow managed to bring with her, as part of her baggage weight allotment, a small jeep, painted baby blue, that Harry and she had purchased for \$400.¹⁹ That jeep, which they soon had enclosed and outfitted with a new engine and a heater, became the Kings' mobility and part of a fine lifestyle in the occupied former Germany and elsewhere in Europe during Harry's remaining time in Nuremberg. His work was grueling, the evidence of Nazi atrocities that he assembled and worked with was searing and emotionally devastating, and the principles that he and colleagues sought to vindicate in court were high ones, but those men and women also were parts of an occupying army hierarchy, and that experience had its perks.

After Betty arrived in Nuremberg, Harry moved out of the Grand Hotel. They moved into a well-furnished apartment, located on the second floor of a well-built house, with two bedrooms and two porches.²⁰ They had two German employees, a chauffeur/mechanic/handyman (who drove them in that jeep) and a maid. Following the conclusion of the *Milch* trial in spring 1947, Harry and Betty were able to travel and, indeed, to vacation. They spent weekends in Berchtesgaden and elsewhere in the Bavarian Alps. They saw Zurich,

Subseries 1 - Box 1 - Folder 5) (NMT—Correspondence—Letters of Introduction and Staff Recommendations (1947–1948)) (quoted with permission).

¹⁹ Before leaving Nuremberg, Harry and Betty sold the heavily used jeep for \$800.50 to a man who was working at the U.S. Nuremberg Military Tribunals as a German-English translator.

²⁰ The building was located on the east side of Nuremberg, less than five miles from the Palace of Justice (courthouse), on Thumenberger Weg. During an initial period of residency, the Kings shared a third floor room, its ping pong table and other furniture with a couple living on the first floor. Later, the Kings' maid moved into that space.

Geneva, Montreaux and other places in Switzerland. They visited Venice, Florence, Pisa, Genoa, Lake Garda, Bolzano and other spots in Italy. During February 1947, Betty became pregnant (explaining later that it had something to do with an unplanned overnight stay on the Zugspitze.)²¹ Henry said that in his and Betty's long marriage—which had some hard challenges, including the special needs and care of their second child, their late son Hank (Henry T. King, III), who was profoundly autistic—they were never happier together than they were in Nuremberg.

HENRY KING AND NUREMBERG'S FUTURE

For Henry King, Nuremberg was about playing a significant role in historical achievements and advancing humanity's high principles. The professional substance of his work was law as an alternative to war. The potential of his and colleagues' work was the prospect that the world would make progress toward peace by building on the precedent of Nuremberg.

In the last decade of Henry King's life, that Nuremberg idea and he became huge and relevant again. The Cold War ended, which made possible the United Nations tribunals for the former Yugoslavia and for Rwanda. The world made it, finally, to the Rome Conference, and Henry King was there to play a vocal, influential role supporting the creation of a permanent international criminal tribunal, the logical successor, just fifty years late, to the Nuremberg IMT. Rome in 1998 produced the statute that, through ratifications by a broad and sufficient world community (of course not yet including the United States) created the International Criminal Court in 2002.

Henry King, speaking on the International Humanitarian Law Dialog panel with Whitney Harris and Ben Ferencz in August 2008, offered this summation on Nuremberg and his sixty-one subsequent years:

I am in the autumn of my life—perhaps the late autumn, I don't know, although I hope I have a few years left. As I look at it, Nuremberg was the most meaningful part of my life. I don't say that in a selfish stance—we have to sell young people on the substance. Peace is a concern of all persons who are going to be here on the planet and want a world in

²¹ Harry and Betty returned to New York on September 6, 1947. He later explained to many that he had timed her return so that she would give birth in the United States, thus ensuring that no one could question their first child's status as a "natural born Citizen . . . eligible to the Office of President . . ." U.S. CONST., art. II, § 1, cl. 5.

which weapons don't destroy men. We want men to control weapons—that's the important thing.²²

As Henry King worked on that substance in the years I knew him, in his many articles and speeches, his Nuremberg was always about those highest concerns, including young people, ideals and hope.

We will deeply miss our friend Henry King. With his life and lessons, we are well equipped to continue Nuremberg's—and his, and the law's, and what has always been the future's—work.

²² See *Nuremberg and Genocide: Historical Perspectives*, *supra* note 1, at 31.