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# The Legacy of Nuremberg

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## THE LEGACY OF NUREMBERG

*Henry T. King, Jr.\**

### INTRODUCTION

As dawn broke over the Nuremberg courthouse on November 21, 1945, the world little knew the significance of what was to occur that day. For it was on that day in Nuremberg that Justice Robert H. Jackson, speaking for the prosecution, would launch the first international trial of major war criminals in human history. For thousands of years up until that date, those who committed war crimes of the nature described at Nuremberg had largely gone unpunished. Now, at Nuremberg, civilization was coming to grips with the need to punish those who committed these crimes. As Jackson said in his ever-memorable opening address, "the real complaining party in this trial is civilization."<sup>1</sup> The method used at Nuremberg, a fair trial, was unparalleled in human history and unique in its approach. And, as Jackson correctly stated, the trial represented the most significant tribute that power had ever paid to reason. Jackson saw universality as the key to be followed in the proceedings. Indeed, he specifically said, "to pass these defendants a poisoned chalice is to put it to our own lips as well."<sup>2</sup>

What Jackson sought at Nuremberg was individual accountability, both high and low. For the first time in history, he aimed to bring top officials to the bar of justice to answer for their crimes. He saw, and wanted to correct, the ultimate anachronism, whereby domestic defendants are severely punished for murders and top officials of nation states who commit crimes of the same nature on a massive scale go unpunished. In addition, Jackson wanted to eliminate superior orders as a defense for international crimes such as those that were the basis for the prosecution at Nuremberg.

Suffice it to say that Jackson's words that November day will never be forgotten by those who heard them. They matched in eloquence the importance of the occasion. I believe that they will live forever in human

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\* Speech given on December 18, 2000 at The Hague. B.A., Yale University, LL.B., Yale University. U.S. Director, Canada-United States Law Institute; Professor of Law, Case Western Reserve University. Mr. King also served as a member of the prosecuting team at the Nuremberg War Crimes Trials in Germany after World War II.

<sup>1</sup> Justice Robert H. Jackson, Address to Nuremberg Tribunal 2nd day (Nov. 14, 1995) (transcript available in the International Military Tribunal, Vol. II).

<sup>2</sup> Office of the United States Chief Counsel for Prosecution of Axis Criminals, Nazi Conspiracy and Aggression, Vol. I, ch. VII, United States Government Printing Office, Washington, D.C., 1946.

history because they express the hopes of all of us, of all of mankind, for a better world, where we can live together under a rule of law characterized by peace with justice.

The winds of change blew fiercely that fateful day at the courtroom in Nuremberg, and the effects of that change continue to radiate today as we meet here at the Hague to discuss these same issues.

#### THE ROAD TO NUREMBERG

The road to Nuremberg began in Washington, D.C., with meetings among U.S. Government officials to determine what to do with the Nazi war criminals. There were those who felt that summary execution was the answer. They included Secretary of the Treasury, Henry Morgenthau, and Secretary of State, Cordell Hull. They were joined in their opinion by Winston Churchill and other British officials. But a strong voice was heard against their approach – namely that of Secretary of War Henry L. Stimson. Stimson favored a fair trial of the Nazi war criminals. He opposed summary execution, which bore a striking similarity to the approach followed by the Nazis in dealing with those who opposed them. Stimson rightly believed that the allies needed to rise above the example set by Hitler and his gang of thugs.

President Roosevelt sided with Stimson, and Samuel Rosenman, who was counselor to the President, was dispatched to London to persuade the British to support a fair trial. Rosenman had not yet met with success when Roosevelt died on April 12, 1945.

With matters unresolved at Roosevelt's death, Justice Robert H. Jackson of the U.S. Supreme Court gave a now memorable address on April 13, 1945, at the annual meeting of the American Society of International Law ("ASIL"), in which he advocated a trial of the major Nazi war criminals.<sup>3</sup> Jackson advocated a trial, a fair trial, where the guilt or innocence of those charged would be based solely upon evidence. Jackson's approach was totally divergent from the summary execution approach because he was following the common law tradition, which called for a presumption of innocence until proof of guilt was established by the evidence.

In his remarks before the ASIL, Jackson stated, "the ultimate principle is that you must put no man on trial under the form of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case there is no occasion for a trial. The world yields no respect for courts which are designed only to convict."<sup>4</sup>

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<sup>3</sup> Justice Robert H. Jackson, Address to the American Society of International Law (Apr. 13, 1945), in 31 A.B.A. J. 290 (1945).

<sup>4</sup> *Id.*

President Harry S. Truman succeeded to the U.S. Presidency after Roosevelt's demise. Samuel Rosenman continued as his advisor on what to do with the Nazi war criminals. On April 29, 1945, Rosenman asked Jackson, on behalf of Truman, if he would head up the prosecution of the Nazi war criminals. Jackson accepted on May 2, 1945, and reported back on June 6, 1945, with a plan approved by Truman and used as the basis for negotiating with the allies in dealing over the matter. Jackson's plan provided the conceptual foundation for the International Military Tribunal ("IMT") at Nuremberg.

Jackson's plan envisioned three basic crimes and a conspiracy charge. First, Jackson felt that the supreme international crime was aggressive war, which he characterized as crimes against peace – planning, preparing, and carrying out wars of aggression and wars in violation of treaties. In addition, as a second basis for charges against the top Nazis, Jackson envisioned war crimes – violations of the laws or customs of war. There he meant, *inter alia*, violations of the Hague Conventions of 1899<sup>5</sup> and 1907<sup>6</sup> and the Geneva Convention of 1929,<sup>7</sup> which were respectively designed to cover the conduct of warfare and the treatment of civilians and prisoners of war during the course of international conflict. The third count envisioned within Jackson's approach was crimes against humanity, or crimes committed in the course of aggressive war, including atrocities or other inhumane acts committed against civilian populations and persecutions of civilians for racial, religious, and political reasons. These charges together with a charge of conspiracy to commit the foregoing crimes, and in particular aggressive war, constituted the substantive charges envisioned by Jackson as the basis for bringing the Nazi war criminals to justice.

President Truman approved Jackson's report and authorized him to enter into negotiations for an international trial of the major Nazi war criminals with representatives of the U.K., U.S.S.R., and France, which Jackson proceeded to do in London. These negotiations resulted in the London Charter of August 8, 1945,<sup>8</sup> which was the basis of the primary Nuremberg trial before the international military tribunal.

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<sup>5</sup> Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1907, 32 Stat. 1803, 1 Bevans 247.

<sup>6</sup> Hague Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

<sup>7</sup> 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 L.N.T.S. 343.

<sup>8</sup> Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, annex, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 [hereinafter London Charter].

A. *The Structure of the London Charter of August 8, 1945.*

In designing the structure of what was to become the London Charter, Jackson felt that the key to any approach should be individual accountability. As a matter of the first instance, he wanted to ensure the accountability of heads of state and other top government officials for crimes they had committed or allowed to be committed in the name of nation states. Historically, accountability had been least where responsibility had been greatest. Jackson wanted to change all that, and to make sure that top officials were held to account for actions taken in the name of the nation state. Here, Jackson's focus was on the aggressive war count, but in its final version the Charter included all the counts suggested by Jackson.

Jackson also wanted to eliminate superior orders as a defense. This fell perfectly in line with his belief that individuals should be held accountable for what they had done. Mitigation of punishment might be considered, however, in cases where the moral choice was impossible.

In the case of extreme crimes, such as those encompassed in the crimes against humanity count, Jackson did not want domestic law to be used as an excuse to justify such crimes. Implicit in this approach was the conviction that a higher law – international law – was applicable in dealing with such crimes. This approach was followed in the London Charter.

B. *The Effects on National Sovereignty of Jackson's Rule of Law Approach*

Jackson recognized that if international peace and security were to be the order of the day, national sovereignty had to be limited. The world had witnessed the devastation brought about by unabridged national sovereignty. When the Nuremberg Charter was formulated, much of the world was in ruins, and Jackson recognized that if civilization was to survive, the order of things had to be changed. Jackson wanted to achieve this by establishing a rule of law in which man's most distinguishing characteristic – reason – prevailed.

The Jackson approach disregarded national sovereignty by pulling the curtain of sovereignty aside to directly reach and hold accountable top government officials for their criminal behavior. Moreover, in removing the superior orders defense, Jackson challenged the validity of orders that had been given in the name of a nation state by top government officials (e.g., Hitler). The Nuremberg trials found many top Nazis attempting to justify their crimes by arguing that their crimes had been committed in response to orders by Hitler. Finally, the Charter stated that with regard to crimes against humanity, authorization by domestic law was to be no excuse. Certainly the extermination and mistreatment of the Jews, Gypsies, and others could find justification in laws or directives of the Nazi

government or by its top officials. This provision in the crimes against humanity count removed such legal support under the London Charter.

Jackson's approach, in reality, pierced the veil of sovereignty of the nation state when it held that individuals had both rights and responsibilities where the guideposts were international in character. In so doing, Jackson followed the principle that there existed standards of international law that prevailed over national law and national standards.

As a result, when implemented at Nuremberg, Jackson's approach to human rights as being independent of nation state recognition really was the catalyst for the international human rights movement.

#### THE TRIAL BEFORE THE INTERNATIONAL MILITARY TRIBUNAL

The trial lasted from November 20, 1945 until October 1, 1946, when the Tribunal rendered its judgment. During this period I had occasion to talk to several of the defendants, in particular Hermann Goering and Albert Speer. I found Goering interesting but still an unreconstructed Nazi. Speer, on the other hand, was a horse of a different color when I met him. Blinded by ambition, he did Hitler's bidding until the very end. However, in the throes of Nazi Germany's defeat, Speer first saw Hitler for what he was when he received Hitler's order to destroy all of Nazi Germany's industrial facilities in order to punish the German people for losing the war. Speer not only countermanded Hitler's order for the destruction of Germany, but also went into Hitler's bunker and told him he had done so. At Nuremberg, Speer said that he shared with Hitler responsibility of the crimes of the Third Reich. In his closing statement at Nuremberg he expressed concern about the march of extremely destructive new technologies and their potential for destructive use in future wars. He said, "therefore this trial must contribute towards preventing such degenerative wars in the future and towards establishing rules whereby human beings can live together."<sup>9</sup> I thought that this was a very prophetic statement.

In the end, three of the Nuremberg defendants were acquitted, seven received prison terms, and eleven were sentenced to hang. By most accounts, the trial was fair and conducted with objectivity by the Tribunal under the wise leadership of the British judge, Lord Geoffrey Lawrence. Distance was maintained between the prosecution and the judges. Indeed, at one point, Jackson was very much at odds with the court because of rulings the court made against him in conjunction with his cross-examination of Hermann Goering. Moreover, Jackson strongly disagreed with the court's acquittal of two of the defendants, von Papen and Schacht, both of whom had been very helpful to Hitler in the early stages of the Nazi regime. In its final judgment, however, the court largely agreed with the prosecution's case. The court's judgment was facilitated by Jackson's approach towards the evidence during the proceeding. Jackson felt that the

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<sup>9</sup> See Nazi Conspiracy and Aggression, *supra* note 2.

prosecution's fundamental approach should be to rely on the Nazis' own documents to convict the party's defendants. This meant relying on documents created by the Nazis themselves, of which there was a surplus. Jackson also felt that, when appropriate and necessary, witnesses should be called to support or elaborate on the Nazi documents. My experience at Nuremberg leads me to conclude that the basic and primary test applied by the court in determining the admission of documents or testimony of witnesses was relevance.

In response, defense counsel raised four primary arguments. One defense was denial, saying "I was not there" or "That was not my signature." This defense in any objective observer's mind raised the question of plausibility for most of the defendants because of the flood of incriminating documents. A second defense was the doctrine of superior orders. Many orders, particularly the military orders, were issued in Hitler's name, and this would have provided an out for the military defendants if the court so allowed. But the court did not allow the use of this defense and held that mitigation could be extended only if the moral choice was not possible. In the case of the top-drawer defendants at Nuremberg, the moral choice, of course, was definitely possible. These defendants, however, had carried out Hitler's will with gusto because of their desire to serve him. As Speer's conduct clearly demonstrated, each of these defendants could have disobeyed Hitler's most egregious commands. A third defense was *ex post facto* – *nullum crimen sine lege, nulla poena sine lege*.<sup>10</sup> This defense was based on the principle that, at the time the defendants committed their crimes, there was no law in place declaring such activities to be criminal, arguing in essence that there can be no punishment without a pre-existing law.

The court brushed aside this defense when it said *ex post facto* was a principle of justice, not a limitation on sovereignty. A final challenge by the defendants, which was asserted by Dr. Hermann Jahreiss, the gray eminence of the defense counsel, and counsel for General Alfred Jodl, was a challenge to the jurisdiction of the court itself. However, Article 3 of the London Charter provided that there could be no challenge to the jurisdiction of the court<sup>11</sup> and, although the court allowed Dr. Jahreiss to present his case, it did in fact dismiss this claim.

Two points regarding the International Military Tribunal's judgment are worthy of note. One is that the court confined its judgment on the aggressive war count to what the Nazis did, finding a number of the defendants guilty of crimes against peace. But there was no sweep in the court's approach on this count and the judgment contains little generic language with regard to crimes of aggression. Moreover, the court did not find the defendants guilty of invasions where there was no military conflict

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<sup>10</sup> See Law Reports of the Trials for War Criminals, Vol. 6 at 41.

<sup>11</sup> Charter of the International Military Tribunal, *supra* note 8, art. 3.

but instead where threats of force were used to bring the victim states into submission, such as the Nazi invasions of Austria and Czechoslovakia. Finally, with regard to crimes against humanity, the court limited the application of this count to crimes occurring after the military invasion of Poland.

A positive effect of both Jackson's approach towards war crimes and crimes against humanity at Nuremberg and the Tribunal's judgment was its implicit endorsement of universal jurisdiction. Here it is important to note that Jackson spoke in his opening statement of civilization as the real complaining party at Nuremberg. He emphasized that a poisoned chalice passed to the lips of these defendants is passed to our lips as well. He further said that, "we must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow."<sup>12</sup> Further, the court in its judgment stated that, in bringing about the trial jointly, the four nations were doing what any one of them could have done singly, and that each of the complainant nations had a right to establish courts of law to deal with such crimes. Finally, the crimes against humanity count could, without more, support the concept of universal jurisdiction. As proved by the evidence, these were crimes so heinous and horrible as to be crimes against not only the particular, immediate victims, but against all humanity as well. This concept of universal jurisdiction, which largely emanated from Nuremberg, may indeed be one of the most important legacies of the trials. After all, it is one thing to conceptually agree on international law principles but another thing entirely to enforce those principles. As further evidence of its significance, universal jurisdiction has in recent times been used by organizations like Amnesty International as a means of attempting to bring international leaders such as General Pinochet of Chile to justice. It was also used extensively by the Israeli courts as support for their conviction of Adolf Eichmann, a key Nazi implementer of the "Final Solution."

#### NUREMBERG: SUBSEQUENT PROCEEDINGS

General Telford Taylor was designated the man to head up the Subsequent Proceedings at Nuremberg. He was a very distinguished leader and the success of the Subsequent Proceedings is notable for having been achieved with more limited political support than was the case in the IMT proceedings with Justice Jackson, who had reported directly to president Truman.

The basis for the Subsequent Proceedings was Control Council Law No. 10, which was passed by the four zone Commanders to establish a uniform legal basis in Germany for the prosecution of war criminals and

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<sup>12</sup> Jackson, *supra* note 1.

similar offenders outside of those dealt with by the international military tribunal.<sup>13</sup>

In the American zone, a series of twelve trials were held under the provisions of Law No. 10. With the exception of one trial in the French zone, no trials were held under Control Council Law No. 10 in any other zone of Germany. The trials in the American zone at Nuremberg ran from late 1946 (indictments) to April of 1949.

There were two significant differences between Law No. 10 and the London Charter. First, crimes against peace were defined to include "invasions" as well as wars. This meant that the Austrian and Czechoslovakian conquests could be charged as crimes against peace. Secondly, as distinct from the IMT Charter, crimes against humanity need not have been carried out in conjunction with crimes against peace or war crimes to make them actionable.

The tie-in for the Subsequent Proceedings with the IMT was stated in Article X of the rules:

The determinations of the IMT in its judgment that invasions, aggressive acts, aggressive wars, crimes, atrocities or other inhumane acts were planned or occurred shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the IMT in the judgment constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.<sup>14</sup>

The judges for the tribunals were almost all state court judges from the U.S. Their qualifications varied widely, however several of the opinions of the Control Council Law No. 10 tribunals exhibit careful and thoughtful legal analysis.<sup>15</sup> Although crimes against peace charges were filed against a number of the defendants, the focus of the tribunals was primarily on war crimes and crimes against humanity.

#### A. *Medical Experiments Case: The Killer Doctors*<sup>16</sup>

The crimes charged in these cases and the defendants who were involved were widely varied. There was, for example, the case where doctors were charged with murdering thousands of individuals in pursuance of medical experiments and euthanasia programs. The result of the case

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<sup>13</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany, 50-55 (1946).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> United States v. Brandt (Case No.1), 1 Law Reports of the Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1948) [hereinafter Medical Experiments Case].

was a set of standards set forth in the court's opinion to guide society's approach with regard to the use of individuals in medical experiments. This case and its holdings have had a vast effect on the approach of the medical profession towards human experiments and the conditions under which they may be carried out.

B. *Justice Case: "The Dagger of the Assassin Concealed Beneath the Robe of the Jurist"*<sup>17</sup>

Oswald Rothaug was Presiding Judge of the Supreme Court at Nuremberg from 1937 to 1943. In convicting Rothaug of crimes against humanity, the justice case tribunal based its decision largely on persecution of members of "racial" or "national" groups. The Tribunal placed stress on the sentence of death Rothaug rendered against a Nuremberg Jew named Katzenberger. The defendant Katzenberger, who was 68 years old and head of the Jewish community, had been accused of having sexual intercourse with a young German girl.

Prior to Katzenberger's trial, Rothaug had called on Dr. Armin Baur, medical counselor for the Nuremberg court, to act as the medical expert for the case. Rothaug told Baur that he wanted to pronounce a death sentence and it was therefore necessary for the defendant to be examined. The examination was a mere formality since Katzenberger "would be beheaded anyhow," according to Rothaug. When the doctor responded that Katzenberger was old and it seemed questionable whether he could be charged with race defilement, Rothaug stated, "It is sufficient for me that the swine said that a German girl sat upon his lap."<sup>18</sup>

While presiding over Katzenberger's trial, Rothaug tried with all his power to encourage the witnesses to make statements against the defendant. Katzenberger was hardly heard by the court, and his statements were passed over or disregarded. During the course of the trial, Rothaug even took the opportunity to give the audience a National Socialist lecture on the subject of the Jewish question.

On the basis of these carefully crafted facts, Rothaug was found guilty at Nuremberg. In considering Rothaug's actions, the Tribunal found that "the evidence establish[ed] beyond a doubt that Katzenberger was condemned and executed because he was a Jew; . . . in conformity with the policy of the Nazi State of persecution, torture and extermination of these races. The defendant Rothaug was a knowing and willing participant in

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<sup>17</sup> United States v. Alstoeffer (Case No. 3), 3 Law Reports of the Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951) [hereinafter Justice Cases]. The Tribunal's opinion regarding Oswald Rothaug begins at 1143.

<sup>18</sup> *Id.* at 1152.

that program of persecution and extermination.”<sup>19</sup> Based upon this, the Tribunal sentenced Rothaug to life imprisonment.

In the following justice case, other judges and prosecutors were convicted of judicial murder for trying and convicting individuals of crimes because of their race or ethnic group. This justice case was the basis for the recent movie *Judgment at Nuremberg*.<sup>20</sup> In convicting the defendants in this case, the court stated that “the dagger of the assassin was concealed beneath the robe of the jurist. Individuals received the death sentence because they were Jews.”<sup>21</sup>

### C. *Hostage Case*<sup>22</sup>

In the hostage case, the trial demonstrated some gaps in the rules governing the permissible handling of hostages. These gaps were later the subject of amendments to the Geneva Conventions in 1949. Here it should be noted that the legal rulings of the Tribunal upheld the right of an occupying power under certain circumstances to shoot hostages and to deny partisans the status of belligerents.

The hostage case is also notable because it articulated and endorsed the concept of universal jurisdiction. The court said:

An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left with the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.<sup>23</sup>

The court in the hostage case found that the crimes with which it was dealing fell within the foregoing text as defined by the court.

### D. *Einsatzgruppen case*<sup>24</sup>

The IMT trial had been primarily a documentary case. In the Subsequent Proceedings, one case was also totally documentary and took only two days to present since no witnesses were called. This was the *Einsatzgruppen case*,<sup>25</sup> in which Benjamin Ferencz was the chief

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<sup>19</sup> *Id.* at 1155.

<sup>20</sup> JUDGMENT AT NUREMBERG (MGM 1961).

<sup>21</sup> *Id.*

<sup>22</sup> *United States v. List* (Case No. 47), 8 Law Reports of the Trial of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 38 (1949) [hereinafter *Hostage Case*].

<sup>23</sup> *Id.* at 54.

<sup>24</sup> *United States v. Ohlendorf* (Case No. 9), 3 Law Reports of the Trial of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1949) [hereinafter *Einsatzgruppen Case*].

prosecutor. The documents introduced by prosecutors provided the sole basis for conviction of all of the defendants involved, which included six SS Generals and thirteen defendants sentenced to death by hanging. It is estimated that well over one million people were killed by the Einsatzgruppen, whose mission was the immediate and outright slaughter of all Jews (as well as Gypsies) in the occupied areas of Russia. This trial was widely publicized as the biggest murder trial in history.

*E. Ministries case*<sup>26</sup>

The largest, longest, and last to be concluded of the subsequent proceedings was primarily concerned with the activities of government officials. Consequently, the case became known as the Ministries or Wilhelmstrasse case. My friend H. W. William Caming played a significant role in prosecuting this case. The list of defendants was headed by Ernst von Weizsaecker, a career diplomat, and included five other diplomats as well as top officials from other government ministries. The case lasted seventeen months, from November 1947 to April 1949.

Defense counsel numbered sixty-eight attorneys, including one American, and thirty-four attorneys were used on the prosecution side. The total court record ran to some 79,000 pages. The judgment itself ran to 692 pages, of which the dissenting opinion contributed seventy-one pages.

The Ministries case paralleled the first trial before the International Military Tribunal, with the exception that the military leaders were separately tried in the so-called "high command" case of the Subsequent Proceedings. The case was important because five of the defendants, including von Weizsaecker, were convicted of crimes against peace. This was the most noteworthy feature of the judgment because these were the first convictions for the commission of crimes against peace that had been obtained at Nuremberg since the IMT judgment.

Further, the Ministries judgment broke new ground by holding that the "invasions" of Austria in February 1938 and of post-Munich truncated Czechoslovakia, Bohemia and Moravia, in March, 1939 which although they were bloodless conquests without resort to a "shooting war," were still acts clearly aggressive in nature that constituted crimes against peace.

In his final report to the Secretary of the Army, dated August 19, 1949, General Telford Taylor, the chief prosecutor in the Subsequent Proceedings, specifically references the Ministries case as:

[a] landmark holding [that] laid to rest the concept that a great power can with impunity mass such large forces on the borders of a much weaker

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<sup>26</sup> United States v. Weizsaecker (Case No. 11), 12-14 Law Reports of the Trial of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1949) [hereinafter Ministries case].

nation to threaten it with annihilation, so that the latter succumbs without putting up any armed resistance.<sup>27</sup>

It is also important to note, however, that the IMT had not ruled on this question because the indictment failed to charge such measures as invasions as crimes against peace.

*F. Milch case: Slave Labor Condemned*<sup>28</sup>

I was involved in the Subsequent Proceedings when I prepared the case against Erhard Milch, the actual head of the Luftwaffe in the Battle of Britain. Milch, a Hitler favorite, was responsible for Nazi Germany's aircraft production program, at first individually and then later with Albert Speer. In this connection he was accused of and convicted of the use and mistreatment of foreign slave labor on a massive scale, resulting in the death and destruction of many slaves. Specifically, the charge against him was the enslavement and mistreatment of foreign workers. Milch shared this responsibility with Albert Speer, a defendant in the earlier IMT trial who received a 20-year sentence. Milch and Speer discharged their responsibility for running the German armaments production program through the Central Planning Board, of which Speer was the dominant member. It is perhaps ironic that Milch received a life sentence after his trial in the Subsequent Proceedings, while Speer received a 20-year prison term after his trial by the IMT. However, in Speer's case, the IMT found substantive grounds for mitigation. Milch was unsuccessful in an appeal to the U.S. Supreme Court, but his sentence was subsequently reduced by the U.S. High Commissioner for Germany, John McCloy, and he was released from prison well before his death.

All in all, 177 defendants were tried in the twelve subsequent proceedings, including doctors, judges & prosecutors, government ministers, SS police leaders, military leaders, industrialists, and financiers. With regard to the Nuremberg Subsequent Proceedings, it is fair to state that they provided a valuable supplement to the IMT proceedings. They extended the reach of the Nuremberg principles and enlarged the depth of their applications to groups not represented among the Nuremberg defendants in the IMT trial. On the whole, the decisions of the courts in the Subsequent Proceedings are well thought out and for the most part conservatively reasoned. They are, indeed, a valuable contribution to our understanding of the true implications of Nuremberg for society as a whole. They are an important part of the Nuremberg literature and need to be read and appreciated by those who would understand Nuremberg in depth.

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<sup>27</sup> Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Tribunal Under Control Council Law No. 10, Washington, D.C., United States Government Printing Office, 1949.

<sup>28</sup> United States v. Milch (Case No. 2), 2 Law Reports of the Trial of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950).

FOLLOW-UP TO NUREMBERG: AN ENDORSEMENT OF NUREMBERG  
PRINCIPLES AND NUREMBERG AS AN IMPETUS TO HUMAN RIGHTS  
CONVENTIONS

The Nuremberg principles were endorsed by a UN General Assembly Resolution of December 11, 1946.<sup>29</sup> Thereafter, the effects of Nuremberg were reflected in the Universal Declaration of Human Rights,<sup>30</sup> which was adopted on December 10, 1948, and the UN-sponsored Convention on the Prevention and Punishment of Genocide of December 9, 1948.<sup>31</sup> This Convention harkens back to the crimes against humanity count at Nuremberg as an antecedent. However, the Genocide Convention covers genocide in both wartime and peacetime. On August 12, 1949, four Geneva Conventions relating to the conduct of warfare were passed and based in part on the experience of Nuremberg – Geneva Convention 1 related to the amelioration of the wounded and sick in armed forces in the field,<sup>32</sup> Geneva Convention 2 dealing with the amelioration of the conditions of the wounded, sick, and shipwrecked members of the armed forces at sea,<sup>33</sup> Geneva Convention 3 related to the treatment of prisoners of war,<sup>34</sup> and Convention 4 addressing the protection of civilian persons in time of war.<sup>35</sup>

The European Convention on Human Rights<sup>36</sup> of November 4, 1950 (and all protocols) was also a direct outgrowth of Nuremberg and it is flourishing today under the aegis of the Council of Europe.

One other convention dealing with human rights deserves mention in conjunction with Nuremberg. This is the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of December 10, 1984.<sup>37</sup> This can be characterized as, in general, a descendent of the crimes against humanity count at Nuremberg. In addition, this Convention

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<sup>29</sup> G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1946).

<sup>30</sup> G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

<sup>31</sup> Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>32</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31.

<sup>33</sup> Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85.

<sup>34</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

<sup>35</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>36</sup> European Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221.

<sup>37</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

adopts the concept of universal jurisdiction, which was introduced at Nuremberg. It was this concept which was the basis for Amnesty International's efforts to bring General Pinochet of Chile to justice.

Apart from the foregoing, there are other international conventions, which deal with practices that are parallel to the crimes of the Nazis as revealed at Nuremberg. What Nuremberg did was to focus on indignities to the body and spirit of human beings. These declarations and conventions will remain with us forever as part of the inheritance of Nuremberg.

#### A. *The Adolf Eichmann Trial*

Eichmann was the head of Jewish Affairs in Heinrich Himmler's Reich Main Security Office ("RSHA"). In May 1960, Israeli agents forcibly abducted Eichmann from Argentina, where he had escaped after the defeat of the Third Reich. He was tried in Jerusalem before a three judge tribunal under Israeli law for his significant contribution to Hitler's "Final Solution" to the Jewish question. On December 11, 1961, he was convicted of genocide, war crimes, and other crimes against humanity under Israel's Nazi Collaborators Law – a law enacted after Israel became a state in 1948.

Eichmann's agents had scoured occupied Europe to seize and arrange for transportation of Jews in freight cars to Auschwitz and other extermination camps. For example, some 360,000 Jews in Hungary were seized and jammed into cattle cars and sent to Auschwitz for extermination or for deadly slave labor (although this happened in relatively few instances). Countless others from other occupied countries were similarly rounded up and deported. After Eichmann's appeal to the Supreme Court of Israel was heard and denied, he was hanged on May 31, 1962.

The two Israeli courts rested their jurisdiction on the "universality" of the crimes with which the defendant was charged. In 1950, an advisory opinion of the World Court had held that because the unspeakable crime of genocide is universal in character and criminality, there is a corresponding universality of jurisdiction under international law. Any nation could try such a war crime, so long as it had possession of the defendant. The UN had accepted this concept, and the World Court accepted the analogy of such a crime to piracy on the high seas.

As both Eichmann courts noted, legal and political circles in a number of countries had questioned Israel's right to try Eichmann because his crimes had been committed in Europe, not Israel. In fact, Israel had not even existed at that time, so he was being tried under statutes which also were not in existence when the crimes were committed. Since none of the victims were the citizens or nationals of Israel, the trial took an *ex post facto* approach. In response, the Eichmann courts held that the sovereign Jewish state represented millions of murdered Jews.

Further, with regard to the universal jurisdiction approach as applied to crimes against humanity, Richard Goldstone – the first chief prosecutor at the ad hoc Former Yugoslavia and Rwanda trials – stated in his presentation at a Bard College war crimes forum in October 1998, “that some crimes are so huge, are so egregious, are so horrible, are so heinous, that they’re a crime not only against the people who are the victims, . . . but it’s truly a crime against all humanity, and therefore a criminal becomes amenable to the jurisdiction of the courts of any country in the world, because humanity all over the world is entitled to protect itself and members of the human race.”<sup>38</sup>

Nuremberg’s theory of universal jurisdiction has found recognition in a number of international cases. Specific support for applying the universality principle to genocide under customary international law is found in the Third Restatement of the Foreign Relations Law of the United States, which considers genocide an offence for which a state has jurisdiction to prescribe punishment because genocide is an offence “recognized by the community of nations as of universal concern.”<sup>39</sup>

### B. *Hague Proceedings*

In 1993 and 1994, the UN Security Council passed resolutions covering the establishment of ad hoc tribunals to try alleged war criminals in the Former Yugoslavia and Rwanda.<sup>40</sup> The U.S. was a prime mover behind the resolution establishing the ad hoc tribunal covering crimes committed in the Former Yugoslavia.

These resolutions cover war crimes, crimes against humanity and genocide. They do not cover aggressive war, since aggressive war was not involved. The substantive aspects of these resolutions bear a striking similarity to the Nuremberg model. They rule out superior orders as a defense and establish accountability for top leaders and officials of nation states or subdivisions thereof for crimes as specified in the resolutions. The definitions of crimes against humanity and war crimes are patterned after similar crimes as defined at Nuremberg, although in more elaborate form. Rape, for example, is identified by name as a separate crime.<sup>41</sup> Genocide, which is derived from the crimes against humanity count at Nuremberg, is separately identified and, thereby, given more emphasis.

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<sup>38</sup> Justice Richard Goldstone, Address at Bard College Conference, Accounting for Atrocities: Prosecuting War Crimes 50 Years After Nuremberg (Oct. 5, 1998) (transcript available at Bard College Institute for International Liberal Education).

<sup>39</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

<sup>40</sup> S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/Res/808 (1993); S.C. Res. 955, U.N. SCOR 49th Sess., U.N. Doc. S/RES/955 (1994).

<sup>41</sup> The IMT at Nuremberg did not address whether rape constitutes a crime against humanity.

In the IMT trial at Nuremberg, defendants could be tried and convicted in absentia, and this was the case with Martin Bormann, Nazi party chief and secretary to Adolf Hitler. The situation with the war criminals in the Former Yugoslavia is different. The presence of the defendants is required before they can be finally convicted and sentenced. This has meant that the top targets of the Yugoslavia proceedings have, thus far, escaped justice because no police force has yet captured them. They include Radovan Karadzic, the former Bosnian Serb President, Ratko Mladic, the Bosnian Serb military commander, and Slobodan Milosevic, former Serb President.<sup>42</sup> The international community, particularly the NATO force, has been criticized for not cooperating with The Hague Tribunal. The result is that the relative level of war criminal on the dock at The Hague is, on the whole, very low, compared with those on the dock in the IMT trial at Nuremberg.

The proceedings at The Hague faced many problems before they got underway; severe under-financing was one. The proceedings at The Hague are more protective of defendant's rights than were the Nuremberg proceedings. There is an appeal provision in the Hague proceedings while there was none at Nuremberg. Moreover, the sentences to be rendered at The Hague are less than was the case at Nuremberg. The maximum sentence at Nuremberg was hanging while the maximum sentence at The Hague is a term of years.

It is harder to get witnesses to go to The Hague for testimony than it was to get witnesses to testify at Nuremberg. This is particularly true of female witnesses with their potential testimony concerning sex crimes. They fear retaliation after their return home. Nuremberg was primarily a documentary case. This is not true of The Hague, where witnesses are critical to the establishment of cases against defendants.

Jackson was a charismatic top leader who had the ear of the President of the United States. The Hague Tribunal is very different. It is truly a multilateral effort which operates pursuant to a UN Security Council Resolution. Thus, its support is not concentrated in any one country, which adds a very different dimension to the proceedings.

The quality of the IMT bench at Nuremberg was extremely high. Their standing helped to secure the acceptance of their decisions as set forth in the Nuremberg judgment.

At Nuremberg there could be no challenge to the jurisdiction of the court because of Article 3 of the London Charter. This is not true for the Hague Tribunal dealing with crimes in the Former Yugoslavia.

At Nuremberg the defendants in the trial before the IMT were given the opportunity to select attorneys to represent them and they were paid for by the court administration. In particular, German attorneys were engaged

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<sup>42</sup> This lecture was given before the Milosevic trial began at the International Criminal Tribunal for the Former Yugoslavia.

and over thirty German attorneys served as defense counsel. At The Hague, the defendants have, in actuality, a greater choice, and the list of attorneys includes Americans and other nationalities. Attorneys are financed for indigent defendants.

To sum up, my impression is that the trials carried out at The Hague involving the war criminals from the Former Yugoslavia are fair and the defendants' rights have been protected. The trials are part of an ad hoc process, which will come to an end some day. On the whole, I believe the decisions have been credible and well reasoned, which attests to the competency of the judges. Now, with several years experience under their belts, the prosecution staff members at the trials are performing in a highly credible fashion. I hope, indeed, that any concerns relative to monetary funding have now been resolved.

It is important to keep in mind that through The Hague and Rwanda tribunals we are gathering valuable experience in the operation of war crimes tribunals. This experience will be a valuable backdrop for the new International Criminal Court ("ICC"). Some of the well-thought-out decisions of the Hague tribunal may well serve as guideposts for the operation of the ICC tribunals. After all, there were no multilateral war crimes trials in operation for almost fifty years, so these new trials provide invaluable experience to a new generation of peace-seekers.

The operation of the Hague Tribunal has pointed up the ever-present problem of getting custody of the defendants for trial purposes. Universal jurisdiction may help us in that regard if we can secure greater acceptance and implementation of this basic concept.

### C. *Rome Statute of the ICC v. Nuremberg*

It may be useful to enumerate some of the differences between the Rome Statute<sup>43</sup> and the Nuremberg trials.

At Nuremberg defendants could be tried in absentia. The ICC requires the defendant's presence for trial before conviction.

At Nuremberg aggressive war was a basic charge. Not so with the ICC at this time, although it may be in the future when certain conditions are met.

At Nuremberg Robert Jackson as chief prosecutor had a relatively free hand. This is not so with the ICC, where the statute limits the authority of the chief prosecutor. For example, the ICC prosecutor's initiatives with regard to investigations are subject to prior review by a pre-trial chamber. Moreover, the UN Security Council can delay initiatives by the ICC prosecutor for a year.

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<sup>43</sup> The Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999, available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Sept. 17, 2003).

Nuremberg by comparison was less protective of the defendant's rights than the ICC. The defendants' protections are spelled out in more detail in the ICC statute. Moreover, decisions by ICC tribunals are subject to appeal. This was not true of the Nuremberg judgments. At Nuremberg the maximum penalty was hanging. Under the ICC, the normal maximum penalty is thirty years with a life sentence permissible in extreme cases.

Nuremberg implicitly adopted the principle of universal jurisdiction. ICC jurisdiction is more circumscribed. The court has automatic jurisdiction in cases of genocide and crimes against humanity, where either the country of which the accused is a national or the country of *situs* of the alleged crime is a party to the ICC Statute.

Nuremberg had a broad-brush description of crimes against humanity and war crimes. The ICC defines crimes against humanity more fully and adds, with some particularity, sexual crimes such as rape, etc. War crimes are also described in detail in the ICC Statute. Individual accountability for war crimes, as set forth in the ICC Statute, flowed directly from Nuremberg.

Both Nuremberg and the ICC Statute are directed at individual accountability. Both have provisions covering accountability of top people before the law. At Nuremberg superior orders was not a defense and could not be considered in mitigation unless the moral choice was not possible. The ICC Statute provides superior orders as a defense only when the crimes are not "manifestly unlawful."

The ICC follows Nuremberg in regard to actionable crimes. The three categories of crimes with which the ICC will deal all have antecedents in Nuremberg.

The complementarity regime under the statute is the most targeted reference to state sovereignty concerns. The mechanism allows each state to conduct its own investigation and provides that the prosecution of the ICC may not intervene unless such states are "unwilling" or "genuinely unable" to prosecute the case. There was no complementarity regime at Nuremberg, since there was, in fact, no German government in place.

At Nuremberg there were no custody or enforcement problems. The military might of the world was there to back us up. This will not be true of the International Criminal Court. It will be interesting to see how matters work out for the ICC in terms of getting custody of prospective defendants and in terms of the punishment of guilty defendants. The fact that the U.S. will not be a party to the Rome Statute is not helpful, but hopefully matters can move ahead without U.S. participation – as has been the case with the UN Convention on the Law of the Sea.<sup>44</sup>

I applaud the achievement of securing agreement on the Rome Statute of the ICC. My concern is that in an effort to secure acquiescence of the

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<sup>44</sup> Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261.

U.S., we have circumscribed the operation of the ICC so severely that it may not be able to function effectively and with dispatch.

#### SUMMARY AND CONCLUSION

Nuremberg was the foundation stone of a better world for all of mankind. It endeavored to replace the law of force with the force of law. At Nuremberg, Justice Robert Jackson outlined a blueprint for a better world – a world ruled by reason, where human accountability was the order of the day. In Jackson’s world of the future, unabridged national sovereignty was “past tense.” Jackson came to grips with the fact that unabridged national sovereignty is antithetical to an international rule of law. Limitations on sovereignty are the building blocks for a better world, as was recognized by the Europeans when they created the EU.

Nuremberg originated from a U.S. blueprint developed by Robert Jackson, the architect of the IMT proceedings. Nuremberg was concerned with limitations on German sovereignty. The U.S. surrendered no basic elements of sovereignty in the planning and implementation of Nuremberg. Likewise, no U.S. sovereignty was surrendered when the ad hoc tribunals for the Former Yugoslavia and Rwanda were established. It is most unfortunate that the U.S. has not yet been willing to give up even a fragment of sovereignty to make the International Criminal Court work.

It is a matter of supreme irony that much of the rest of the world is supporting the creation of an International Criminal Court of the type envisioned by Jackson at Nuremberg, while the U.S. has refused to go along with the draft because the U.S. in all cases wants full control as to whether any American will be subject to jurisdiction of the court. We should never forget that there can be no international rule of law if each nation is to have the right to determine for itself whether any of its nationals will be subject to the jurisdiction of the court. My hope is that pressure from non-governmental organizations (“NGO’s”) will turn the U.S. position around on this crucial effort to create a better world.

The positions that Jackson took on human accountability at Nuremberg have survived. Jackson succeeded in his effort to abolish superior orders as a defense in war crimes cases. Both provisions establishing the ad hoc tribunals for Yugoslavia and Rwanda follow this approach, as does the statute for an International Criminal Court.

Jackson believed that responsibility was greatest where the power was strongest. He wanted the top officials held to account for their crimes. Provisions in the tribunals for the Former Yugoslavia and Rwanda follow Jackson’s lead in this regard, as does the Rome Statute for an International Criminal Court. But accountability on paper is one thing, and putting such accountability into action is another! Some progress on this point has been made recently particularly in the cases of Pinochet and Hesse Habre, the former dictator of Chad (now being tried in Senegal). But in other cases

such as Milosevic, Karadzic, and Mladic, who have all been indicted for crimes in the Former Yugoslavia, nothing has been achieved to date in bringing these alleged international criminals to actual trial. There can be no realistic comparison with Nuremberg because under the London Charter such individuals could be tried in absentia. I wonder whether we should rethink the provision whereby defendants must be present in the courtroom to face their accusers. I wonder whether it might be more realistic to give such defendants the opportunity to face their accusers and, if they don't appear, to try them in absentia with the option to have counsel represent them in court and to present their defense. We could also offer the opportunity, when and if a convicted defendant is brought into custody, to present evidence to set aside the guilty verdict. This would give us the opportunity to try such international criminals as Saddam Hussein and bring the details of their crimes to international daylight.

Jackson's goal was to internationalize human rights. Evidence of this is found in the crimes against humanity count, where it says in effect that violations of human rights can not be justified by local laws which support the Nazi policy (which was, of course, to exterminate the Jews). What this meant by implication was that a higher law was controlling over Nazi actions and not the domestic law of the Nazi state. Jackson's contention was that those who were murdered and exterminated by the Nazis had rights, which superceded their rights under the law of the Nazi state, and this new credo was the basis for the international human rights movement. In the current world context, much progress has been made in implementing the internationalization of human rights. A shining light in this regard is the European Human Rights Court at Strasbourg, which is a direct descendant of Nuremberg. This court, which has been in operation over four decades, has made vast strides in internationalizing human rights in Europe. Moreover, Nuremberg precipitated the growth of human rights conventions under the sponsorship of the UN. The Torture and Genocide Conventions are outstanding examples of this progress. Here it should be noted that genocide is particularized as a crime under the rules governing The Hague and Rwanda tribunals and also in the Rome Statute for the International Criminal Court. The Torture Convention was used as a basis for the proceedings against general Pinochet in the U.K. – proceedings which would have been successful had he not been released on health grounds. I take my hat off to Amnesty International and to other non-governmental organizations in their efforts to make international human rights a reality throughout the world today.

Aggression was Jackson's prime area of focus at Nuremberg. Jackson and his court believed that aggression was the supreme international crime, and it is in regard to this crime that progress has been glacial. Of all internationalized crimes, this has the most profound political overtones. As an excuse for inaction, some have stated that there are definitional problems. But significant progress has, in fact, been made in this area, and

if the political will were there, I am confident that these concerns could be surmounted with dispatch.

Aggression was not included in the crimes to be dealt with by the tribunals for the former Yugoslavia and Rwanda because it was not relevant. However, aided by the efforts of surviving former Nuremberg prosecutors, aggression was included in the Rome Statute, subject to subsequent definition. At the earliest, this would be, in reality, seven years after the court becomes operational. But as one who was there, who was close to the heart and pulse of Nuremberg, I feel that aggression must be addressed if we are going to have a lasting peace in this world.

Our constituency here today – as we deal with crimes of great magnitude, which are international in scope – is threefold. First, there are the victims of past crimes. They are with us in spirit if not in body. They watch and they wait in hope that we can successfully institutionalize a rule of law with justice, which would prevent a recurrence of what happened to them.

A second constituency is the living – the potential future victims of the crimes with which we are dealing here today. I say emphatically, let us by our actions give them hope – hope that they will live in a world where peace with justice is the order of the day.

Our third constituency is future generations. If we are successful in creating a better world where international criminals are brought to justice in the same way as domestic criminals, the anarchy of the past will be ancient history and humankind will have used its most distinguishing characteristic – reason – to establish a world characterized by the rule of law.

It was Robert Jackson's vision, implemented at Nuremberg, which gave us a blueprint of a better world for all of us. We can best honor his memory by bringing that vision into reality.

On a personal note, I worked for justice at Nuremberg with a sense of mission. But for a long time after Nuremberg the memory of Nuremberg was obliterated by the Cold War. Now I see a resurgence of hope and feel progress is being made in implementing a legacy based on the Nuremberg principles.

I leave you with one final thought, namely, that we must keep our eyes on the stars. Robert Jackson had a dream that many of his contemporaries judged to be foolish and unworkable. Yet Jackson's dream became a reality during the Nuremberg trials, and his concepts have survived to guide us as we strive for an international rule of law. His dream reverberates throughout the world today, bringing hope to people who never had hope, justice to nations that had been rife with injustice. If life is to be worth living, we must catch those dreams and never let them die, always working for a better tomorrow for all mankind. Some dreams turn to ashes; some

are compromised by the hard glare of reality. What must never be forgotten is that the one true danger is never to dream at all.