JUSTICE JACKSON, NUREMBERG AND HUMAN RIGHTS LITIGATION*

Paul L. Hoffman**

I would like to thank Albany Law School for organizing this event. It is an honor for me to speak today alongside such distinguished panelists.

Justice Robert H. Jackson thought that his role as the United States chief prosecutor at Nuremberg was one of the most important roles that he played in his distinguished career. He was right about this and his impact was even greater than he thought.

I will speak about the impact of Justice Jackson and the Nuremberg legacy on efforts to end impunity internationally. One reason that I believe I was asked to be on this panel is because of my extensive background in Alien Tort Claims Act litigation. I will discuss the legacy of Nuremberg in human rights litigation in the United States. I would like to think of myself as someone walking in the shadows of Justice Jackson’s work to end impunity, trying to hold individual human rights perpetrators accountable in the ways that we have available to us in the courts of the United States.

In preparing this address, I reread Justice Jackson’s opening statement at Nuremberg,¹ and I plan to use that as the organizing principal of this talk. The eloquence and power of Jackson’s opening statement contributed mightily, along with his conduct at

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** Paul Hoffman is a partner in the law firm of Schonbrun De Simone Seplow Harris & Hoffman LLP in Venice, California. He is the former Legal Director of the ACLU Foundation of Southern California and the immediate past Chair of the International Executive Committee of Amnesty International. He has litigated many cases brought under the Alien Tort Claims Act and argued the case Sosa v Alvarez-Machain, 124 S. Ct. 2739 (2004), in the United States Supreme Court.

the trial, to the incorporation of the basic Nuremberg principles into modern international law.

At the time of the opening statement, as acknowledged by Justice Jackson, the concept of victor's justice swirled around the undertaking and threatened the legitimacy of the Nuremberg trials. The eloquence with which Justice Jackson advanced the position that individuals had to be held accountable for their actions contributed greatly to the acceptance of that principle by the international community. This acceptance is embodied in the 1946 United Nations General Assembly Resolution accepting the Nuremberg principles as fundamental norms of the international legal system.

Perhaps more importantly, however, this notion has been accepted by both the international community and ordinary people as a basic principal of international justice—that all men need to be held accountable for their actions through the rule of law. As Justice Jackson said: “We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.”

There is a long and well-known story about how efforts to institutionalize the Nuremberg principles ran aground on the shoals of Cold War politics after Nuremberg. However, the idea of individual responsibility and accountability, which is at the heart of the Nuremberg legacy, remained and emerged more strongly after the Cold War ended. In the 1990s, in the aftermath of the genocide in Bosnia, and then the genocide in Rwanda, the Nuremberg legacy and the idea of individual accountability led in large part to the creation of the ad-hoc tribunals for the former Yugoslavia and Rwanda.

2 “Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes.” Id. at 33.

3 See Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (1946).

4 See Opening Statement, supra note 1, at 93.


tribunals, the importance and legacy of Nuremberg is clear.\(^7\)

One of the things I was struck by when rereading Justice Jackson’s opening statement at Nuremburg was his explanation of the difficulties facing those who were trying the Nazi war criminals—the practical difficulties.\(^8\) These difficulties included the fact that there were no previously established tribunals, and, thus, having no precedent to follow, some of the rules had to be fashioned as they went along.\(^9\)

With regard to the ad-hoc tribunals for Bosnia and Rwanda, I think that Justice Jackson would have been very sympathetic to the manner in which some of the early trials had to take place. For example, in the Tadic trial, the defense asked for the elements of the crime during the case and only received them at the end.\(^10\) The ad-hoc tribunals could be criticized for that, but I think that what Justice Jackson said about Nuremburg also applies to the ad-hoc tribunals. It is possible, notwithstanding those practical difficulties, to establish trials that are fair and that are seen to be fair by the international community at large. Viewing the Tadic trial as a whole, and the trials which have occurred since, the ad-hoc tribunals should be seen as dispensing international justice of a high standard.

Justice Jackson’s position was that when you are confronted with the enormity of an evil of the kind that confronted him at Nuremburg, it is possible to do justice that is perceived as fair to the defendants, the victims and to the international community as a whole, even in tribunals which require further development.

When one reads the opinions of the ad-hoc tribunals, it is obvious that the Nuremburg principles have become a part of the very fabric of the new international criminal law jurisprudence that is developing in the Hague. It is clear that the Nuremburg legacy continues with enormous impact.


\(^8\) See Opening Statement, supra note 1, at 31–35; see also Brady O. Bryson, Remembering Robert H. Jackson at Nuremburg Decades Ago, 68 Alb. L. Rev. 9, 10–11 (2004) (giving an excellent description of the realities faced by Justice Jackson in establishing the international tribunal at Nuremburg).

\(^9\) “It is true, of course, that we have no judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs.” Opening Statement, supra note 1, at 85.

This impact can also be seen in decisions in the various opinions of the House of Lords in the *Pinochet* case, where the Nuremberg legacy greatly affected the decisions rendered by the Law Lords. In *Pinochet*, the decisions had to do with the extradition laws of the United Kingdom, and the ultimate decision was open to criticism; however, the Law Lords accepted the Nuremberg legacy as being an essential foundation of the international criminal law system. That principle of personal liability for certain international crimes was, by the time of the decision, an accepted principal of international law.

Moreover, efforts like the creation of the Convention Against Torture, so central to the *Pinochet* case, were motivated by the same principle. The activism that led to the Convention Against Torture is also attributable to the Nuremberg legacy, as the Convention came about as the result of the international campaigns against torture waged by non-governmental organizations seeking to put into practice the essential Nuremberg idea—that every individual must be held to account for international crimes regardless of their station or official position. Thus, the Nuremberg legacy may be seen as a driving force in non-governmental activism and in judicial decisions, as well as in the emerging anti-impunity framework that is emerging at the international level, as is further evidenced by the principle of universal jurisdiction for human rights crimes.

It is vital for any international system wishing to thwart impunity to establish mechanisms and institutions capable of bringing offenders to justice. One cannot have an international system of this sort without an international tribunal like the International Criminal Court (“ICC”). It strikes me that our nation needs, now more than ever, statesmen like Robert Jackson who would dispel the objections to American involvement in the ICC, and who could explain that it is in our national interest to support human rights and adherence to the rule of law.

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12 See id. at 188, 292 (holding Senator Pinochet could be extradited under the United Kingdom's Extradition Act 1989 for offences of torture that occurred after December 8, 1988).
13 “Since the Nazi atrocities and the Nuremberg trials, international law has recognized a number of offences as being international crimes.” Id. at 189.
14 See id. at 205 (deciding ex-heads of state could not be given immunity for acts of torture after the creation of the Torture Convention and also recognizing torture as an international crime).
15 See id. at 189 (noting that the Torture Convention required the United Kingdom to recognize as criminal “all’ torture wherever committed worldwide”).
In reading his opening statement, it seems clear that Robert Jackson would be a leader in the fight for United States ratification of the ICC. Jackson’s statements regarding the difficulties of politics in the context of Nuremberg apply to some of the objections about the ICC. He was confident that judges and prosecutors could rise above politics. He stated: “We must summon such detachment and intellectual integrity to our task, that this trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.”

To those who would say that an International Criminal Court and judges and prosecutors on the international level would be impacted by politics, and that the United States would not get a fair shake, Robert Jackson would have an answer. Additionally, international tribunals show that it is possible to have international justice, and that such justice is in the United States’ national interest. It is with great regret that we do not have a Justice Jackson to lead that charge within the United States today, or even a candidate willing to contest the notion that it is not in the best interest of the United States to have an International Criminal Court.

Regarding Justice Jackson, Nuremberg, and the Alien Tort Claims Act, the main basis for human rights litigation in U.S. courts, if you conduct a Lexis search to see how often the Nuremberg cases have been cited in ATCA cases; you will come up with several dozen cases. The references in these cases to Nuremberg do not accurately reflect the more profound influence the idea of Nuremberg has had on the whole enterprise of bringing Filartiga-type cases.

For example, one would not read very much in the Marcos cases about Nuremberg. But I can tell you from having litigated the Marcos cases from the beginning that the judges were affected by the power of the idea of Nuremberg when it came to determining whether someone, like Ferdinand Marcos, who was the President of the Philippines at the time of the torture, disappearances, and summary executions that he was being charged with, was entitled to former Head of State immunity. The judges rejected former Head

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16 Opening Statement, supra note 1, at 34.
18 The Marcos cases brought Ferdinand Marcos, the former President of the Philippines, to account for widespread torture, summary execution and disappearances during his regime. Some of these cases include: Hilao v. Estate of Marcos, 393 F.3d 987, 988 (9th Cir. 2004); Sison v. Estate of Marcos, 165 F.3d 36 (9th Cir. 1998); In re Estate of Marcos, 25 F.3d 1467, 1469 (9th Cir. 1994); In re Estate of Marcos Litig., 978 F.2d 493 (9th Cir. 1992).
of State immunity in that case, based largely on the power of the Nuremberg principles.\(^\text{19}\)

Similarly, the *Doe I v. Unocal* case, another case that I am litigating, involves claims by Burmese villagers that Unocal was complicit in human rights violations committed against them in connection with a pipeline project.\(^\text{20}\) In that case, there has been a consistent argument about the meaning of Nuremberg, but not about the power or applicability of the Nuremberg principles.

In *Unocal*, the district judge dismissed the case based on his own reading of Nuremberg concerning the scope of aiding and abetting liability, finding that the plaintiffs have to show that Unocal “actively participated” in the human rights violations to be held liable.\(^\text{21}\) The first panel in the Ninth Circuit rejected that reading of Nuremberg and found that there was broader aiding and abetting liability, based in large part on the precedents of the ad-hoc tribunal for the former Yugoslavia.\(^\text{22}\) The case was argued *en banc* in June 2003, and in that *en banc* argument there was significant questioning about the meaning of Nuremberg, not about its power, influence, or applicability. The idea of individual accountability for international human rights violations is at the core of every Alien Tort Claims Act case.

In arguing the *Sosa v. Alvarez-Machain*\(^\text{23}\) case last March in the Supreme Court, there was a point at which I mentioned Nuremberg. It was my impression that the legitimacy of the Nuremberg principles was well-accepted by the Justices. The fact that Justice Jackson, one of the Brethren, had been a part of the Nuremberg enterprise surely had an effect on the Court.

In *Sosa*, the Court rejected the government’s arguments of nearly unrestrained executive power in the area of foreign affairs.\(^\text{24}\) In part, the government based its arguments on *Youngstown*.\(^\text{25}\) However, I think the Court found that the Alien Tort Claims Act was an example of the courts and Congress working together, and

\(^{19}\) See *In re Estate of Marcos*, 25 F.3d at 1472 (concluding that Marcos’ acts of torture were outside his authority as President and therefore he was not entitled to immunity).


\(^{21}\) *Unocal*, 110 F. Supp. 2d at 1310, 1312.

\(^{22}\) See *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002) (stating the standard for aiding and abetting was “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime”).


\(^{24}\) *Id.* at 2766 n.21.

\(^{25}\) See *Youngstown Sheet & Tube Co. v. United States*, 343 U.S. 579, 592, 635–38 (1952) (Jackson, J., concurring) (recognizing three levels of executive power to take action).
rejected claims of Executive power. So, Justice Jackson also had an impact here. In the post-
Sosa era, to the extent that a claim is grounded in Nuremberg jurisprudence—like claims based on war
crimes and crimes against humanity such as Kadic v. Karadzic26 and the Mehinovic case27—I think those claims will be sustained.

Justice Jackson would have been pleased with Justice Souter’s analysis of the role of customary international law in U.S. courts
and the ability of federal courts to determine what currently constitutes customary international law, as well as the ability of federal courts to fashion federal common law in Alien Tort Claims Act cases. For Justice Jackson, international law was more than a
“scholarly collection of abstract and immutable principles”; it was something that evolved over time in much the same manner as the
common law. It evolved out of the real experience of human beings and in response to real problems and circumstances.

Justice Souter’s opinion recognizes the evolutionary nature of international law. For example, Justice Souter found that
customary international law includes the way in which governments treat their own citizens.28 That finding may create
certain problems for the courts, but it is a recognition, as was the Nuremberg judgment, that international law evolves over time.
The Supreme Court has adopted an approach to customary international law and to federal common law with which Justice
Jackson would have been very comfortable.

In sum, I hope we will see the federal courts continue to uphold
the rule of law and their own role in enforcing customary
international law in the human rights sphere. The Alien Tort
Claim Act, for example, might be broad enough, given the
suggestions Justice Stevens made in the Rasul opinion, to challenge
the detentions in Guantanamo.29

Beyond this specific context, when federal judges enforce
international law under the Alien Tort Claims Act, they are walking
in the illustrious footsteps of Justice Jackson and building a

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27 Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1343–55 (N.D. Ga. 2002) (analyzing the plaintiff’s Alien Tort Claims Act and Torture Victim Protection Act claims with regards to official torture, cruel treatment, arbitrary detention, war crimes, genocide, and crimes against humanity; also specifically referencing the Nuremberg trials).
29 See Rasul v. Bush, 124 S. Ct. 2686, 2692–95 (2004) (stating that detainees held at Guantanamo have the right to bring habeas petitions in federal courts despite not having been captured or held on American territory).
framework for international anti-impunity efforts that will complete the task he began at Nuremberg sixty years ago.