Pace International Law Review

Volume 16
Issue 2 *Fall 2004*

Article 5

September 2004

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ESSAY

TRIBUTE TO NUREMBERG PROSECUTOR JACKSON

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I. JACKSON'S VISION OF PEACE THROUGH LAW

The highest compliment we can render to the memory of Justice Robert H. Jackson, as we approach the 60th anniversary of the Nuremberg trials is to try to build on the principles of law that he espoused. In his oft-cited opening statement at Nuremberg, Jackson hailed the trial against the Nazi leaders as "one of the most significant tributes that Power has ever paid to Reason." His primary aspiration was to use the law as an instrumentality to curb aggression - "the supreme international crime." If war-making itself could be diminished or eliminated, that would surely be the greatest tribute man could pay to human reason. But where does Jackson's aspiration stand today?

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The idea that aggression was a crime was not invented at Nuremberg. The illegality of war-making had been discussed in ancient times and was extensively debated at the League of Nations after the first World War. The German Kaiser narrowly escaped trial for aggression since no Head of State had previously been charged with that particular offense. Legal committees of the League gave notice, however, that in the future it would be different. In the Kellogg-Briand Treaty of 1928, the world community renounced the use of force for the settlement of international disputes. During World War II, Allied leaders repeatedly warned that those responsible for violating laws or customs of war would be held to legal account. In 1945, as soon as Germany surrendered unconditionally, the four occupying powers (US, UK, USSR and France) began to set-up an International Military Tribunal (IMT) to bring the responsible malefactors to justice.

The proposal that Hitler and his top henchmen should be tried for the crime of aggression had been broached by Colonel William C. Chanler, a law partner of the United States Secretary of War Henry L. Stimson. The plan was approved by President Franklin D. Roosevelt Following Roosevelt's death, President Harry Truman appointed Robert H. Jackson, Associate Justice, who took leave from the Supreme Court, to represent the US in preparing the prosecution of Axis war criminals. Jackson consulted the British, French and Soviets. The British had been eager to avoid protracted political debates by simply shooting prominent Nazi leaders. The Soviet representative argued that it had already been established that the leading Nazis were criminals and the only task before the IMT was to mete out the punishment. Justice Jackson retorted sarcastically that, if that were the case, why have a trial at all? Under Jackson's persuasive influence, the rule of law prevailed.

On June 6, 1945, barely one month after the war had ended, Jackson reported to President Truman, "It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal." To support his conclusion that starting an illegal war could be condemned as an international crime, the eminent jurist cited the Kellogg Pact and many other accords that restricted the power of sovereign states to make war — except in self-defense. He also appealed to "the common

sense of justice". He argued that by enforcing emerging principles of international law, war "would be made less attractive to those who have the governments and the destinies of peoples in their power." Jackson's primary goal was to mobilize the force of law on the side of peace.

On July 16, 1945, a quadripartite committee of distinguished jurists began to draft the Charter whose principles and rules would govern and bind the IMT. Existing international law would have to be respected and illegal military aggressions were given a new designation as Crimes Against Peace. Leaders would also be held accountable for planning or perpetrating large-scale Crimes Against Humanity, such as genocide directed against large numbers of persecuted innocent civilians. Outrageous war crimes that violated traditional rules of war would also be punishable. It was paramount that all of the accused should receive an absolutely fair trial.

Although Jackson felt strongly that the crime of aggression should be defined before the trial, he knew that committees of the League and drafters of the United Nations Charter had been unable to agree on that contentious subject. Time was of the essence. Jackson was prepared to accept language drawn from several 1933 Soviet treaties that condemned as the aggressor the state that had struck the first blow. Since nations can only act through their leaders, Jackson reasoned that the responsible individuals could be held to account for criminal deeds committed in the name of the State.

Jackson was dedicated to the principle that international law must apply equally to all nations. "I am not willing to charge as a crime against a German official acts which would not be crimes if committed by officials of the United States." In unforgettable phrases, he warned, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well." His goal was to have the IMT hold accountable only those leaders personally responsible for the crimes. "The guilt we should reach is not that of numberless little people . . . but of those who planned and whipped up the war."

On August 8, 1945, the Charter for the IMT was signed in London. Robert Jackson's signature "For the Government of

the United States of America" led all the rest. In his opening statement before the IMT, Jackson denounced aggressive war as "the greatest menace of our time." He expressed regret that they had been unable to include an agreed definition of the crime in the IMT Charter. In conclusion, Jackson noted, "to start an aggressive war has the moral qualities of the worst of crimes . . . ." He said he did not expect the Tribunal to make war impossible, but he did expect that its judicial action would put "international law, its precepts, its prohibitions and most of all, its sanctions, on the side of peace . . . ."

Jackson's eloquent plea and the evidence to support his arguments were persuasive. In its judgment, the IMT held: "To initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of whole." The same view would later be confirmed by the International Criminal Tribunal for the Far East. It was also confirmed in the detailed judgment in the "Ministries Case" of the Subsequent Proceedings held at Nuremberg.

The IMT rejected the defendants' arguments that they were being subjected to *ex post facto* law. The learned judges observed that the equitable maxim that there could be "no crime without a law" was designed to protect the innocent who did not know that their deeds were wrong. The court held that the high-ranking defendants must have known that they were acting in defiance of law, as shown by the treaties and historical precedents prohibiting the use of force. Those who, after careful deliberation, carried out a common plan and conspiracy to invade ten nations, including Poland, France, the Soviet Union, Denmark, Norway, Greece and others, were, "by any permissible standard guilty of a Crime Against Peace." Eight of the accused leaders, whose deeds met the strict standards of guilty knowledge and intent to commit the crimes, were sentenced to death.

Jackson recognized that law must advance to meet the needs of a changing society. Offenses against "the laws of humanity" had frequently been condemned but there had never been such a clear articulation of the crime as in the IMT Charter. Jackson persuaded the international court to convict German leaders for Crimes Against Humanity but because of a

glitch in punctuation and translation, it was limited only to outrages against civilians that occurred during the time that Germany was at war. Later statutes and courts would correct that restricted view to make clear that, no matter when or where such cruel acts were committed, those responsible would be held to criminal account - as Jackson had intended.

What was done at the Nuremberg trials between 1945 and 1949 was not "victors' justice" but a determined effort, led by the United States, and inspired by Jackson's rhetoric and logic to create a world order governed by law rather than violence. His colleague and successor for twelve subsequent trials at Nuremberg, Telford Taylor, wrote, "Jackson worked and wrote with deep passion and spoke in winged words. There was no one else who could have done half as well as he." In addition to clarifying the scope of Crimes Against Humanity, Robert H. Jackson's greatest contribution at Nuremberg was outlawing the crime of aggression. In his final report to President Truman, Jackson expressed the belief of all those who shared in the work of the IMT that "at long last the law is now unequivocal in classifying armed aggression as an international crime instead of a national right."

II. Implementing Jackson's Dream

The principles of law laid down by the IMT were reinforced in the dozen subsequent trials at Nuremberg headed by then General Telford Taylor, who later became a Professor of Law at Columbia University. A new Control Council Law, No. 10, enacted by the four powers on 20 December 1945, reaffirmed and elaborated on the IMT Charter. In four of the subsequent trials at Nuremberg, 52 defendants were charged with Crimes Against Peace and five of the accused were convicted. The German arguments of self-defense and justification were dismissed in carefully reasoned judgments that carried forward arguments that had been enunciated by Robert Jackson.

A Charter for the International Military Tribunal for the Far East was based very largely on the London Charter for the IMT for which Jackson had been the leading architect. The Tokyo Charter made clear that a war of aggression could be either declared or undeclared. The Tokyo Tribunal, composed of judges from eleven nations, held the Charter to be a valid ex-

pression of existing international law. 28 high-ranking defendants were accused of Crimes Against Peace. Seven were convicted of conspiracy to wage wars of aggression. They were sentenced to death and executed.

When President Harry Truman addressed the United Nations on 23 October 1946, he called upon the world body to create an international criminal court where perpetrators of aggressive wars could be placed on trial. The IMT Charter was adhered to by 19 other nations. On 11 December 1946, the first General Assembly affirmed the principles of law recognized by the IMT Charter and Judgment - thus endowing them with universally binding legal force.

The UN set out to codify international criminal law. During the following years of the "cold war" various U.N. committees wrestled with the problem of defining the crime of aggression that would be in the forefront of any international criminal code. Finally, in 1974 a definition, reached by consensus, was adopted by the General Assembly. Its ambiguous phraseology reflected the hesitation of powerful states to accept international restraints on their use of armed force. Whether a state had committed aggression had to be determined by the Security Council "in the light of all the circumstances." Powerful nations were not yet ready to entrust their security to the decision of any international tribunal they could not control. Jackson's dream of world peace under law was applauded in principle but not accepted in practice. The world has paid dearly for the indecision of its political leaders. Wars continued as before and there was no tribunal that might deter the criminals.

In 1991, thousands of women were raped during brutal armed conflicts in former Yugoslavia. In 1992, hundreds of thousands of civilians were butchered in internal strife in Rwanda - to the everlasting shame of the world community that might have prevented the genocide. Public outcry, particularly in the United States, was so loud and strong that, the UN Security Council was able to create two new ad hoc international courts to deal with those Crimes Against Humanity. These two international criminal courts - each created in a matter of weeks - are now headquartered in the Hague and are creating important precedents for the development of humanitarian law.

They are building on the Nuremberg principles as enunciated by Jackson but they have only limited jurisdiction. Aggression was not an issue in the civil wars and the special *ad hoc* courts have no authority to deal with that crime.

In 1996, the International Law Commission, a body of independent experts, finally concluded work begun in 1947 on a code of international crimes. The crime of aggression, described as a "customary law crime" was included in the code but it was not defined. The legal experts reported that "[it] would seem retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nuremberg. . . . It should be left to practice to define the exact contours of the concept of crimes against peace. . ." Jackson's concept of "the supreme crime" was, in effect, recognized by leading experts as a peremptory international norm that was binding on all state. Even without a definition! But where was the tribunal competent to deal with it? The "supreme crime" lacked a Supreme Court.

III. A New International Criminal Court is Born

Creating special Security Council tribunals retroactively to punish a few international crimes committed in a limited area during a brief time-frame was not the most efficient or effective way to enhance universal law or deter future international crimes. Many states joined the call for the permanent international criminal jurisdiction that had been on the UN agenda every since the world body was formed. After many years of intense negotiation by various temporary UN Committees, the General Assembly finally created an open-ended Preparatory Committee for the Establishment of an International Criminal Court (ICC). Starting around 1995, a number of like-minded States, supported by a coalition of over a thousand non-governmental organizations from all parts of the world, became a driving force determined to move toward the mandated goal.

When the Preparatory Committee met in Rome in the summer of 1998 their goal was to bridge the hundreds of points of difference that still remained. Delegates came from countries with different legal and social systems and with different perceptions about how world peace could best be maintained.

There was general agreement that the ICC should have jurisdiction over Genocide, Crimes Against Humanity and major war crimes, all of which were carefully defined. The most contentious issue related to the Crime Against Peace, which had been the heart of Jackson's achievements at Nuremberg.

Those who opposed allowing the ICC to deal with the crime of aggression argued that the 1974 consensus definition was too vague. It gave the Security Council discretion to determine whether aggression by a state had occurred. Criminal statutes had to be precise and interpreted narrowly. The UN Charter charged the Council with primary responsibility to determine the existence of an act of aggression. Without a prior Council finding that a state had committed the crime, it might be beyond the competence of the ICC to convict any individual for the offense.

Delegates also remained skeptical about the impartiality of a politically-minded Security Council that might undermine the Court's independence. It was agreed that the definition of the crime and the relationship between an independent ICC and the Council needed clarification. Many smaller states felt that they could not accept an international criminal court that had no authority to deal with "the supreme crime". They settled for a compromise. Further consideration of aggression would be deferred for at least seven years after the Statute received the minimum of sixty ramifications needed for the treaty to go into effect. At that time there could be an amendment conference which, if almost all states agreed, aggression, as well as terrorism and narcotics trafficking, might become punishable by the ICC. The hottest issue was thus put on ice.

In the late evening of 17 July 1998, the exhausted Delegates from 120 nations, presented with the proposed compromise Statute for the ICC, voted "Yes". It was a remarkable historical achievement that owed much to the precedents laid down in Nuremberg more than fifty years earlier. The hall burst into wild and sustained applause. UN Secretary General Kofi Annan called it "A gift of hope to future generations" Unfortunately, seven nations, including the United States, and a few that the US had condemned as "Rogue States" voted "no."

The Rome Statute was in the form of a treaty that had to be accepted voluntarily by States that agreed to be bound by its

terms. Under the US Constitution, no treaty can be ratified without the consent of two-thirds of the Senate. Senator Jesse Helms of North Carolina was Chairman of the Foreign Relations Committee. He was adamantly opposed to any foreign court ever having jurisdiction over any Americans. His view was shared by many conservatives who seemed to prefer the law of force to the force of law. The Defense Department wanted a free hand to intervene with unrestrained military might wherever it was deemed necessary for humanitarian, political or security reasons.

It had taken forty years to obtain the two-thirds consent needed to ratify the Genocide Convention proposed by the US in 1945. Many American Presidents, including the first President Bush, had spoken out clearly for the rule of law and supported the idea of an International Criminal Court. In September 1999, President Clinton, addressing the United Nations, called for the creation of an ICC. Just before leaving office, he directed that the treaty be signed as an indication that the United States was in principle in favor of such a court. Knowing that it would not gain the needed Senatorial consent, Clinton noted that improvements were needed and he would not submit the treaty for ratification. Leading bar associations and legal scholars supported US participation in the International Criminal Court. Conservatives who opposed the court rolled out misguided and non-persuasive arguments designed to kill the infant ICC in its cradle.

Following the election of George W. Bush to the presidency, John Bolton, an Assistant Secretary of State and reputed protégé of Senator Helms, filed notice with the United Nations on May 6, 2002 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." This unprecedented and unlimited repudiation of a solemn presidential commitment shocked all those who supported the ICC. A host of other measures were taken by the US unilaterally in Washington and at the United Nations to make sure that every American would be forever exempt from ICC jurisdiction. These attempts to provide immunity for all American citizens and their employees brought the US government into disrepute with nations determined to create a rule of law that would bind

everyone equally. It was a repudiation of Justice Jackson, Telford Taylor and the most fundamental principles repeatedly espoused by the United States at Nuremberg.

IV. WHERE IS JACKSON'S DREAM TODAY?

Despite the vehement and widespread opposition from the Executive Branch of the U.S. government, the ICC treaty passed the target mark of more than 60 ratifications on 1 July 2002 — much sooner than expected. Many of America's staunchest allies, including England, Canada and the European community have joined those who stand firmly for the ICC and the rule of law that binds everyone. The International Criminal Court now sits in a new courthouse in the Hague. Its bench is staffed by 18 eminent jurists elected by member States from all parts of the world. A distinguished Prosecutor, Luis Moreno-Ocampo of Argentina, a noted human rights advocate, has begun to prepare for trials of crimes within the ICC's limited jurisdiction. The United States has turned its back on the court. The seat kept open for an American representative to contribute to the further development of international criminal law remains empty. The voice of Justice Robert M. Jackson is missing.

Aggression is one of the four crimes listed in the Statute of the Court but the ICC cannot exercise its jurisdiction over that most dangerous and destructive of all offenses until and unless new agreements are reached. Only after 1 July 2009 will it be permissible to consider amending the ICC Statute. Despite Justice Jackson's report to the President of the United States that aggressive war-making would henceforth be treated as an international crime, and despite the affirmation of that conclusion by many courts and the United Nations, the only international court in the world that may be able to try aggressors for Crimes Against Peace is the International Criminal Court that now sits in the Hague, with its hands tied. How much more suffering must the innocents of this planet endure before decision-makers recognize that law is better than war?

Would the world not have been better off if, after Iraq's 1990 invasion of the friendly neighboring Arab state of Kuwait, there would have been in existence a functioning International Criminal Court to bring to justice those leaders of Iraq who

were responsible for the aggression, crimes against humanity and major war crimes?

Thousands of non-governmental organizations all around the world call out for support of the new criminal tribunal that now stands before us facing the opposition of a hostile US administration. It is high time for political leaders to heed the voices of the people. Until the sound principles so eloquently articulated by Justice Robert H. Jackson at Nuremberg are universally accepted and implemented, the world will remain a very dangerous place.

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