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## Remarks of Henry T. King, Jr.

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## Remarks of Henry T. King, Jr.\*

### American Bar Association's Commemoration of the 60th Anniversary of the Nuremberg Trials, November 11, 2005, Georgetown School of Law, Washington, DC

Nuremberg marked a beginning. A new era in which individuals and nation states would be guided by a set of enforceable rules in their behavior towards one another. To those who were there, such as myself, it foreshadowed a new golden era in human history. In a real sense it marked the coming of international law as a force to be reckoned with on our planet. Nuremberg was designed to replace the law of force with the force of law.

What Nuremberg did was to attack through a trial involving the leaders of a nation state the root causes of international misbehavior. It was designed to demonstrate to the world that there was, indeed, a better way in which peace, justice, and security in the world could be secured by a rule of law.

Nuremberg introduced the concept that individuals and states were subject to international law—including limitations on sovereignty. This was indeed a remarkable step forward in the world in which Nuremberg was created. Nuremberg in a true sense imposed limitations on national sovereignty which had run wild after nation states had been freed from the Pope's domination under the Treaty of Westphalia of 1648. Under the principles of Nuremberg, neither nation states nor their leaders were permitted to be the sole arbiters of their destiny.

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\*Mr. King practiced law in New York with Milbank, Tweed & Hope, served as a Nuremberg war crimes prosecutor, and then had a long and distinguished career as a corporate counsel, which included more than twenty years with TRW Inc. (he was chief corporate international counsel). He teaches International Arbitration and is U.S. director of the Canada-U.S. Law Institute. A former chairman of the American Bar Association's Section of International Law and Practice, he served on the ABA's special task force on war crimes in the former Yugoslavia and was the U.S. chairman of a joint working group, organized by the American, Canadian, and Mexican bar associations, on the settlement of international disputes. Mr. King has written a book on Albert Speer, one of the Nuremberg defendants, entitled *The Two Worlds of Albert Speer*. The University of Pittsburgh, School of Law named Mr. King a Fellow *honoris causa* of the Center for International Legal Education on March 9, 2002. On June 4, 2002, Mr. King was awarded an honorary degree of Doctor of Civil Laws by the University of Western Ontario. Mr. King was a guest of the government of The Netherlands on March 11, 2003, for the inauguration of the International Criminal Court at The Hague. Mr. King is senior advisor to the Robert H. Jackson Center at Jamestown, New York. In 2004 the Government of Canada appointed Dr. King the first Honorary Consul for Northeastern, Ohio in 2004.

By limiting national sovereignty, Nuremberg bestowed on individuals specific rights and obligations which were transcendent over their parallel rights and responsibilities to their nation states. Nuremberg modernized the laws of war and created a denominator under which all citizens of the world could live and be judged. In so doing, Nuremberg launched the international human rights movement.

In today's world Nuremberg has had some profound effects and some effects which are not so lasting. The concept that sovereigns are not immune for their actions was first initiated at Nuremberg. It was designed to make leaders of nation states responsible for their crimes. Herman Goering and other Nazi leaders were prohibited by the London Charter of August 1945 from pleading sovereign immunity—act of state—as a defense at Nuremberg. No longer were sovereigns to be exempt from responsibility for their crimes under international law. This approach was confirmed by the International Military Tribunal (the Nuremberg Court) and followed by the Courts in the twelve Subsequent Nuremberg trials. It has also been followed in United Nations' Security Council resolutions establishing the International Courts at The Hague and Tanzania dealing with violations of international law in the former Yugoslavia and Rwanda. In today's world Slobodan Milosevic, the former leader of Serbia, is on trial for crimes committed in Bosnia and Kosovo. The issue of the responsibility of former Chilean dictator Augusto Pinochet for crimes committed during his regime is now being debated in Chilean courts. So—the renunciation of the doctrine of sovereign immunity which was introduced at Nuremberg is alive and well today.

The rejection of superior orders as a defense for international crimes was first introduced at Nuremberg under the London Charter. This meant that defendants who committed international crimes could not absolve themselves by pleading that they had been ordered to act. At Nuremberg Wilhelm Keitel, Chief of Staff at the High Command of the German Armed Forces, attempted to plead this defense and the Court rejected it. The Nuremberg Court held that Keitel bore personal responsibility for the criminal orders of Hitler, which he had carried out. Otto Ohlendorff, who admitted that his *Einstazgruppen* was responsible for the killing of 90,000 Jews, Gypsies and Russian commissars from Southern Russia, stated that he had been under orders. But a Nuremberg Subsequent Proceedings Court gave no quarter to this defense and he was executed by hanging. Rudolph Hoess, the commandant of Auschwitz who admitted responsibility for the execution of 2,500,000 people, stated that he acted because he was ordered to do so. This proved to be no defense and Hoess was hung by the Poles for his crimes. The defense of superior orders has largely been eliminated in the United Nations resolutions establishing The Hague and Rwanda Tribunals. At Nuremberg and in the Nuremberg Subsequent Proceedings mitigation could be allowed in cases where no moral choice had been possible. However no mitigation was in fact allowed at Nuremberg because the defendants on the dock were holding major positions in Hitler's criminal regime when they carried out his orders. They were involved because they wanted to be part of that regime.

In a real sense Nuremberg marked the start of the international human rights movement. Nuremberg was the ancestor of the European Court of Human Rights and also courts where violators of human rights are being punished today, such as the courts at The Hague and in Tanzania. Future violators of human rights will be subject to trial by, among others, the new International Criminal Court, located at The Hague. The United Nations (UN) continues to deal with the problem of intervention in nation states where human rights are being violated. Some progress has been made but we are not there yet in terms of a permanent resolution of this problem.

On the plus side—genocide was one of the crimes identified by name in the indictment against the Nazi defendants at Nuremberg. It was also listed by name in the closing statements of the British and French prosecutors. The Nuremberg principles were endorsed by the UN General Assembly on December 11, 1946 and the endorsement was followed by a separate resolution dealing with genocide. The net result was the Genocide Convention of 1948 which became effective in 1951. Today most nations, including the United States, have ratified the Genocide Convention. Moreover, genocide is among the crimes subject to the jurisdiction of UN-sponsored tribunals in The Hague and Tanzania, as well as that in Sierra Leone. It is also included in the crimes over which the International Criminal Court has jurisdiction. It is a long way from the indictment of the Nazis at Nuremberg for genocide on October 6, 1945 to the trials of individuals for genocide in today's world but the connection is strong and it is real and it should never be overlooked. In the course of human history, Nuremberg stands as the ancestor of the Genocide Convention and the aforementioned tribunals dealing with genocide.

The effects of Nuremberg's dealing with the problem of crimes against peace—planning, preparing, initiating and waging wars of aggression—are less apparent in today's world. In the negotiations preceding Nuremberg, the Chief U.S. Prosecutor, Robert Jackson, faced the problem of the USSR representatives' advocacy for limiting the charge of aggressive war to the specific acts committed by the Nazis during World War II. The Russians did not want a generic definition of aggression included in the Nuremberg Charter. But Jackson firmly took issue with this approach and Jackson prevailed. However, the holding of the IMT which condemned what the Nazis did by way of clearly premeditated acts of aggression does not generically deal with the nuances of the problem of aggression. Subsequent to Nuremberg attempts have been made to define aggression generically culminating in a United Nations General Assembly endorsed resolution in 1970. However, this definition has not been recognized in practice by major powers, such as the United States. Aggression was not included in the charges set forth in the United Nations resolutions establishing The Hague and Tanzania tribunals. In the Rome Statute establishing the International Criminal Court, the crime of aggression was specifically included as part of the Court's jurisdiction. However, this charge will not become effective until aggression is defined and the resulting definition is approved by 7/8th of the parties to the Rome Statute. The earliest this can be is 2009 when revision of the Rome Statute by those ratifying it becomes possible. Robert Jackson, the architect of Nuremberg, felt that aggression was the most important crime dealt with at Nuremberg and aggressive war remains an essential item on our international agenda today. A major problem is to reconcile the doctrine of preemption with the provisions of the United Nations Charter dealing with aggression. In the trial of Saddam Hussein aggression may well be dealt with for the first time since Nuremberg. Robert Jackson, were he alive today, would indeed be pleased at this development.

Nuremberg was in essence an American creation that resulted in a giant step forward for the entire world. By contrast, the rest of the world is going forward today while the United States is moving backwards and away from the rule of international law. At Nuremberg Robert Jackson said "As we pass a poison chalice to the lips of these defendants we pass it to our lips as well." But the U.S. has since fought this principle tooth and nail. For example, in signing the Genocide Convention the U.S. included provisions which in essence permit the U.S. to self-judge the application of the Genocide Convention vis-à-vis U.S. behavior. Moreover the U.S. opposed the International Criminal Court because it did not want U.S. soldiers tried by the Court without the consent of the U.S. Yet the U.S. has supported the application of the Nuremberg principles to others — as evidenced by the U.S. sponsorship

of the U.N. Security Council resolutions providing for the trial of individuals for crimes committed in the former Yugoslavia and Rwanda.

Nuremberg's potential has never been fully realized for enforcement purposes. Ideally Nuremberg should serve as a beacon light for the prevention of crimes, as well as for their punishment. If its rules were all firmly in place it should act as a deterrent to those who would commit international crimes (crimes against peace, war crimes, crimes against humanity and genocide). In many countries of the world outside the United States the Nuremberg principles are revered. Let us take Germany, for example, whose citizens were the target of the Nuremberg proceedings. By a unanimous vote the German Reichstag endorsed the International Criminal Court and there are provisions in the German constitution prohibiting the crime of aggression by Germany. Moreover, the city of Nuremberg will be commemorating the 60th anniversary of the opening of the Nuremberg trial on November 21, 2005, just ten days from now. Germany recognizes the importance of the Nuremberg principles to peace and security in the world. It is indeed ironic that the United States, which led the world in creating the Nuremberg principles, is now fighting so vehemently against the International Criminal Court which would institutionalize those principles, whereas Germany, whose leaders were the target of Nuremberg, is in the forefront of the fight to sustain the Nuremberg principles in today's world.

Our current leaders fail to understand that with the Nuremberg principles firmly in place our citizens can be the beneficiaries. The Nuremberg principles can well deter the commission of crimes against our people. For example, the adoption of these principles by all nations might have averted some of the crimes which have been endured by our citizens abroad.

We worry about the aggressive intentions of others, including China, North Korea, and Iran. Why not at least try to get these nations, and others to agree not to commit aggression? Why not try to avoid the commission of what Justice Jackson felt to be the supreme international crime at Nuremberg? This, indeed, could implant the inheritance of Nuremberg in today's world by establishing a benchmark for determining the existence of aggression and accountability for same. If a country enters into a non-aggression pact, whether it be bilateral or multilateral, that country obligates itself to abide by its terms or face the consequences. The UN is at present the ultimate arbiter and unprovoked aggressions invite sanctions, including the use of military force. Breach of a non-aggression pact without good cause would weigh heavily on the scales of justice when the UN Security Council considers the action that it should take. Such a breach is substantive evidence of criminality and opens the door too to a possible conclusion that such State initially entered into the pact without any intent to live up to its obligations thereunder.

When the parties to the International Criminal Court consider in the 7th year after it became effective whether to amend the Rome Statute, it may well find a mutually acceptable definition of "aggression" so as to bestow jurisdiction of the Court over such crimes against peace. Unprovoked breach of a non-aggression pact would be one persuasive fact in determining intent to commit an act of aggression.

Such a pact would not render the U.S. helpless but could put us in a position to respond with force to the aggression of others. By no means am I recommending that we disarm. What I wish to make clear is that it might well be in the self-interest of the United States to renounce aggression as a national policy and to do so by agreement with others.

We must exert every effort to construct a rule of law so certain that it truly would act as a deterrent to the commission of international crimes. Punishment would remain but deterrence would be the guiding principle. Case law is being developed that should show that "international crime does not pay." Ideally, Nuremberg has the potential to be a symbolic

deterrent to the commission of such crimes so as to achieve the goal of Nuremberg where peace with justice is the order of the day. The International Criminal Court can be a building block for peace and security. If the nations of the world would support it, the International Criminal Court would permanently institutionalize Nuremberg.

Nuremberg was an international tribunal with four powers participating and 23 other nations endorsing it. From the standpoint of credibility, if a tribunal is truly international it cannot be seen as merely a case of the victors trying the vanquished. International tribunals develop an international constituency for international law.

Jackson's emphasis was on due process while protecting the rights of the accused and the rights of humanity. Fairness was the order of the day at Nuremberg. The case against the defendants was primarily based on documents from their own files. As evidence of this fairness, three defendants in the IMT trial were acquitted where the evidence did not support the charges levied against them.

We need to educate people on the true meaning of Nuremberg so that the Nuremberg principles, which are indeed far-reaching, become a rule of law in the world—so that ordinary citizens in all countries know there will, indeed, be consequences if their international rights are violated. They are good principles and they must guide our behavior by adherence to them—with no country exemptions (including the U.S.).

Nuremberg is sometimes viewed as a legend in today's world, but its legacy is with the people of the world. We must honor the actuality of Nuremberg while respecting its symbolism so that the Nuremberg principles which are indeed far-reaching, become the universal rule of law in the world. If asked today I believe most people in the world would say they favored the principles of Nuremberg, but in their response would they fully comprehend the significance of Nuremberg?

Nuremberg emphasized dramatically the role of lawyers in the world. We should, indeed, never forget that if Winston Churchill and Joseph Stalin had had their way, the Nazi leaders would have been summarily executed. But Robert Jackson and U.S. Secretary of War Henry L. Stimson felt there was a better way—a legal way—to deal with the Nazi leaders for their crimes. They wanted fairness rather than vengeance to be the order of the day and I believe the world is immeasurably better for it. Moreover, our understanding of the Nazi era, an era which hopefully will never be replicated, has been beneficial because we learned how the checks and balances and power in a democratic system were destroyed by the Nazis.

What Robert Jackson wanted to do at Nuremberg was to build a framework of international law that would guide the relations of individuals and nations for the future. He believed that the international context as it existed in the mid-twentieth century was not cast in stone but could be improved—immeasurably so.

In the public sector the profession of "international lawyer" is largely derived from Nuremberg. The approaches to the doctrines of sovereign immunity and universal jurisdiction, and the issue of superior orders are all derived from Nuremberg. Human rights today have an international status because of Nuremberg. Nuremberg demonstrated what contribution lawyers could make to peace and to the creation of a world in which individuals violating sound rules of international behavior would be punished for their crimes.

A world governed by the Nuremberg principles would be a world of certainty and predictability where individuals and nations could plan for the future and make their dreams come true. We have not achieved that ideal yet, but I am confident that over time we will.

Before closing I wanted to say a few words about Robert Jackson, the father of Nuremberg. As Francis Biddle, the American judge, said: "There would have been no Nuremberg without Robert Jackson."

There were three aspects of Jackson's character that impressed me most; namely, his fairness, his courage, and his vision.

As evidenced by his speech before the American Society of International Law on April 13, 1945, which preceded his appointment as the U.S. representative in the negotiations for the trial of the Nazi war criminals, Jackson wanted findings of guilt to be supported by proper evidence. If there was not sufficient evidence of guilt he believed the charges should be dismissed. This sense of fairness stood him in good stead in negotiations for the trials which he maintained in the face of USSR opposition that there should be a presumption of innocence in the cases of all the defendants.

Jackson also wanted to secure proper legal representation for all defendants. He accomplished this with the financial help of the Allied Control Council and the caliber of at least several of the lawyers representing the defendants was very high. Alfred Kranzbuchler, Doenitz's counsel, is a case in point.

Robert Jackson wanted the case against the defendants to be based on their own documents and with less reliance on witnesses. He followed this principle in the course of the trial. The International Military Tribunal (IMT) commented on this in its opinion. The decision to uphold this principle has given the IMT's decision at Nuremberg lasting credibility.

Albert Speer, a prime defendant at Nuremberg, told me that he felt that he had been given a fair trial. His only concern was that the indictment was so sweeping that he had to plead not guilty to all charges. He would have preferred to have been able to plead not guilty to some and guilty to others.

As for courage, Jackson did not hesitate to plow new ground in the legal world. His convictions were right and he stood with them through thick and thin. The chief justice of the United States, Harlan Stone, called Nuremberg "Jackson's high lynching expedition." Of the judges on the Supreme Court, several, including Justice Douglas, were critical of Nuremberg. Jackson did not have support of much of the organized bar of the United States and Nuremberg was excoriated by Senator Robert A. Taft of Ohio in a speech at Kenyon College just after the IMT handed down its decisions. But Jackson withstood the slings and arrows of his countrymen and held fast to his belief in the legitimacy of Nuremberg.

Robert Jackson's greatest characteristic was his vision. To do what Jackson did he had to think beyond his immediate environment, disregarding the shackles of the present and peering into the future. He put it upon himself to consider future generations and to visualize a world where a rule of law based on justice would be the order of the day. I can say no less that we are here today because of that vision.

In sum, Nuremberg was Jackson's creation and as he so well put it:

"This is the first case I have ever tried where I had to persuade others that a court should be established, help negotiate its establishment, and when that was done, not only to prepare my case, but find a courtroom in which to try it."

Through his accomplishments at Nuremberg, Robert Jackson brought for me, and I believe others, a new dawn of hope for a better world for all of mankind. Lawyers throughout the world should take steps to preserve his legacy and keep it alive in today's world.

I am, indeed, pleased to honor his memory and that of Nuremberg here today.

So, hats off to Robert Jackson and Secretary of War, Henry L. Stimson, and those who were involved in Nuremberg! They honored our profession immeasurably by what they did and we—and the world—owe them a debt of undying gratitude.