



**From Nuremberg to Kampala – Reflections on the
Crime of Aggression**

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Crimes against Peace - Aggression in the 21st Century**

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Ladies and Gentlemen, dear Friends,

Our gracious hosts of this wonderful meeting at Chautauqua were kind enough - and this is somewhat unusual - to leave it entirely to me on which subject I will speak today.

I am, however, aware that this meeting is, by tradition, primarily a gathering of renowned international prosecutors, from Nuremberg through the present day. I am also aware that the main topic of this meeting is "Crimes against peace – Aggression in the 21st Century". Consequently, I have decided that I will essentially speak on the role and contribution, enormous contribution, of three American prosecutors, namely Robert H. Jackson, Whitney Harris and Benjamin Ferencz, to the recognition and outlawing of the crime of aggression as a crime under international law. I will do so from the perspective of a citizen of Germany, who was born during the Second World War, who is reasonably aware of the history of the 20th Century and who, by the unpredictable circumstances of life, became in the 90s of the last century the German Chief Negotiator for the future International Criminal Court and in 2003 one of the first judges of this Court.

But before I go *medias in res*, I would also like to mention the following: two days ago, on Saturday, Elisabeth and I had the honour to meet in New York, at the airport, for the first time, Bill Caming, another Nuremberg Prosecutor. Actually, we came here in the same plane. When I now speak about Nuremberg, I am aware that so many other distinguished Americans, e.g. Telford Taylor, Bill Caming, etc. had their role in establishing the legacy of Nuremberg. Mr. Caming, it is wonderful that you are here.

After the Review Conference

We are all aware that on 11 June 2010 the ICC Review Conference in Kampala adopted a package proposal on the crime of aggression which will probably provide the ICC after 2017, to some extent, with jurisdiction over future crimes of aggression. Before the Review Conference, pessimism prevailed internationally as to the likelihood that an agreement could be reached. My point is: the successful outcome of the ICC Review Conference on the crime of aggression would not have been possible without the vision, without the groundwork of Jackson and the lifelong commitment of Whitney and Ben to the cause of peace and justice.

Needless to say, I never had the chance to meet Robert Jackson in person. On the other side, in the 90ies, I had, during the ICC negotiation process, the chance to become acquainted with and even befriend outstanding American jurists and former Nuremberg prosecutors, in particular Whitney and Ben. It is on this basis and my memories from a number of personal encounters where we have been together that I will try to illustrate their exemplary work against aggressive war-making, a work which has given hope to so many in our global community.

Berlin, 3 May 2010, two weeks after the passing away of Whitney: a conference is held on the crime of aggression in preparation of the ICC Review Conference in Kampala. Ambassador Wenaweser, the President of the ICC Assembly of States Parties, is present, a number of Bundestag Members and Government officials, a good audience, and some journalists. The situation for me as ICC Vice-President is a bit difficult, as I myself took part in deciding the Court's policy: ICC Judges should not comment on the forthcoming negotiations in Kampala; the discussion of the crime of aggression is a matter for the States Parties alone. Eventually, I say, with some hesitation – and I recall this almost by heart:

“As an ICC Judge, I cannot speak on the crime of aggression and the forthcoming negotiations. But as a German citizen who was born during the Second World War and who knows article 26 of our constitution, the Basic Law, containing a prohibition of aggressive wars I feel very close to two American pioneers for the proscription of the crime of aggression, both US Prosecutors in Nuremberg, namely Whitney Harris and Benjamin Ferencz. As you may know, Whitney Harris passed away recently in Saint Louis, on 21 April 2010. He was a Prosecutor of the International Military Tribunal in the case against Kaltenbrunner, the head of the Nazi Secret Police, the Gestapo. Whitney published a book in 2004 called “The Tragedy of War”. I would like to cite a single phrase out of the epilogue of this book:

“The crime of aggressive war must be recognized, defined and punished when it occurs, for war is the greatest threat to the survival of civilisation”.

Benjamin Ferencz, Prosecutor in the so-called Einsatzgruppen Trial, was just awarded with the Erasmus Prize in The Hague Royal Palace for his lifelong work. The headline of his website reads, “Law not War”. Ferencz will soon travel to Kampala to attend the discussions on the crime of aggression, with tremendous energy and charisma, despite his age. Both Harris and Ferencz basically agree on the following: the common task is about repressing, preventing and banning the waging of aggressive war”.

And I concluded:

“It seems essential to me - it would indeed be wonderful if Kampala would bring about real progress and a breakthrough for the outlawing and penalisation of the crime of aggression.”

Why do I report about this conference, about this episode, which may seem small, to all of you? Well, to demonstrate to you, to an American audience that on this 3 May 2010 in Berlin, 6000 kilometres from here, the principles, the ideals and the lifelong commitment of Whitney and Ben, two former aides of Robert Jackson in Nuremberg, were present in the capital of Germany. They had an impact. I am not sure that many Americans really understand what the ideas, principles and vision of Jackson,

Whitney and Ben have done internationally for this country, the United States of America.

Towards the Rome Conference

It is wonderful that Anna Harris and Ben are today with us. Ben, you are indeed the first former Nuremberg Prosecutor whom I met back in 1996, at the August PrepCom. It was obvious to all that Ben was already then the leading and eloquent advocate for the inclusion of the crime of aggression in the statute of the future International Criminal Court.

And when we prepared for the February 1997 PrepCom, I got the green light from the top level of the German Foreign Office that we would be authorised to table a new concrete text proposal on the crime of aggression. Before flying to New York, I sought the advice of leading international lawyers in Germany, for example Professors Tomuschat, Simma, the current ICJ Judge from Germany, Frowein and Bernhardt. Needless to say, they all were quite aware of the historic complexities of the issue of crimes against peace, aware of the painful and often frustrating efforts to achieve progress. They hardly managed to hide their scepticism, even irony when they said, "Good luck, good luck, Mr. Kaul!"

When my delegation arrived in New York at the PrepCom, the discussion on the crime of aggression was low-key if not dormant. But in May 1997, the International Criminal Court Monitor, a newsletter by the NGO Coalition headed by Bill Pace, commented:

"... During the February PrepCom many of the States spoke in favour of the inclusion of the crime of aggression. Germany's proposal on aggression was particularly helpful in lending focus to this debate."

Two months later, Lionel Yee, the respected Head of the Singapore Delegation added, *"a draft consolidated text defining aggression is ... before the Committee now; and much credit for this should go to the German delegation's efforts..."*

It was during the Rome Conference that I became eventually quite close, in a relationship of trust and confidence with Whitney and Ben. Those who know the story of the Rome Conference will also know that both of them were, time and again, a source of encouragement and inspiration in particular for the German delegation – you might even say that sometimes they acted as informal advisers to my delegation. Whitney and Ben were unanimous in their view that the crime of aggression should be within the jurisdiction of the ICC. Having them on our side was an invaluable source of encouragement to the German delegation not to resign, not to give up in our quest for a credible International Criminal Court.

The ICC is the direct heir of Nuremberg, of the downfall of Germany to barbarism under the Nazis. First, the persecution of Jews, then the invasion of Poland on 1 September 1939, a textbook example of a war of aggression, of a “crime of aggression” that led directly to the Second World War, with all the ensuing crimes against peace, crimes against humanity and war crimes. Given our own experiences, our own past, it is I believe only right that Germany did its utmost to promote the establishment of an effective, functioning, independent and thus credible International Criminal Court.

It is also widely accepted, if not common knowledge, that without Germany, the crime of aggression would not have been incorporated in article 5 of the Rome Statute, our founding treaty. The German proposal, which was the last on the table in Rome, at least made sure that the crime of aggression was reaffirmed as an international crime, once and for all in article 5 of the Statute.

From today’s perspective, it seems obvious that this was of fundamental importance. If the crime of aggression had not been recognised as such, at least with this placeholder provision of article 5 of the Statute, we probably would have been faced with the following consequences:

- (1) This would have meant a serious setback, if not dramatic regression in international law. It probably would have been interpreted or misinterpreted as a rejection of the lawfulness of the concept of crimes against peace as enshrined in the Charter of the International Military Tribunal of Nuremberg. It would even have meant an implicit rejection of the vision and crucial role of Jackson.
- (2) This would have been a triumph for all those who continue to argue that it is simply impossible to regulate power politics and the use of military force through norms of law.
- (3) There would have been no mandate and no basis for further work on the codification of the crime aggression.
- (4) There would have also been no basis for this special Assembly of States Parties Working Group on the crime of aggression, which over seven years prepared, in Princeton and New York, the ground for the breakthrough in Kampala, with Ben and Whitney acting time and again as inspiring advisers.

Tribute to the work of the IMT at Nuremberg

With the permission of Anna, I would like to recall once more, before this audience, the memorable visit of Whitney and Anna in Berlin in October 2000 when Whitney was a guest of honour of the German Parliament. Why so? Because one can see, in a nutshell, what the work of Jackson, Telford Taylor, Whitney, Ben and others means for many in Germany.

You will now see five pictures covering 55 years, from 1945 to 2000, which Whitney and also Ben have seen as witnesses of history.

The first picture is a picture that even nowadays most Russians know, old and young, from war veterans to school kids. It shows, it symbolises indeed the victory of the Red Army and their conquest of Berlin. One should not forget that the war of aggression waged on 21 June 1941 by Hitler against the Soviet Union and Russia, a proud nation, has caused the loss of 20 million Russian lives alone.

The next picture shows the Reichstag in ruins in 1945, another consequence of the wars of aggression ending in this year.

The following picture shows an officer whom we have honoured last night, Whitney Harris, in Nuremberg in 1946.

Here we have the Reichstag rebuilt, as it looked in 2000 – only in 1999, the German government has moved from Bonn to Berlin.

It was the vision, the special wish of Whitney to be present when the German Parliament would adopt the ratification law for the future International Criminal Court. On 27 October 2000, Whitney, elegant and distinguished as ever, sat on the gallery of the Reichstag reserved for the guests of honour, the only one on this gallery above us, here you have a picture of a plenary meeting of the German Parliament. I myself was sitting behind Chancellor Schroeder and Foreign Minister Fischer, on the bench reserved for the senior civil servants. When the ICC law was adopted, Deputy Foreign Minister Vollmer took the floor and said,

“Dear Colleagues,

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

All parliamentarians from all parties, from the left to the right, rose. The records of the German Bundestag note a “standing ovation and long applause”.

Another event which has left a deep mark in my memory is the symposium “Judgement at Nuremberg” held in Washington University in Saint Louis from 29 September to 1 October 2006, on the 60th anniversary of the judgment of the International Military Tribunal at Nuremberg. As many who were present during this extraordinary conference are also among us today, including Anna and Ben, I can be brief. There were several aspects of this outstanding conference whose proceedings are published in this edition of the “Washington University Global Studies Law Review”, which I found particularly impressive. In hindsight, it seems

clear that in particular Whitney and Leila were the driving force for this excellent conference.

Firstly, there was the quality, profoundness and impartial fairness of the speeches and contributions made, and this includes in particular those of Whitney, Ben and Henry T. King Jr., the three Nuremberg Prosecutors. Secondly, the entire seminar was future-oriented. If I remember well, I have hardly ever participated in a conference attempting so seriously to identify the lessons for the present and the future to be drawn from the terrible crimes and human catastrophes which had to be dealt with at Nuremberg. We were all reminded in a powerful way by many what Jackson thought about the crime of aggressive war. Today, I am myself among the many Germans who believe: the most important point of Nuremberg was the conclusion that aggressive war, which had been a national right throughout history, should henceforth be punished as an international crime.

Crimes against Peace – Lessons from the 20th Century

As Ben has said, this was a revolution in thinking. As we are talking about the lessons from the last century, please permit me to mention a brief correspondence I had in early 2008 with Ben. I will again use three pictures to introduce this episode:

On the first picture you see the ruins of the Brandenburg Gate and the Reichstag in Berlin in 1945. I am quite familiar with pictures of such destruction; they were the almost daily reality of my childhood and youth. I was born in nearby Dresden, the capital of Saxony, one of the most beautiful cities of Europe, totally destroyed by devastating air raids from 13 to 15 February 1945, looking then like Sodom and Gomorrah. Dresden is the first city I have vivid memories of as a child in 1946/1947. It was a totally ravaged Dresden, a city littered with ruins, where beaten tracks through the rubble served as streets – although at the time, as a small boy holding his mother's hand, I found this quite normal. When I became an adult, it did not take long to make me understand that the wiping out of Dresden in those murderous air raids - by current standards of international humanitarian law certainly a particularly serious war crime pursuant to article 8 of the Rome Statute – was nothing else than another terrible consequence of the aggressive wars started by Adolf Hitler and his followers.

Ben - you see him in this picture as a prosecutor in the Einsatzgruppen case - was after the war a number of times in Berlin.

The following picture has also to do with the catastrophic situation in which Germany was plunged after its aggressive wars; it also has to do with Ben. I found this picture around Christmas in 2007 in the Academy of Arts nearby the Brandenburg Gate.

It caught my interest. The picture is of Berlin in 1945 and shows ruined buildings and piles of rubble. And on a wall that had somehow remained standing, somebody had written three words, only three words, in large white letters: "Nie wieder Krieg" – "Never again war".

We know how hungry the people were in Berlin in 1945, what deprivations they suffered, how they fought to survive each day.

And nevertheless there were individuals or small groups who criss-crossed the ruined city with a bucket of paint and a brush to spread the message as wide as they could: "Nie wieder Krieg". I was moved by this idea.

Since I know that Benjamin Ferencz had been in Berlin after the war, we sent this card to him in America with our greetings. We soon heard back from him, on 6 January 2008. With his permission, I would like to read you his email:

"I vividly recall the scene depicted in your photo of Berlin "Nie wieder Krieg". I hope one day with your help, we can add a postscriptum "Krieg ist strafbar!" [war is a criminal offence]. I am still working on it."

Yes indeed, Ben, you and Whitney and so many good people kept working on it, with steadfastness and determination.

Conclusion - Some Personal Thoughts

And now, against all odds, against most expectations, we have since 11 June 2010 a full and agreed package proposal on the crime of aggression. It closes in all likelihood the last remaining important lacuna in the substantive law of the Rome Statute. We now have a yardstick, a measurement, an agreed standard to determine whether a crime of aggression was committed or not. It is not my role as a Judge of the ICC, nor my intention to delve into the intricacies and maybe even weaknesses of the complex proposal which was adopted. In this regard, I look already forward to the dialogue on the crime of aggression which will immediately take place after my remarks. Instead, let me, therefore, share with you three or four considerations of a more general nature.

First, it was in my view absolutely right and timely that the organisers of this important symposium devoted it to a dialogue on "Crimes against Peace – Aggression in the 21st Century". The outcome of the ICC Review Conference is in my view also part of the legacy of Nuremberg and of the pioneer role of Jackson, Whitney, Ben and others. What is needed now is a meaningful dialogue on the implications and consequences of this major step in the development of international criminal law. Not only the distinguished participants of this conference but leaders all over the world including those in Washington are called upon to reflect which

conclusions they may draw from the adoption of the amendment to the Rome Statute on the crime of aggression by consensus. They may reflect on which policy they may henceforth follow in this field.

Second, please permit me to share with you some personal thoughts on the use of military force for political purposes and on the phenomenon of war in general. I note that my own thinking with regard to these issues has changed and evolved considerably in the past decades. Like Whitney and Ben, I also served in the military, as a Captain and paratrooper in the German army. Then, after the Cuban missile crisis, at the peak of the Cold War, I wanted, like others, to defend the West against the Communist threat. Therefore, I believe that I am not in danger of falling for naïve pacifism. But when we re-assess today crimes against peace, let me reaffirm what I said two years ago in Cologne, another 2000 year old treasure, founded by the Romans, and totally destroyed as a consequence of Hitler's aggressive gamble:

War: this is the ultimate threat to all human values. War is sheer nihilism; it is the total negation of hope and justice. Experience shows that war, the injustice of war in itself, begets massive war crimes and crimes against humanity. And once again, in my own words, this time as blunt and unpleasantly as reality itself: war crimes are the excrement of war – they are an odious, an inevitable, an inescapable consequence of war. We have seen this time and again, in World War II, in Vietnam, in the former Yugoslavia, in Iraq, also in practically all African situation States, with which the ICC is currently seized. As in the past century, a terrible law seems to hold true: war, the ruthless readiness to use military force, to use military power for political interests, regularly begets massive and grievous crimes of all kinds.

Recently, Michael Bohlander, a German professor now teaching in Durham, South Africa, has reminded me about a further appalling aspect of this evil: even nowadays, in modern warfare, in the time of so-called surgical strikes, 80 to 90% of war casualties are regularly civilians, mostly children and women. This is an ongoing scandal, a shame for all concerned.

Third, given this situation, it will not surprise anybody that when learning about the outcome of Kampala with regard to the crime of aggression, I felt not only relief, but satisfaction. I also have heard, from various sources, that the German delegation in Kampala, most of them my former collaborators in Berlin or even members of my delegation during the Rome Conference, as for example Claus Kress, had again an important and constructive role in the negotiations. Ten days ago, Dr. Wasum-Rainer, the current Legal Adviser of the German Foreign Office told me in an informal meeting at the ICC that Germany will endeavour to ratify quite soon the amendment on the crime of aggression to the Rome Statute adopted in Kampala. There is little doubt that this treaty, the Rome Statute, will soon have an article 8bis and articles 15bis and 15ter incorporating the crime of aggression.

My last remark concerns a programmatic announcement which Jackson made in his opening statement before the International Military Tribunal on 21 November 1945 in Nuremberg. In my view, this announcement continues to be of fundamental importance for the crime of aggression even today. You will probably recognise again these well-known sentences, when I quote the following words of Jackson:

“But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.”

Now, why are these programmatic, these farsighted sentences even nowadays of such a tremendous importance? Well, because they set out the vision, they set out the promise that international law relating to crimes against peace will be applied in the future in an equal manner vis-à-vis all possible aggressors; because they set out the vision and the principle of “Equal law for all, Equality before the Law” with regard to crimes against peace.

The principle of “Equal law for all, Equality before the Law” is a general principle of law recognised by civilized nations within the meaning of article 38(1)(c) of the Statute of the International Court of Justice. Yes, law must apply to everyone equally.

Well, while there are some in this world and also in this country who want to ignore this principle, who want to push it back, there are, however, also many in this great country who actively support and work for full respect of the principle of “Equal law for all, Equality before the Law”.

This gives hope, much hope and encouragement.

Thank you very much.