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World Peace Through Justice Award Lecture

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WORLD PEACE THROUGH JUSTICE AWARD LECTURE†

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It is a great honor to receive this distinguished award. This is the second time the award is being presented. The first was in 2006 when the honoree was Philippe Kirsch, the President of the International Criminal Court. I was present on that occasion and little could I have imagined that a year later I would be standing before you as the second person to be honored with the award.

The World Peace through Justice Award is very special because of its association with Whitney Harris. I need hardly spell out for this audience the crucial role Whitney played in the development of the Law of War. He will be remembered for the competence he demonstrated as a prosecutor at the Nuremberg trials. Thereafter, as a teacher and activist, he made innumerable contributions to the development of international criminal justice.

My association with Whitney Harris goes back to the middle of 1995 when I was invited by the Mayor of the City of Nuremberg to speak at a conference arranged to mark the fiftieth anniversary of the start of the Nuremberg trials of the major Nazi war leaders. Whitney delivered the opening keynote address in the very courtroom where the trial was held. I will never forget Whitney's wonderful voice resonating in that historic room and his recitation of some of the most moving words of Justice Robert Jackson. From that time it has been a great pleasure and privilege to count Whitney and his elegant wife, Anna, as friends.

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I nearly missed the Nuremberg event. I was then the Chief Prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia. Months prior to the proceedings, my wife and I, together with a member of my staff and his wife, were invited to Nuremberg as guests of the Mayor. The invitation was duly accepted and our travel arrangements were made by the office of the Mayor. Some three days prior to the event I received a telephone call from Jean-Claude Aimé, the personal assistant of the then Secretary-General of the United Nations, Boutros Boutros-Ghali. He inquired whether it was correct that I was planning to travel to Nuremberg later in the week. I confirmed that. He then informed me that he had a message from the Secretary-General to the effect that I was not to go to Nuremberg. In response to my inquiry, he stated that he had no idea why the Secretary-General had sent the message. I informed Mr. Aimé that unless there was a good reason for my not going to Nuremberg I intended to do so. I suggested that I speak to the Secretary-General but was told that he was on a flight that would arrive back in New York later that day. I told Mr. Aimé that I was dining that evening at the home of a judge of the International Court of Justice and that it would be in order for the Secretary-General to call me there. In the middle of dinner the call came through. Boutros-Ghali confirmed the message and on inquiry informed me that, because of the bankrupt situation of the United Nations, he had decided to cancel travel by all U.N. officials. I said that the trip to Nuremberg was not at the U.N.'s expense and that all the costs were being paid by the City. "Oh," he said, "then there is no problem and I hope you a good trip to Nuremberg!"

When Professor Leila Sadat, also a wonderful friend, asked me for a topic for this address, I could think of none more appropriate than *The Legacy of the Nuremberg Trials*. In suggesting this title I took into account that in 2006, in conjunction with the presentation of the award to Judge Kirsch, a major conference was held by this Law School entitled *Judgment at Nuremberg*. Leading experts gathered to discuss just about every aspect of the Nuremberg judgment. However, no speaker directly considered the legacy of the Nuremberg trials. There were, of course, references to the new ground broken in finding that individuals—and not only nation states—could be the subjects of international law. Judge Kirsch referred to the fact that a new system of international criminal justice was created by the proceedings and the judgment. It was also noted that, for the first time, crimes against humanity were recognized as a distinct crime. This in turn led to the application of universal jurisdiction for the most serious international crimes. Until that time universal jurisdiction applied only to piracy. Without the Nuremberg precedent, Adolph Eichmann would in all probability not have been tried in Jerusalem. Similarly, it is unlikely that other Nazi war criminals

would have been brought to trial in France and elsewhere. Without those developments, evil leaders would not today fear arrest for serious human rights violations. Slobodan Milosevic would not have appeared before the Yugoslavia Tribunals and suffered an ignominious death in a Dutch prison. Charles Taylor would not be standing trial today in The Hague. Radovan Karadzic would not have been arrested after being a fugitive from justice for thirteen years. Indeed, as Judge Kirsch pointed out, there would not be an International Criminal Court. In short, the Nuremberg trials of the major Nazi leaders were a crucial start to the modern pursuit of international criminal justice. To a greater or lesser extent, all modern international criminal courts are the progeny of Nuremberg.

In his remarks at the conclusion of the conference on *Judgment at Nuremberg*, Whitney Harris quoted the opening statement of Lord Justice Lawrence, the first President of the Nuremberg Tribunal. His words are worth repeating:

> 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 part in this Trial a solemn responsibility to discharge their duties without fear or favor, in accordance with the sacred principles of law and justice.
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> The four Signatories having invoked the judicial process, it is the duty of all concerned to see that the Trial in no way departs from those principles and traditions which alone give justice its authority and the place it ought to occupy in the affairs of all civilized states.[1]

That appeal was largely heeded by those who participated in the proceedings and by no one more than Whitney Harris himself.

What, then, is the enduring legacy of the Nuremberg trials? It is, I would suggest, the wide realization that the global community is competent to arrange its affairs under an international rule of law, one that applies to all nations—large and small, wealthy and poor, powerful and weak.

Before the end of the Second World War, sovereign nations did not consider themselves bound by any supranational order of laws. This was especially true of powerful nations. They resisted being bound by any rule of law that might interfere with their choice of how to order relations with other nations. Certainly, there was no question of individuals, let alone political or

1. *See* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 30 (1947) (Nuremberg Trials).

military leaders, being held criminally liable under international law. At Nuremberg, however, the four victorious powers, not without much difficulty and soul-searching, ceded their individual sovereign powers of prosecution to a multi-national tribunal. This was something new, and to this day the ramifications are not without controversy.

For the first time in history, the Nuremberg judges held that a sovereign country, Germany, was guilty of criminal conduct in waging an aggressive war. This finding was based on the Kellogg-Briand Pact of 1928,[2] in which the then major nations, including Germany, Italy and Japan, undertook not to wage aggressive war. The Nuremberg judges held unanimously that violation of the pact amounted to criminality and that the political and military leaders of Germany were guilty of participating in the commission of that offense. It was the first charge contained in the Nuremberg indictment and one in respect of which a number of death sentences were imposed.

The decision of the Nuremberg judges is reflected in the Charter of the United Nations, which outlaws the use of military force or even the threat of such force unless it is in self-defense or expressly authorized by the Security Council.[3] Most powerful nations still cavil at and more often than not ignore this restraint. I would refer in this regard to Russia's war against the people of Chechnya and the invasion of Iraq by the United States and its so-called "coalition." The debates that preceded the invasion of Iraq and the United Kingdom's desire to seek Security Council authorization under Chapter VII of the U.N. Charter was a powerful, if tacit, recognition of those provisions of the Charter. So, too, was the debate that followed the use of military force by NATO to stop the ethnic cleansing by Serbia of the Albanian population of Kosovo.

The members of NATO acted commendably in using military force for what was solely a humanitarian intervention. However, I would suggest that they seriously erred in failing to respect international law, and especially the U.N. Charter, by not approaching the Security Council to authorize their use of force. The excuse provided for not doing so was the fear that authorization would be vetoed by the Russian Federation. If the approach had been made and indeed vetoed by Russia, the inability of the Security Council to launch a humanitarian military intervention would have been justifiably placed at Russia's door. But perhaps more importantly, the veto might not have been exercised. The Russians may well have wished to avoid getting into bed with the cruel and genocidal government of Slobodan Milosevic.

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2. General Treaty for Renunciation of War as an Instrument of National Policy (Kellog-Briand Pact), Aug. 27, 1928, 94 L.N.T.S. 57.

3. U.N. Charter art. 2, para. 4 & art. 51.

Allow me to illustrate my point with a personal anecdote. In 2004 I was asked by the then Secretary-General of the U.N., Kofi Annan, to join a three-person committee chaired by Paul Volcker to investigate the serious allegations of fraud in the Iraq Oil–for–Food Program. I was immediately interested and so informed the Secretary-General. He then said that there was a problem—Mr. Volcker had not agreed to chair the committee. "Would you speak to him?" asked Annan. I agreed to do so, and made an appointment to meet with Volcker the following day. It turned out that Volcker had informed Kofi Annan, and the U.S. Permanent Representative at the U.N., John Negroponte, that he would only be prepared to chair the committee if there were a Security Council resolution welcoming its appointment and requesting member states to cooperate with the committee. His concern was that such a committee would have no subpoena powers and that even a non-binding resolution of the Security Council would be useful in approaching government officials (this turned out to be quite correct). He had sent a draft of such a resolution to the U.S. Mission. The Russians had signified their intention to veto such a resolution and were prepared only to agree to a statement from the President of the Security Council. While I was in his office, Volcker called both the Secretary-General and Negroponte. They confirmed the Russian position. To complicate the matter even further, Negroponte informed Volcker that he had been told that France would also veto the resolution. Volcker persisted and asked Negroponte whether he had put the draft resolution before the council. Negroponte said that he had not done so. He added there was no point in doing so in the face of two threatened vetoes. Volcker insisted that if the United States wanted him to chair the Committee then the resolution be put before the council, and that if it were vetoed he would reconsider his position. The following day the United States put the resolution before the Security Council and it was passed unanimously. "Of course," said Volcker to me, "how could they veto a resolution welcoming the appointment of an inquiry into huge fraud, especially as their nationals were alleged to have been heavily involved in it?" Volcker's political instincts were remarkable. This experience made me wonder what would have happened had the United States insisted on a vote on a resolution seeking authority for the NATO intervention in Kosovo.

On this occasion I would also like to acknowledge and emphasize the unique and crucial role played by the United States in the development of international criminal justice. First, without the leadership and, indeed, insistence of the United States, there would not have been any Nuremberg trials. It is well documented that, but for the emphatic views of the United States, the Nazi leaders would have been summarily executed in accordance with the strong preference of Winston Churchill. Secondly, it was the United

States that played the leading role in convincing the Security Council, in 1993,[4] to establish the International Criminal Tribunal for the former Yugoslavia and, in the following year, the International Criminal Tribunal for Rwanda.[5]

Thirdly, speaking from personal experience, without assistance from the United States, neither of the U.N. tribunals would have been able to begin their work and, having begun it, succeed in the execution of their missions. Some years later it was the influence of the United States that induced Kofi Annan to call the diplomatic conference in Rome in the middle of 1998 that led to the establishment of the International Criminal Court.

Fourth, without the political and economic power of the United States, none of the high-level defendants would have appeared for trial before the Yugoslavia Tribunal. I refer in this regard to Slobodan Milosevic and senior Croatian generals, including General Gotovina.

The Bush Administration has been justifiably criticized for its most unfortunate and negative policy with regard to the International Criminal Court ("ICC"). That, however, should not diminish the recognition the Administration deserves, for it has continued to support other international criminal tribunals, including the Special Court for Sierra Leone.

It remains in issue whether the ICC will succeed without positive support from the United States. Whatever the answer to that question, there can be no doubt that with support from this country the ICC's prospects for success would be substantially greater. It is not financial but political support that the ICC requires to have its orders respected by nations without whose cooperation they cannot be enforced. The decision by the United States to refrain from exercising its veto in respect to the reference of the Darfur situation to the ICC appears to have ushered in a softening of opposition to that Court. Let us hope so.

In this context it is disappointing that support from the leading European nations has been so weak. They failed to have Karadzic and Mladic arrested when they could have done so soon after they were indicted in 1995. It is true that the Pentagon was not prepared to order United States troops to arrest those indicted by the Yugoslavia Tribunal, but this was, after all, a European conflict.

I will end on a positive note. I have a strong expectation that the United States will not allow the legacy of Nuremberg to flounder and fail. That is not the wish of the people of this country. They do not wish war criminals to

4. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).
5. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

enjoy effective impunity. They are supportive of their prosecution and punishment. And, apart from criminal law, no country, least of all the United States, can afford a world without law. In the ordering of international relations, there is now too great a dependence on modern technology and the consequent need for cooperation across borders in the control of terrorism and other forms of global criminality. In the area of international trade, the plethora of international organizations that has been established with the approval and support of the United States provides ample support for this thesis.

I am optimistic that even if the United States fails in the coming years to ratify the Rome Treaty, it will increasingly offer its support for prosecutions launched by the ICC that are consistent with Washington's foreign policy. Then, there is the role of civil society in this and other democracies. The media, human rights organizations, and the faculty and students of so many universities have successfully pressured political leaders to take action in support of victims of atrocious crimes. It was, after all, public concern and pressure that led the United States and some of the European democracies to push the Security Council to establish the two ad hoc criminal tribunals for the former Yugoslavia and Rwanda. This realization should spur further demands for positive support of the ICC. This Law School has been at the forefront of those efforts, and I know that it will continue to stay there. It is in this context that I am so proud to accept this award.