

ROBERT JACKSON'S TRANSCENDENT INFLUENCE OVER TODAY'S WORLD

*Henry T. King, Jr.**

Today we are seeing the birth of a new international institution that will deal with problems that have plagued mankind since the beginning of recorded human history. The institution is the International Criminal Court ("ICC"), whose birth may be recorded as March 11, 2003, when the judges for the new Court were sworn in. I was there for the swearing in ceremony, which was carried out in good taste and with a sense of historic importance.

As I watched the ceremony unfold I thought of the man who started it all: Robert Jackson. These days Robert Jackson is an unsung hero of history, but I believe that as historians dig deeper into the throes of history, his preeminence in the development and implementation of war crimes concepts will unfold. In this regard, I have an advantage because I was there at Nuremberg and a party to the Nuremberg proceedings. I was an eyewitness and supporting participant in the most important trial in history before the International Military Tribunal ("IMT") and the subsequent proceedings which followed it.

Jackson's concepts of war crimes are set forth in his report of June 6, 1945 to President Harry S. Truman where he recorded his views on what should be the central charges in a war crimes trial of the top Nazis. These crimes included Crimes against the Peace (aggressive war), War Crimes (crimes against the laws of war) and Crimes against Humanity (crimes against individuals for racial, religious or political reasons). Jackson's report was followed by the London Charter of August 8, 1945,¹ in which the three other

* Professor of Law, Case Western Reserve University School of Law. B.A., Yale University, 1941; L.L.B., Yale University, 1943. Professor King was a prosecuting attorney at Nuremberg and an attendee at the United Nations Diplomatic Conference of Plenipotentiaries at Rome, June 1998.

¹ Charter of the International Military Tribunal, *reprinted in* ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, at 420 (1949) [hereinafter IMT Charter].

Nüremberg plaintiff nations agreed with Jackson's war crimes concepts. They also agreed with his Nüremberg trial approach, which implemented his concepts through joint action against the top Nazi defendants.

Jackson's concepts of war crimes were the progenitors of crimes set forth in the Rome Statute, which will be the basis for the operation of the International Criminal Court's jurisdiction over genocide, crimes against humanity and war crimes. These crimes are all derived from the Nüremberg precedent. The same, I believe, will also be said of aggression when it is eventually defined and implemented under the Rome Statute.

It is indeed a matter of supreme irony that the United States of America, which led the way in the Nüremberg proceedings through Jackson's leadership, has turned its back on Jackson by renouncing, and making every effort to sabotage, the introduction of the International Criminal Court into today's world. The United States not only "unsigned" its signature to the Rome Statute,² an event unparalleled in the long history of diplomacy, but also it suspended "military assistance to 35 countries...[which support the Court, when] they refused to pledge to give American citizens immunity before the International Criminal Court."³ Jackson, in his opening statement at Nüremberg, said "[t]o pass these defendants a poisoned chalice is to put it to our own lips as well."⁴ In the Rome Statute negotiations, the United States took the position that no American should be subject to trial by the Court without prior concurrence by America. Obviously, had other nations taken this position, there would indeed have been no Court. I believe the U.S. approach was designed to kill the Court even before its birth.

The challenges faced by Jackson in bringing Nüremberg to reality were monumental—but for perspective's sake they need to be

² WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 420 n.5 (2d ed. 2004).

The US Government sent the following communication to the Secretary-General of the United Nations on 6 May 2002: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000."

Id.

³ Elizabeth Becker, *U.S. Suspends Aid to 35 Countries Over New International Court*, N.Y. TIMES, July 2, 2003, at A1.

⁴ Opening Statement for the United States of America by Robert H. Jackson, Chief of Counsel for the United States at the Palace of Justice, Nürnberg, Germany, November 21, 1945, reprinted in ROBERT H. JACKSON, THE NÜRNBERG CASE 30, 34 (1947).

emphasized today. Such influential figures as Winston Churchill and Secretary of the Treasury Henry Morgenthau favored summary executions of the top Nazis. Secretary of State Cordell Hull endorsed “drum head” courts-martial designed only to convict and execute defendants. These approaches might have had some therapeutic value, but they would have added nothing to developing a rule of law for the world. Following this approach would have paralleled the Nazi policy for dealing with enemies of the Nazi regime. Here we should bear in mind that three of the defendants at Nüremberg were acquitted of the charges levied against them. Convicting the innocent through a summary execution approach could have scarred the memory of the Allies’ achievements in World War II.

In the negotiations preceding the London Charter, Jackson and his U.S.S.R. counterpart, negotiator General Nikitchenko, squared off on the approach to be followed in the trial of the Nazis. Jackson favored a presumption of innocence, which meant that the Nazis were to be freed if there were insufficient evidence to rebut this presumption, while Nikitchenko pushed hard for a presumption of guilt, mainly concerned with the degree of punishment to be meted out. An exchange of June 29, 1945 between Jackson and Nikitchenko highlights the differences in their approaches. At one point Nikitchenko stated:

We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea [(Yalta)] declarations by the heads of governments, and those declarations both declare to carry out immediately just punishment for the offenses which have been committed.⁵

To which Justice Jackson replied later in the session:

These declarations are an accusation and not a conviction. That requires a judicial finding. Now we could not be parties to setting up a mere formal judicial body to ratify a political decision to convict. The judges will have to inquire into the evidence and reach an independent decision.... I have no sympathy with these men, but, if we are going to have a trial, then it must be an actual trial.⁶

Negotiations continued at length on this issue. In the end,

⁵ IMT Charter, *supra* note 1, at 104.

⁶ *Id.* at 115.

Justice Jackson told Nikitchenko that there would be no U.S. participation in the trial if the Soviet approach were followed. United States leverage on this matter was increased because the United States held most of the prospective defendants in custody. Nikitchenko eventually yielded and the presumption of innocence was the order of the day at Nüremberg. Ironically, Jackson's approach resulted in the acquittal of three defendants, including Hjalmar Schacht and Franz von Papen, whose acquittals upset Jackson greatly.

In preparing for the trial, Jackson took the position that the prosecutor's primary thrust in the trial should be reliance on documentary evidence from the Nazi's own files. He felt that such evidence would be largely irrefutable and that it would enhance the credibility of the outcome. But this precipitated a conflict with General William J. Donovan, one of his projected top subordinates. General Donovan was chief of America's principal wartime intelligence agency—the Office of Strategic Services (OSS). Donovan's view was that the trial required live witnesses, in addition to the captured documents on which Jackson intended to rely. Jackson, however, informed Donovan in a memorandum that because he was convinced that the documentary case was so strong, witnesses would be used, at most, only incidentally in the primary prosecution case. Shortly after receipt of Jackson's memorandum, Donovan left Nüremberg never to return.

My own view of this conflict, as one who was there, is that Jackson was profoundly right in principle. Support for this view is found in the Nüremberg Court's decision. It pointed out that much of the support for the convictions of the top Nazis was to be found in documents of their own making. On the other hand, Nüremberg, as a documentary case, attracted significantly less contemporary press coverage than would have been the situation where witnesses were the order of the day. This may have been why Bill Donovan pushed so hard for reliance on witnesses. I believe, however, that Nüremberg's historical significance is enhanced by Jackson's decision to make Nüremberg primarily a documentary case, not based on witnesses whose credibility could have been undermined by severe German defense counterattacks.

In the interest of fairness, Jackson wanted Nazi defendants to be well represented by counsel at Nüremberg. This was, in one sense, a self-created hurdle, but it helped to ensure the integrity of the trial. As it turned out, the defendants had a primary role in the

selection of their counsel. Both Jackson and Sir David Maxwell-Fyfe, the British Deputy Chief Prosecutor, praised the German defense counsel as a whole. Jackson lauded the German lawyers for the “professional attitude [they took] toward the trial on the whole.”⁷ Sir David wrote that the defense counsel “kept up the high tradition of the profession in circumstances which must have been extremely difficult for them.”⁸ In his autobiography, he wrote “Dr. Rudolf Dix, who defended [(Hjalmar)] Schacht, and Flottenrichter Otto Kranzbuehler, defending [(Karl)] Doenitz, were as good as could be found at any Bar.”⁹ Here it is noteworthy that Hjalmar Schacht, Dr. Dix’s client, was acquitted at Nüremberg and that Karl Doenitz, the U-boat chieftain and Hitler’s designated successor, received a prison sentence of ten years, the shortest given to any defendant.

It is a matter of historical record that some German defense counsel (e.g. Kranzbuehler) were critical of the legal basis for the trials, but defense counsel criticism of the manner in which the trial was conducted has been largely muted. A comment on the proceedings made by Dr. Theodore Klefisch, a defense counsel in both the primary Nüremberg trial before the International Military Trial and the subsequent proceedings, is of timely significance; he wrote:

It is obvious that the trial and judgment of such proceeding require of the Tribunal the utmost impartiality, loyalty, and sense of justice. The Nuremberg Tribunal has met these requirements with consideration and dignity. Nobody dares to doubt that it was guided by the search for truth and justice from the first to the last day of this tremendous trial.¹⁰

Furthermore, the Nüremberg defendants believed that the trial was necessary. Albert Speer, the Nazi War Production boss, said: “The trial is necessary. There is a shared responsibility for such horrible crimes even in an authoritarian state.”¹¹ Hans Frank, the

⁷ Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* vi, xxxv (1954).

⁸ DAVID PATRICK MAXWELL FYFE, *POLITICAL ADVENTURE: THE MEMOIRS OF THE EARL OF KILMUIR* 103 (1964).

⁹ *Id.*

¹⁰ 2 DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT* 748 (1999) (citation omitted) [hereinafter *INSIDE THE NUREMBERG TRIAL*].

¹¹ *Id.* at 1026 (citation omitted).

Nazi Governor General of Poland and a former president of the Bavarian Bar Association stated: "I regard this trial as a God-willed court, destined to examine and put to an end the terrible era of suffering under Adolf Hitler."¹² Baldur von Schirach, the Nazi Youth leader, said: "The guilt is mine in that I have educated the youth of Germany for a man who murdered by the millions."¹³

The fact that the trial occurred was a magnificent achievement for Jackson. After all, the Germans had only surrendered at Rheims, France on May 8, 1945, and yet just half a year later the Nüremberg Court convened on November 20, 1945. Jackson's opening statement of November 21, 1945 was an all-time forensic masterpiece. As he spoke that fateful day, the world listened and his words are imbedded in the memories of those who heard them. For the first time in history, the top leaders of a nation which had carried out wars of aggression were being held responsible and punished for their roles in that aggression. Moreover, leaders who instigated violations of the laws of war governing the treatment of civilians and prisoners of war were being tried for their crimes. Those who were instrumental in the murder and injury of millions of people for racial, religious, or political reasons were being brought to the bar of justice. What was occurring, as Jackson spoke that day, was a shift from country responsibility to personal responsibility for war crimes. The veil of national sovereignty could no longer insulate national leaders from responsibility for their crimes. They were to be called to account personally under international law.

It would seem to be self-evident that the practices condemned at Nüremberg, such as genocide, should be stopped, and that the world under a rule of law for all mankind would be safer and more secure. Jackson, however, had his critics in the United States and some of their attacks were personal. United States Supreme Court Chief Justice Harlan Stone characterized Nüremberg as Jackson's "high-grade lynching party."¹⁴ To his dying day, Jackson resented this personal attack on himself and Nüremberg. For whatever else is said about Nüremberg, most analysts, together with those directly involved, have characterized Nüremberg as a fair trial. Stone's characterization of Nüremberg as a "lynching party" does not hold

¹² *Id.* at 895 (citation omitted).

¹³ *Id.* at 1006-07.

¹⁴ ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 716 (1956).

water in the face of the fact that three Nüremberg defendants were acquitted.¹⁵

Jackson's Nüremberg also drew political fire from Senator Robert A. Taft, a powerful U.S. politician and presidential candidate. Speaking at Kenyon College shortly after the Nüremberg judgment had been rendered, Taft condemned the judgment as *ex post facto* law. He argued that Nüremberg was born of the "spirit of vengeance" and that "[t]he hanging of the eleven men convicted will be a blot on the American record which we shall long regret."¹⁶ Taft stated, "[b]y clothing policy in the forms of legal procedure, we may discredit the whole idea of justice in Europe for years to come."¹⁷

Taft's Kenyon speech came so soon after the Nüremberg judgment that it seems almost incomprehensible that he had a full opportunity to assess its significance. With regard to Taft's *ex post facto* argument, the Nüremberg Court said that this principle was a principle of justice and not a limitation on sovereignty. Albert Speer, a key defendant, told me that it would have been an injustice to free the defendants on this ground.¹⁸ He believed that they knew full well the ethical implications of the actions they took. It can be said that in some of the situations, on which the Nüremberg cases were based, the Nazi defendants had legal opinions that what they did was contrary to customary international law.

Taft forecasted that Nüremberg would discredit the whole idea of justice in years to come; however, quite the opposite occurred. The nations of Europe are today the core supporters of the International Criminal Court, which is based on Jackson's concepts implemented at Nüremberg. The nations of Europe saw the Nüremberg principles as a blueprint for achieving justice under a rule of law. Today they are willing to challenge the United States in support of what they believe in—the institutionalization of a rule of law in the world through the establishment of a permanent institution to administer it—namely, the ICC.

With regard to Taft's much-discredited forecast, it is worthy to note that the post war German Constitution contains a provision

¹⁵ INSIDE THE NUREMBERG TRIAL, *supra* note 10, at 1406–09 (noting that Hjalmar Schacht, Franz von Papen, and Hans Fritzsche were each found not guilty).

¹⁶ Robert A. Taft, "Equal Justice Under Law:" The Heritage of the English-Speaking Peoples and their Responsibility, Address at Kenyon College (Oct. 5, 1946), *in* 13 Vital Speeches of the Day 44, 47 (1946).

¹⁷ *Id.*

¹⁸ For a detailed discussion of Albert Speer, see HENRY T. KING, JR. & BETTINA ELLES, THE TWO WORLDS OF ALBERT SPEER: REFLECTIONS OF A NUREMBERG PROSECUTOR (1997).

prohibiting aggression by Germany.¹⁹ This is certainly a German vote of confidence in what was Jackson's fundamental objective at Nüremberg—the outlawing of aggression. Moreover, the vote in the German Bundestag in support of adherence to the Rome Statutes establishing the ICC was unanimous.²⁰ It is a matter of supreme irony that in their approaches towards a rule of law in the world, the United States, the progenitor of Nüremberg, and Germany, the home of the major Nazi war criminals tried at Nüremberg, have now switched sides. The United States now uses all its might to oppose the ICC's institutionalization of a rule of law in the world, and Germany is a prime supporter of the Court. Were he alive today, Robert Jackson would have been heartened by the German approach and deeply disheartened by the U.S. approach, which besmirches the memory of all he stood for at Nüremberg.

NÜREMBERG REVISITED IN TODAY'S WORLD

Nüremberg marked the start of the international human rights movement that is flourishing today. Nüremberg held that individuals have international human rights that are not dependent on nation state recognition. In defining Crimes against Humanity, the Nüremberg Charter said that the listed acts were criminal “whether or not in violation of the domestic law of the country where perpetrated.”²¹ What this meant was that domestic authorization for the activities declared criminal was of no account and that a higher international law controlled. It meant that a victim's right to be free from the atrocities listed in the Crimes against Humanity count was protected under that higher law.

This approach was, indeed, a daring attack on the concept of sovereignty as it had existed for centuries before. It was also a big step forward in building a rule of law in the world. In today's world, the European Convention on Human Rights is a direct descendent of Nüremberg. Its objective is to protect individuals from denial of their human rights by their sovereigns, as defined by the

¹⁹ “Acts with the potential to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare war or aggression, are unconstitutional. They have to be made a criminal offence.” GRUNDGESETZ [GG] [Constitution] art. 26(1) (F.R.G.), *reprinted in* THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (May 23rd, 1949) 31 (Axel Tschentscher trans., 2002).

²⁰ *ICC Prep Com Shows Progress Despite U.S. Hesitation*, INT'L ENFORCEMENT L. REP., Jan., 2001.

²¹ IMT Charter, *supra* note 1, at 423.

Convention. Moreover, the Convention has a Court with enforcement powers to protect these rights. The United Nations (“U.N.”) General Assembly endorsed the Nüremberg principles on December 11, 1946.²² Since then, the U.N. has sponsored a number of human rights conventions designed to perpetuate the meaning of Nüremberg. The Genocide Convention is one such example.

The Nüremberg judgment condemned genocide when carried out in the course of aggressive war. The Genocide Convention condemns genocide per se whether in peacetime or wartime. Even the United States, after many years of debate, is now party to the Convention, thanks to the efforts of Senator William Proxmire, Bruno Bitker and others, including myself. The U.S. ratification of the Convention is, however, subject to many conditions that reduce its domestic impact. Other human rights initiatives include the Universal Declaration of Human Rights and the Torture Convention, to name a few. The human rights initiatives emanating from Nüremberg have found continuing support through private organizations such as Amnesty International, Human Rights Watch, and the World Federalists Movement. They have become the conscience of the world in their sustained efforts to protect international human rights.

Jackson’s approaches at Nüremberg are the direct forerunners of the U.N. sponsored international proceedings now being carried out at The Hague to deal with war crimes in the former Yugoslavia and in Tanzania. Both are based on resolutions of the U.N. Security Council and both have the support of the international community. But like Nüremberg, both are ad hoc non-permanent entities on the international legal landscape. Moreover, neither covered aggression, which, in Jackson’s view, was the fundamental international crime.

Both tribunals deal with genocide, Crimes against Humanity and War Crimes, and these substantive charges find their ancestors in Nüremberg. In the Crimes against Humanity count, however, there is one primary addition—Crimes against Females. Rape, forced prostitution, and other crimes traditionally committed against females are very much part of the scene, particularly at The Hague where individuals are being tried for crimes in the former

²² G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (1946), *reprinted in* KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY: 1946–1996, at 429 (Dietrich Rauschnig et al. eds., 1997).

Yugoslavia. This addition enhances the credibility of these proceedings and widens their scope.

Jackson's contribution to international human rights is also found in Nüremberg's endorsement of the principle of universal jurisdiction. As Jackson said in his opening statement at Nüremberg on November 21, 1945: "The real complaining party at your bar is civilization."²³ The Nüremberg Court applied the concept of universal jurisdiction when it said that the nations who were plaintiffs at Nüremberg were doing collectively what each of them could have done individually. In essence, what Jackson was saying was that the crimes that were dealt with at Nüremberg were so terrible that any legitimate court could take jurisdiction of them because they were crimes against all humanity—literally and collectively.

The Israeli courts, in the Adolf Eichmann case, applied this concept in convicting Eichmann of crimes against Jews that had, at the time of their commission, no legal standing in Israel because Israel was not then a nation state.²⁴ There was no Israeli law in effect which Eichmann could be charged with violating, but, said the court, these crimes were so massive that they were crimes against all humanity and it held that Eichmann should pay with his life for their commission. The United States Court of Appeals, in *Demjanjuk*,²⁵ endorsed this concept. It is also included in the Restatement of the Foreign Relations Law of the United States and the U.N. sponsored Torture Convention. The concept is now firmly entrenched, as witnessed during the recent application in the trials of former Chilean dictator Augusto Pinochet.

Jackson's approach at Nüremberg, namely that heads of states and other top officials should be held responsible for war crimes, is center stage today at The Hague. While at The Hague in March, 2003, I witnessed the trial of Serbia's former leader, Slobodan Milosevic. This was, I believe, the first time since Nüremberg that a man of Milosevic's rank and status has been brought to the bar of justice for war crimes committed by his regime against others in Bosnia and Kosovo. He is being given a fair trial—as Jackson would have wanted—and he will be punished if and only if the Court finds support for the charges levied against him.

²³ JACKSON, *supra* note 4, at 94.

²⁴ Attorney General of Israel v. Eichmann, 36 I.L.R. 277 (Isr. Ct. 1962).

²⁵ *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

At Nüremberg, Jackson did not want national leaders hiding behind the “superior orders” defense. In fact, in the London Charter, which governed the Nüremberg proceedings, it is eliminated as a defense, although it could be considered a mitigation of punishment in certain cases. The Nüremberg Court took this to mean that the mitigation provision applied only in cases where moral choice was not possible. In the case of the high level defendants at Nüremberg, however, the Court found that this was not the case, that they were at Hitler’s side, doing his bidding, because they wanted to be there.

Jackson’s principle, that superior orders generally should afford no defense in war crimes cases, was largely adopted as a guiding light for the U.N. sponsored tribunals operating in The Hague and Tanzania. At Nüremberg, Jackson went to great lengths to ensure that the defendants had competent counsel. This practice has also been followed in the current proceedings at these tribunals. Despite repeated overtures, however, Slobodan Milosevic has insisted on being his own counsel. I saw him in action at The Hague in March, 2003 and found he was putting up a very aggressive defense against the charges leveled against him.

In comparing the Nüremberg proceedings with its current counterparts, it should be noted that at Nüremberg Martin Bormann was tried *in absentia*. At The Hague and Tanzania, however, the defendant must be present in court to face his accusers.²⁶ I personally think that in some cases this requirement is a tough hurdle. My feeling is that a better approach would be to give the prospective defendant the opportunity to be heard and then to proceed even if he did not appear. Thereafter, the trial could proceed to its conclusion. If at some subsequent time the defendant did appear, the verdict could be subject to review on the basis of any new evidence he might present. In this regard, it offends me deeply that Messrs. Karadzic and Mladic, both of whom are tied to terrible war crimes committed in the former Yugoslavia, should be running free today in their former haunts, while other lesser offenders are being brought to justice.

Jackson’s principles of fairness and justice have been written into the Rome Statute in several provisions. In proceedings conducted under the Rome Statute, there will, as a matter of first instance, be

²⁶ Rome Statute of the International Criminal Court, July 17, 1998, art. 63(1), U.N. Doc. A/CONF. 183/9 (1998), *reprinted in* 37 I.L.M. 999, 1037 (1998) [hereinafter Rome Statute].

a presumption of innocence.²⁷ The defendants will have counsel of their own choosing or, if need be, counsel will be provided to them.²⁸ They will be fully apprised of the charges against them by the prosecutor.²⁹ There will be review by a tripartite review panel to advise the Prosecutor on the issue of whether to proceed or not.³⁰ The Prosecutor is obligated to follow the recommendation of this review panel.³¹

With regard to the definition of crimes under the Rome Statute, some comments seem appropriate after looking at the Statute from Jackson's perspective. Aggression, for example, is included but not defined, and its inclusion awaits definition and ratification by 7/8ths of the parties to the treaty.³² This cannot occur until 2009, which will be seven years after the treaty has been in effect. In the meantime, a primary issue which must be faced is the relative roles of the U.N. Security Council and the ICC in dealing with aggression. Three of the five permanent members of the U.N. Security Council, however, are not parties to the Rome Statute establishing the ICC.³³

Other provisions of the Rome Statute warrant examination as well. The Genocide Provision generally follows the provisions of the Genocide Convention. The War Crimes provisions of the Rome Statute follow generally the provisions governing the treatment of civilians and prisoners of war by parties engaged in armed conflict. These are primarily derived from The Hague Conventions of 1899 and 1907, the Geneva Conventions of 1928 and 1949, and The Nuremberg Trials; including both the primary trial before the International Military Tribunal and the subsequent proceedings.

The Crimes against Humanity Provision included in the Rome Statute is defined with great precision—in fact far more so than in the London Charter, which governed the Nuremberg Proceedings.³⁴ Moreover, the Crimes against Humanity Provision in the Rome Statute covers Crimes against Females, which was not targeted as

²⁷ *Id.* art. 66(1), *id.* at 1040.

²⁸ *Id.* art. 67(1)(d), *id.*

²⁹ *Id.* art. 67(1)(a), *id.*

³⁰ *Id.* arts. 15, 39, *id.* at 1011, 1023.

³¹ *Id.* art. 58, *id.* at 1033–34.

³² *Id.* art. 121(4), *id.* at 1067.

³³ As of September, 2004, China, Russia, and the United States are not parties. *See* SCHABAS, *supra* note 2, at 416–20 app.4 (2d ed. 2004) (listing the countries that have ratified and accepted the Rome Statute).

³⁴ *Compare* Rome Statute, *supra* note 26, art. 7, 37 I.L.M. at 1004–05, *with* IMT Charter, *supra* note 1, at art. 6(e), 423.

such in the Nüremberg Trials. The great precision with which Crimes against Humanity are defined in the Rome Statute clearly rebuts the American charges that trials under the Rome Statute could well be political trials designed to punish American military personnel for political reasons. It is also important to note that the Rome Statute is concerned with patterns of conduct and not individual incidents. Moreover, under the complementary provision of the Rome Statute, the ICC does not have exclusive jurisdiction over cases where the national sovereign is dealing with the crimes under its laws.³⁵

In response to U.S. charges that the trials under the Rome Statute will be politicized, I cite the caliber of the eighteen judges already chosen for duty on the ICC.³⁶ The selection procedure requires a split between judges with a criminal law background and judges with international law experience. Many have already served on either the International Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda. Suffice it to say that they are judges with excellent personal track records based on experience. Moreover, there are three-judge panels under the Rome Statute that advise the prosecutor on whether to proceed on cases and also on appeals procedure. Finally, we should never forget that on these judicial panels will be judges from friends of the United States, including Australia, Canada, Italy, the United Kingdom and other countries. Their legal traditions are borne of the desire for justice and fairness. They give no quarter to bias or unfairness.

SUMMARY AND CONCLUSION

Robert Jackson, the architect of Nüremberg, favored a uniform approach to dealing with war crimes—namely that all nations should be subject to the same rules and that these rules should be enforced across the board. The United States, on the other hand, currently takes the opposite view, that no American should be tried by the International Criminal Court without America's case-by-case consent. The United States, however, has been perfectly willing to participate in the trials of citizens of other countries for war crimes committed in the former Yugoslavia and Rwanda. In essence, the

³⁵ Rome Statute, *supra* note 26, at art. 1, 37 I.L.M. at 1003.

³⁶ See *International Criminal Court: The Judges—Biographical Notes*, <http://www.icc-cpi.int/chambers/judges.html> (listing the eighteen judges currently sitting on the ICC).

United States is perfectly willing to judge others, but does not want to be subjected to judgment without the special privilege of prior consent.

I submit that this unilateral self-judging approach is the road to nowhere. Were all nations to adopt this approach, we could well revert to the anarchy of the pre-World War II era. The fact of the matter is that we have to stop the killing and we need enforceable rules to do so. We cannot ignore the fact that since Nüremberg over eighty-five million people have been killed in 250 international conflicts. To stop this we have, at this time, a golden moment in history to institutionalize a rule of law in the world. Yet, the United States is not only turning its back on this opportunity, but also attempting to sabotage its very creation.

I don't believe that the American people are opposed to a better world based on a rule of law with justice. I think Americans are a law-abiding, peace-loving people. I think that if the American people were fully aware of the current administration's approach toward the International Criminal Court, they would repudiate it emphatically.

All this leads to one conclusion—people have to make themselves heard on this issue. They must, through their representatives, repudiate the current administration's unilateralism and attacks on a very special, new institution designed to implement a rule of law in the world, which is based on justice and fairness.

Robert Jackson had it right at Nüremberg some fifty-nine years ago when he told the world: "To pass these defendants a poisoned chalice is to put it to our own lips as well."³⁷ Our world, and indeed that of future generations, will be more secure if we follow this profoundly wise guidance of the architect of Nüremberg.

³⁷ JACKSON, *supra* note 4, at 34.