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## **The US and the ICC**

by

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## Tom Lantos

I visited Washington DC in March of this year. I was a guest of the American Society of International Law: to address their annual convention. But, a lesser publicized reason for the visit – but no less important – was as a guest of the Embassy of the Netherlands, on the occasion of this year's award of the Anne Frank Prize to Ben Ferencz. I was to say a few words at the pre-award dinner at the Residence of the Dutch Ambassador, whose government is the donor of the Anne Frank Prize.

In the world of international law and human rights, Mr Ferencz is a living giant: never mind his anatomical size. Now in his 100th year, Mr Ferencz is the last surviving person who served as a prosecutor during the Nuremberg trials.

It was at that dinner that I met a most impressive woman – by more accounts than her compelling charisma reveals. That was Katarina Lantos Swett – the daughter of the late great Tom Lantos.

On a note of evident filial rivalry – assuredly of the happier kind – I should point out that both father and daughter had each been fabulously educated, with crowning PhDs. As such, they should be addressed, in their own respective rights, as 'Dr Lantos' and 'Dr Lantos Swett.' But, to avoid confusion of titles, I shall address Père Lantos by the simpler title of 'Mr Lantos' – in keeping with a time-honoured tradition in the US Congress, where he served for close to 30 years as a congressman.

As with Mr Ferencz (another American of Hungarian origin), Mr Lantos was also a towering figure in his own right: in the world of human rights. His public service in the US Congress was uniquely marked by a determination to carry '*the noble banner of human rights to every corner of the world.*' A holocaust survivor himself and the only one (I understand) to have served in the US Congress, Mr Lantos was keenly aware – and he made sure to remind the world – that the '*veneer of civilization is paper thin. We are its guardians, and we can never rest.*' Those are his words. And he never did rest in the fight for human rights and human dignity. In a post-humus homage to him on the floor of the House of Representatives, Ms Pelosi (the House Speaker, even then) testified that Mr Lantos had '*devoted his public life to shining a bright light on the dark corners of oppression. ... He used his powerful voice to stir the consciousness of world leaders and the public alike.*'

A lasting testament of his legacy in that regard is that following his death in 2008, the bi-partisan Human Rights Caucus of the US Congress, which he founded in 1983, was renamed the Tom Lantos Human Rights Commission.

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It is against the foregoing background that you will appreciate the promptness with which I accepted the invitation of Dr Lantos Swett, for me to return to Washington DC and deliver this year's Lantos Annual Rule of Law Lecture, in honour of Mr Lantos.

In both lyrics and melody, Lyle Lovett's song 'South Texas Girl' is one of the most beautiful ballads you would ever hear. In it, Lovett longingly sings of '*the wind [blowing] the echoes of long faded voices ...*'. But, however beautifully Lovett sings that line, it evokes a fate that the voice of Tom Lantos must not suffer. No, we must not allow that 'powerful voice' of his to degrade into history as a long faded voice, which may waft back at us – if at all – only in the occasional echoes of the wind. We must subscribe to an obligation to sustain his powerful voice relentlessly: so that through our own repeating voices he can continue '*to stir the consciousness [or conscience] of world leaders and the public alike*' – even right here in Washington DC. The Lantos Annual Rule of Law Lecture is an important effort in that direction. It is an honour to be here – to contribute my own modest voice to that effort. And it is a true honour to address you today in the name of Tom Lantos.

## **The US and the ICC: in One Word**

The title of my lecture is 'The US and the ICC.' If you would use one word to describe the current state of relationship between the US and the ICC, the one word would be: 'unfortunate'. But, it is a most diplomatic word. As is typical with diplomatic language, that description masks a highly troubling reality – even if you added the qualifier 'most' in front of 'unfortunate'.

An unvarnished picture of that reality is framed by a much publicized speech that Mr Bolton, the former National Security Adviser, delivered in September 2018 – which he presented as a policy position of the US Government on the ICC.

In that speech he directly threatened the staff and officials – including the Chief Prosecutor and also the judges – of the ICC with economic sanctions and malicious prosecution: for embarking upon a judicial process in which the Chief Prosecutor is seeking authorization from judges to allow her to conduct investigation into the situation in Afghanistan.

Listening to that speech, an alien from outer space may be forgiven to think that the National Security Adviser was issuing the standard threats to a terrorist organization.

Apart from the principle that has innately guided America's respect for the ideal of judicial independence, which Alexander Hamilton had articulated with classic eloquence in the 'Federalist Paper No 78', the extremeness of the threats issued by the National Security Adviser also ignore Hamilton's correct portrayal of the judiciary as the least dangerous of all the branches of the Government. As he put it: *'[The judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.'* Hamilton was entirely correct in that description, even in the experience of the ICC. For, this is the reality of the ICC, even in relation to States Parties to the Rome Statute, who have always promised unflinching support for the Court. Why then the bellicose threats against the Court? We *'have neither FORCE nor WILL, but merely judgment.'*

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In subsequent developments, Mr Pompeo, the Secretary of State, appeared to have confirmed those threats. To demonstrate that they mean business, he announced the cancellation of the US travel visa to the Chief Prosecutor. And, the Secretary of State indicated that more actions may follow, depending on the outcome of the judicial proceedings.

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Why? It is because the Prosecutor dared to take steps to commence investigations into the situation in Afghanistan. That matter is now before the Appeals Chamber of the Court, I shall therefore not comment on the merits. But the need for a general understanding of what the case is all about compels me to say a few words about its general circumstances, without prejudice to the legal questions presented.

[I should perhaps point out at this juncture, that I shall make liberal use of adjectives like 'alleged', 'apparent' and their attendant adverbs, merely because that is how lawyers are able to engage safely in discussions of facts and events that have yet to be judicially determined.]

## **The Afghanistan Matter**

By way of background, it helps to recall that great anxiety was excited in the world outside Afghanistan, when it was presented with stories and apparent images of the conduct of the Taliban - a religious regime that allegedly thought it their prerogative to forbid the girl-child from going to school. Measures that seemed draconian were allegedly employed or permitted to enforce these and other diktats of that kind.

Those stories, if borne out by a proper investigation, may well give a clue as to the state of affairs about what else might have been afoot in Afghanistan, which might be of interest to the ICC Prosecutor in the investigation that she seeks permission to conduct. And, from all accounts, representatives of the alleged victims desire the Prosecutor to conduct those investigations for their sake.

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Here is another dimension to the story. The world was stupefied in helpless horror by the events of '9-11' – permanently seared in our memory by the destruction of the Twin Towers of the World Trade Centre, using hijacked civilian airliners full of innocent passengers. Thousands were killed. Those who died included many that jumped in heart-breaking desperation from scores of floors high up the towers. The victims knew that they were jumping to their deaths. But it seemed preferable to die that way, than face live cremation by the raging inferno that engulfed the Twin Towers from around the critical floors that the assailants chose as the points of impact.

It is common knowledge that there were other attacks - or attempts thereof - on American soil on that day; also using hijacked civilian aircraft carrying innocent passengers. Those also cost human lives. By all accounts, these attacks remain undeniable acts of terror. There is no need to speak of those facts as 'alleged' or

'apparent'. They are historical events fit for judicial notice. And they must continue to be condemned as abominable acts of terror.

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No doubt, the destruction of the Twin Towers encapsulated the apogee of the horrors of the day. It was the destruction of an iconic symbol of our collective civilisation. School children of my generation – even in the remotest parts of the world far away from New York – grew up seeing images of the Twin Towers as if they were two pillars holding up the sky, and reading about them as one of the Seven Wonders of the World. Their destruction was very much a destruction of an aspect of our own innocence – wherever we come from in the World.

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In the circumstances, the US military was drawn into what the Government termed a 'war on terror' – with Afghanistan as its geographic epicentre: apparently because their intelligence informed them that Afghanistan had become an operational domain – and training ground - for Al-Qaeda, who were behind 9-11. This is the same Afghanistan that was and remains the land of the Taliban.

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The Prosecutor seeks authorisation to open investigation into the situation in Afghanistan. She contends that she has information that induce credible suspicion or probable cause to believe that some of the events in that situation – beginning with the actions of the Taliban – might implicate specific violations in the nature of crimes against humanity and war crimes, which are of interest to the Rome Statute. This is so, because they occurred in the territories of States Parties to the Rome Statute. Perhaps, it is important to stress that all the acts that the Prosecutor wants to investigate are acts that took place on the territories of States Parties to the Rome Statute.

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This further aspect must be stressed. The terror that American military was fighting in Afghanistan did not have Americans as its only victims all these years. Indeed, the victims of the horrific acts of 9-11 were evidently Americans for the most part. But, the course of that war on terror also revealed to the world stories and images of beheadings, suicide bombings, detonation of improvised explosive devices (IEDs), and sundry mayhem occurring in Afghanistan on a widespread or systematic basis. It

may well be that the victims of these acts have been Afghans for the most part - in their own country, which is a State Party to the Rome Statute.

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Against that background one must also consider that American law is notoriously reluctant to get involved in the business of extending American national justice or legal protection to non-Americans for wrongs they suffered outside US territory. This reluctance stems from an understanding repeatedly expressed in the case law of the US Supreme Court, which holds that the jurisdiction of American courts does not customarily extend extra-territorially. We see this trend in a string of jurisprudence culminating in judgments such as that recently handed down in *Jesner v Arab Bank Plc*<sup>1</sup> decided in 2018; and in the earlier case of *Kiobel v Royal Dutch Petroleum Co*<sup>2</sup> decided in 2013.

*Jesner v Arab Bank* tellingly involved the question whether foreign victims of terrorist activities committed outside US territory could bring a lawsuit, in the US, against a foreign bank alleged to have played a role in the financing of those terrorist activities. By majority, the Supreme Court said no. This trend of jurisprudence may well then present the question whether the ICC may be the only viable or effective jurisdiction where Afghan victims of crimes committed in their own country may receive some justice for wrongs allegedly done to them by fellow Afghans - not only in terms of punitive justice but also the reparation that the Rome Statute provides for: should it turn out that Afghanistan might have been either unable or unwilling to bring justice to the victims of the crimes that the Prosecutor seeks to investigate.

Would it then be an acceptable development that US 'policy' entails subjecting ICC Prosecutor and judges to direct threats, aimed at preventing the fullest judicial consideration of the Prosecutor's request for authorisation to investigate even these beheadings and suicide bombings and IED explosions; merely because such investigations come with the risk of not overlooking whether US forces may have also committed some excesses?

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<sup>1</sup> *Jesner v Arab Bank Plc* 138 S Ct 1386 (2018) [US Supreme Court].

<sup>2</sup> *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013) [US Supreme Court].

All this is to say: it is wrong for anyone to project the impression or encourage the understanding that the orientation of the Afghanistan situation is exclusively or centrally or primarily about investigating the conduct of American soldiers; or that it is designed to target them. To put it differently, assuming the authorisation that the Prosecutor seeks – and this is only an assumption – it remains to be seen whether she will ignore the beheadings and suicide bombings and IED explosions and other mayhem that no one attributes to the Americans – and which compose the greater source of agony for Afghan victims – and concentrate on whether or not US soldiers committed excesses in their war on terror.

And there is the question whether the American Government, being a government with a strong ethos of rule of law, should harbour so much worry about what the Prosecutor might find by way of excesses on the part of American soldiers: knowing that America should be able to show that it is able and willing to investigate and punish American servicemen and women who commit aberrations during war.

But, the process of resolving that matter as a question of law must follow the ordinary processes of the rule of law. That is the essence of the appeal now pending before the ICC Appeals Chamber.

That was the essence of the matter as it remained pending before the Pre-Trial Chamber. It was most unfortunate that the National Security Adviser and the Secretary of State made their threats against the Court while the matter was pending before the Pre-Trial Chamber – with the declared purpose of influencing the decision of the Pre-Trial Chamber.

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To many who consider the rule of law – and respect for it – as sacred creed in a civilised society – of which the US was always considered an exemplar – a certain consolation must come from the fact that the leadership of the American Bar Association was driven to reproach the threats made against the ICC. In a statement issued on 9 April 2019, Bob Carlson, the President of the American Bar Association said this:

*In the United States, the independence and impartiality of our justice system is foundational to our democracy and commitment to the rule of law. Although the United States is not a member of the ICC, barring the travel of legal professionals because of their work on behalf of*



*this international tribunal sends the wrong message about the United States' commitment to those same principles in the pursuit of international justice and accountability.*

*The ABA urges the State Department to immediately reverse this policy decision and to refrain from taking actions against legal professionals based solely on their work on behalf of the ICC.<sup>3</sup>*

The Mr Carlson's statement also recalled to the participation of the American Bar Association in the negotiations that resulted in the Rome Statute in 1998; as well as the ABA's longstanding support, since 1978, for the 'creation of a permanent international criminal tribunal to eliminate impunity for perpetrators of genocide, war crimes, and crimes against humanity'.

Days after the statement from the ABA President, a group of Congressmen and – women wrote to the Secretary of State to express their 'serious concern' regarding the threats that the US Government made against the Court, and measures taken further to that threat. In their letter of 19 April 2019, the congressmen and women rightly recalled that the 'United States has a long and proud history of supporting mechanisms of international justice and the rule of law, beginning with the Nuremberg Trials and including ... the International Criminal Tribunals for Rwanda and for the Former Yugoslavia.' And they continued as follows:

*In line with that history, and with some of our most cherished values, it is absolutely essential that we strongly support the work of the ICC. The Court is a critically important institution in the global fight against impunity for war crimes, crimes against humanity, and genocide. It is a mechanism by which some of our most important American values – including the rule of law, the right to redress, and the principle that no one is above the law – can be put into practice.*

Unsurprisingly, one of the lead authors of that letter is Representative Jim McGovern, Chair of the Tom Lantos Human Rights Commission of the US House of Representatives.

Notably, both the ABA President and the group of Congressmen and -women who reproached the threats and actions of the US Government against the ICC,

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<sup>3</sup> American Bar Association, 'Statement of ABA President Bob Carlson Re: Restricting International Criminal Court officials' visas', dated 9 April 2019: available at: <<https://www.americanbar.org/news/abanews/aba-news-archives/2019/04/statement-of-aba-president-bob-carlson-re--restricting-internati/>>

recalled that the ICC was created to counter impunity for genocide, war crimes and crimes against humanity. Indeed, these are crimes that had blighted humanity frequently and for long periods of time up until the negotiation and adoption of the Rome Statute.

We can be even more specific in recalling the chronicles of such atrocities in the period leading up to adoption of the Rome Statute in 1998.

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We may begin by recalling that no less than 7,000 Bosnian Muslim men and boys were massacred in Srebrenica in 1995. The International Criminal Tribunal for the former Yugoslavia has pronounced their killing as genocidal.

The year before – in 1994 – about 800,000 Tutsis were killed in the Rwandan Genocide.

About 50 years before that, six million innocent human beings – including relatives of Tom Lantos – were killed in a genocide in Europe, because they were Jews.

And in 2018, a trial chamber of the international tribunal we know as the Extraordinary Chamber in the Courts of Cambodia finally handed down their judgment validating what has since been accepted as part of the bleaker chapters of modern history of the world. And that is that shocking atrocities were committed by Pol Pot's regime in Cambodia during the 1970s, killing up to two million people: including extermination of persons belonging to groups viewed as political enemies, as well as genocide against the Vietnamese and Cham minority groups.

I may pause to add that history books teach us that the world has seen other genocides throughout the ages.

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Other notable Americans who reacted to these extraordinary threats against the ICC include Mr Stephen Rapp, a former US Ambassador for War Crimes Issues. Before that, he was the Chief Prosecutor of the Special Court for Sierra Leone - the international tribunal that tried those most responsible for war crimes committed during the Sierra Leone civil war. As he observed: *'This move hurts the U.S.'s reputation far more than it hinders the I.C.C. prosecutor. ... In the past we have always been on the side of*

*prosecutorial and judicial independence, and against authoritarian regimes that demand that justice bend to political power. ...'.*

According to Ambassador Rapp, by making these threats and revoking the Prosecutor's visa as part of these threats, *'we act like we have something to hide and in the process put ourselves on the same side as the world's thugs and dictators.'*<sup>4</sup>

No doubt, such reactions from the group of Congressmen and –women, from the ABA President and from Ambassador Rapp, amongst others, were inspired amongst other things by the truism – so evident in their statements - that the rule of law and respect for judicial independence, are died in the wool of their national identity; as an anti-thesis to the tyranny of raw political power.

This is evidenced, permit me for recalling, in both the Declaration of Independence and in the spirit of the Federalist Paper No 78.

Let us recall that in the Declaration of Independence, one of the cardinal sins levelled against King George III, thus warranting the declaration of his unfitness to continue to rule over the American colonies was that he *'made Judges dependent on his Will alone'*. Notably, King George's sin, even in this regard, was pitched only at the level of manipulating judicial tenure of office and the amount and payment of judicial salaries. He did not, apparently, go so far as to threaten judges with sanctions and malicious prosecution for doing their job or rendering judgments that displeased him.

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It is also correct to point out that these American reproaches against these political threats that their officials have directed at the only permanent international instrument of justice, accountability and reparation, are entirely consistent with the important role that Americans have played in history to establish precisely that international order – as the ABA President and the group of Congressmen and –women had reminded everyone.

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<sup>4</sup> New York Times, 'U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes' dated 5 April 2019: available at: <<https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>>

One celebrated trailblazer in that regard came in the person of Robert H Jackson, who, as an associate justice of the US Supreme Court, had been appointed, on secondment, by President Truman, to represent the US, not only as Chief Prosecutor at the Nuremberg proceedings, but also as the Chief US representative at the London Conference of 1945 that established the Nuremberg tribunal. I shall in a moment summarise some his important contributions in the establishment of the modern international criminal justice system that culminated in the ICC.

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For now, it is necessary to observe that beyond the immediate conundrum of what the raw political attacks described above connote for the ICC and its mandate of humanity, there is the broader worry of what these attacks portend for the idea of rule of law and judicial independence within other nations around the world.

That dimension of concerns entails the precedent and impetus that the threats lend to every highhanded leader in the world to trample upon the idea of the rule of law, and to threaten and intimidate the structures of justice, at home and abroad whenever they can. These threats feed, in turn, the threat that President Duterte of the Philippines had made against the ICC Prosecutor: vowing to arrest her and throw her in jail, if he ever gets hold of her.

It truly confounds the mind to think that such a development would be something that could, in the strangest of happenings, be associated with the Government of the United States – a country that the world has grown used to seeing as the most prominent lighthouse of the rule of law and respect for judicial independence.

### **Introducing ‘Rule of Law among Nations’**

I should perhaps observe, at this juncture, that those who have represented the United States in the early efforts to establish a multilateral order to tackle the intractable social maladies that have plagued our world did not accept the short-sighted value that some may see in either isolationism or zero-risk approach to international law. I may begin by recalling the ever so gentle urge of Eleanor Roosevelt – the ‘Mother of Human Rights’ – upon her compatriots. As she said:

*'Our own land and our own flag cannot be replaced by any other land or any other flag. But, you can join other nations, under a joint flag, to accomplish something good for the world that you cannot accomplish alone.'*

Justice Jackson had also spoken in the same vein. On 13 April 1945, he delivered to the American Society of International Law a speech titled 'Rule of Law among Nations'. That speech must rank amongst the classic lectures in international law.

It was a powerful call for a global society in which all nations ought to subject themselves to the rule of international law, for the benefit of all.

In the opening lines, he promptly observed as follows:

*'Those who best know the deficiencies of international law are those who also know the diversity and permanence of its accomplishments and its indispensability to a world that plans to live in peace.'*

Now, mark that: Jackson was underscoring the 'indispensability' of international law 'to a world that plans to live in peace.' Notably, Jackson had observed that his own generation had experienced two world wars: both of which had affected life in the United States, though the wars had seemed foreign and quite geographically removed to some Americans.

Against that background, Jackson repudiated of isolationism. And he stressed the futility of such a policy. In his words:

*'It is futile to think ... that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.'*

To that eloquent wisdom, I am sure that Jackson would have allowed me to add that when international law operates to make our world a little better for common humanity in the long run, it would have worked to 'our national advantage' – though it may not seem like it in the short run.

## Jackson's Legacy relative to the ICC

We may now take a closer look at Justice Jackson's pioneering efforts in the order of international criminal justice as we know it – beginning with Nuremberg.

In his own essay, titled, 'Robert H Jackson and the Triumph of Justice at Nuremberg'<sup>5</sup>, Henry T King Jr declared that there '*would be no Nuremberg without Robert Jackson.*' Historical records amply bear out that declaration.

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But, that necessarily engages the further query: Would there be the ICC without Robert Jackson?

We will come back to that in a moment.

### *Truman's Appointment of Jackson*

Jackson's speech of 13 April 1945, we are bound to assume, did not go unnoticed at the White House. Two weeks later, on 2 May 1945, President Truman, as Henry King put it: '*put the interests of the United States and what to do with the Nazi war criminals into Jackson's hands.*'

But, that turn of events was not really surprising. It may be noted that Jackson's ASIL speech was delivered the day after President Franklin Roosevelt died and the day his Vice-President Harry Truman became President.

It would be incorrect to leave FDR out of the Nuremberg story, though historians of international law do not always capture that detail. There is ample evidence that FDR (a former practicing lawyer) had sympathy for the trial of alleged Axis war criminals.

For instance, in his Fireside Chat No 23 of 12 October 1942, President Roosevelt was clear that '*the ring leaders*' of the Axis powers '*and their brutal henchmen must be named,*

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<sup>5</sup> Henry T. King Jr., *Robert H. Jackson and the Triumph of Justice at Nuremberg*, 35 Case W. Res. J. Int'l L. 263 (2003).

*and apprehended, and tried in accordance with the judicial processes of criminal law.*' He had made the same message clear in his Press Statement of 7 October 1942.

So, it would come as no surprise that immediately upon succeeding President Roosevelt, his former Vice-President – now President Truman – would throw his weight fully behind the idea of trial of the alleged Axis war criminals. Hence, Truman earned a firm place in the historiography of Nuremberg, as was also the case with the establishment of the United Nations, which he championed and hosted. All that is, of course, without prejudice to the controversies surrounding how he ended World War II.

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In appointing a judge of such zenith ranking in the American judiciary as the US representative at the London Conference and Chief US Counsel to Nuremberg, one central message that Truman communicated was how seriously the US Government took what needed to be done in Nuremberg.

Wearing that armour of prestige, Jackson attended the London Conference (from 26 June to 2 August 1945), as the US representative. Having successfully held off the clamour for summary execution of the 'ring leaders' of the Axis Powers, a proper judicial mechanism needed to be crafted for their trials. That came in the manner of the text of the Charter of the Nuremberg Tribunal.

And Jackson was the champion of that Charter: thus partly explaining the folklore that there 'would be no Nuremberg without Robert Jackson.'

### ***Jackson on Immunity***

Let us consider one example of how Jackson continued to influence the work of the ICC. In May this year, the Appeals Chamber of the ICC delivered a judgment concerning the question whether international law afforded immunity for President Al-Bashir (as he then was) of Sudan, such as protected him from an ICC arrest warrant. The Appeals Chamber answered that question in the negative.

That judgment centrally rested on article 27 of the Rome Statute which abjures immunity – even for Heads of State. And we held, in that judgment, that article 27 of

the Rome Statute reflected a norm customary international law, usually defined as '*general practice of States accepted as law.*'

In tracking the evolution of customary international law in that vein, the role of Jackson could not be stressed strongly enough. And we said so.

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We may note in, that connection, that the original precedent for article 27 of the Rome Statute was article 7 of the Nuremberg Charter. And that provision was dear to Robert Jackson. He was against the idea of immunity – even for Heads of State.

In explaining the place of the anti-immunity norm in the Nuremberg Charter, Justice Jackson said as follows, among other things, in a report he made to President Truman on 7 June 1945:

*We do not accept the paradox that legal responsibility should be the least where power is the greatest.*

He returned to the theme in his opening statement at the Nuremberg trial five months later:

*The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.*

Jackson's repudiation of immunity in those two passages must rank amongst the most profound rule of law maxims of all time – certainly in international law.

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It is thus right to credit Jackson and his Nuremberg legacy with the trend that culminated in the codification of the anti-immunity norm so clearly in the Rome Statute: which instrument is, above all, a continuation of the very Nuremberg idea that multilateral judicial mechanisms (of international law) must be used to ask questions of accountability, when people commit atrocity crimes and there is nowhere else to ask those questions effectively.

That, ultimately, was an American ideal and legacy delivered to the world – through the agency of Robert H Jackson.



### *The ICC and Nuremberg Connection*

Against that background, it is not merely pleasing platitude to say that the ICC owes its own existence to what Jackson once described of the Nuremberg Tribunal as an 'experiment' in international law.

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There are, indeed, historical facts that bear out the thesis. The decisive influence of the Nuremberg Tribunal is all too obvious in a number of UN General Assembly adopted between 1946 and 1948, beginning with res 95(I) on the Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal.

It is common knowledge that res 95(I) was the brainchild of the US Government.

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On 9 December 1948 – the UN GA adopted res 260 B (III), directing the ILC to study the desirability and possibility of creating an international criminal court.<sup>6</sup>

UNGA res 260 B (III) really was the marching order that commenced the work done by the ILC through the years. It all culminated in the 1994 ILC draft Statute for an International Criminal Court. That, as we all know, was the working draft used in the negotiations that directly resulted in what we know today as the Rome Statute.

We thus see that direct linkage between Nuremberg and the ICC. If we conclude that there would not be the ICC without Nuremberg, and we accept that there would not have been Nuremberg without Mr Jackson, then we may indeed insist that without Mr Justice Robert H Jackson of the US Supreme Court, there would be no ICC today.

### **Subsequent American Role**

For now, I should observe that in the period after Nuremberg, American jurists – men and women – have (just as Robert Jackson had done) also played their own prominent parts in the project of criminal justice according to international law – when

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<sup>6</sup> A year earlier – specifically on 21 November 1947 – the UNGA had adopted res 177 (II), directing the International Law Commission to '[p]repare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles [of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of that Tribunal].'

the delicate mosaic of humanity was once again ripped in more recent times. They helped to create – and operate – other international criminal tribunals: such as the tribunals for Rwanda, the former Yugoslavia, and Sierra Leone. They served in those tribunals as judges, chief prosecutors, prosecution counsel, defence counsel, law clerks, and administrative staff.

And even as we speak, the ICC numbers amongst its staff Americans who have served – and still serve – as defence and prosecution counsel and other legal staff, notwithstanding that the United States is not a State Party and does not contribute to the budget of the Court. Unfortunately, we have not yet had an American judge at the ICC: for the simple reason that the Rome Statute requires that no one other than a national of a State Party may become an ICC judge. We look forward to the day when American citizens will start taking their place on the ICC Bench.

### **The US Role at the ICC PrepCom**

It must also be recalled that the American Bar Association played a strong role in the establishment of the ICC. So, too, was the US delegation highly active in the negotiation of the text of the Rome Statute itself, before its adoption. There are those who hold the cynical view that the role of the US delegation was more prominent in seeking to create a toothless Court. But, the record will show that such was not always the case. Indeed, the US delegation did intervene in manners that ensured that international law was correctly reflected in the Rome Statute in ways that enhanced the Court's protective role.

### **The ICC's Complementarity Doctrine**

I should next say a few words about the Court's jurisdiction.

It is clear that many States that have not yet ratified or acceded to the Rome Statute are staying away because of a professed worry about usurpation of their national sovereignty. And, one hears that refrain in the unfortunate attitude of the US Government against the ICC.

But, I am bound to insist with respect that such a worry is necessarily misplaced. The nature of the ICC's jurisdiction does the very opposite of usurpation of national sovereignty. It actually prides and underscores national sovereignty.

Under the Rome Statute, the primary jurisdiction belongs to the State with effective sovereign connection to the locus of the crime or the alleged suspect. It is only when that State proves unable or unwilling to do justice genuinely in the exercise of that primary jurisdiction that the ICC is legally entitled to intervene.

The essence of the doctrine of complementarity – as outlined above – is that justice may not suffer the fate of the neglected orphan in the province of national sovereignty.

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In practical terms, the doctrine of complementarity means that nation states, who are able to do so, must show leadership in doing justice – precisely because they can. For those States, ICC's complementary jurisdiction will remain a mirror of conscience, in the event of government's reluctance or unwillingness to do justice.

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That said, the preponderance of experience – from the world history of atrocity crimes – shows that ICC's complementary jurisdiction serves the greater purpose at the instance of States whose national systems are ill-equipped to administer justice for the purposes of accountability and reparation, according to the generally accepted international standards. In those situations, the ICC remains a veritable insurance policy against impunity.

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We may examine some examples. In August 2010, the Office of the UN High Commissioner for Human Rights published a report documenting serious violations of human rights and international humanitarian law allegedly committed – with impunity - in the Democratic Republic of the Congo between 1993 and 2003.

Notably, the failings and inadequacies of the DRC national judicial system were centrally implicated in that reign of impunity; in the terms of *'significant structural and chronic shortcomings in all parts of the Congolese justice system.'*<sup>7</sup>

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<sup>7</sup> Mapping Report, para 51.

Rwanda is another striking example. From 8 to 17 April 1993 – mark the year 1993 – the UN Special Rapporteur on Extrajudicial, summary or arbitrary executions, visited Rwanda. He published his report on 11 August 1993, reporting on massacres of civilian populations, and noting that the killers had enjoyed impunity.

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Here, too, the failings of the judicial system were squarely implicated in this reign of impunity. As the Special Rapporteur put it in his August 1993 report:

*'It is the serious failings of this system that have made possible the impunity enjoyed by the persons responsible for the killings.'*

One year later, on 6 April 1994, the genocide against Tutsis erupted in Rwanda, killing at least 800,000 people – and leaving alive less than 300 legal professionals (ie judges and lawyers). That is to say, a judicial system which, even at its best, was found incapable of ensuring against impunity, was left utterly broken altogether by the genocide. It needed the international community to step in and do justice – through an international criminal tribunal. That was the International Criminal Tribunal for Rwanda.

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These stories of serious shortcomings in national judicial systems would be very much the same in many places with persistent and deep-rooted histories of human rights violations, which eventually lead to mass atrocities.

The moral of the story is that it is very easy to do atrocity; but doing justice is much, much harder. And wherever impunity reigns is a fertile breeding ground for more and worse atrocities. The ICC was established to countervail against precisely that condition in the affairs of humanity.

## **A Lucid Moment in Time**

The establishment of the ICC is one of the leading examples of what Eleanor Roosevelt, Harry Truman, Robert H Jackson – and Woodrow Wilson before them –

would regard as the joint effort of nations *'to accomplish something good for the world'* that no one State could hope to accomplish on its own.

But it came during a rare window of opportunity that can truly be described as a lucid moment in time in the often disheartening circumstances of global geopolitics; which plays out in the micro-climate of the UN Security Council, where the US, Russia, China, France and the UK wield the veto power – and where some seem ready and willing to use it more often than others, regardless of its consequences to the broader lot of humanity.

And this is a highly significant factor, of which we must neither lose sight nor take for granted.

What do I mean by that? I mean this. The Rome Statute that established the ICC was adopted in 1998. This was within a five-year band of time during which the UN Security Council had managed to create two ad hoc international criminal tribunals: one for the former Yugoslavia (in 1993), the other for Rwanda (in 1994) – respectively to bring accountability for the violations including ethnic cleansing that were committed in the former Yugoslavia, and violations including the genocide that had been committed against Tutsis in Rwanda. That was indeed a lucid moment at the time, some of the heady hallmarks of which were the Glasnost and Perestroika and their associated demolition of the Berlin Wall; as well as the dissolution of the apartheid regime in South Africa and the associated release of Nelson Mandela from a lifetime of political imprisonment.

As fate would have it, that lucid moment lingered long enough to permit the ICC finally to be created in 1998 – following moribund efforts that had long been dismissed in the previous decades as wishful thinking.

Perhaps, the significance of the lucid moment of the 1990s may be better appreciated if one considered that the other time that the US, Russia (then generally known as the USSR), China, France and the UK, had agreed to the creation of an international accountability mechanism with a global prestige was at the London Conference of 1945, regarding the Nuremberg proceedings that was to address the atrocities of World War II.

But, that was before the United Nations was up and running. In the subsequent years – in age of the UN - the global mandate for the maintenance of international peace and security was consigned to the Security Council. It may be noted that in the odd half century between the Nuremberg experiment of 1945 and the Security Council's creation of the ad hoc tribunals (in 1993 and 1994, respectively) for the former Yugoslavia (the ICTY) and for Rwanda (the ICTR) - pursuant to the Council's mandate of international peace and security - no international accountability mechanism was created under the auspices of the UN. Yet, it could not be credibly supposed that there had not been troubling events in Africa, Latin America, Asia, Europe and elsewhere that engaged the need for such an accountability mechanism. And all that gives especial significance to the lucid moment of the 1990s that saw the creation of the two ad hoc tribunals, the ICTY and the ICTR.

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That the opportunity was also seized to create the permanent ICC directly in the wake of the creation of those two ad hoc tribunals is a matter of much significance. That significance should escape no one. To be kept in mind in that regard is that the purpose or effect of creating the ICC – against the background of historical experience – was to avoid holding questions of accountability (for gross atrocities) hostage to ad hoc solutions that may not materialise due to the vagaries of geopolitics of the UN Security Council.

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We know that the lucid moment of the 1990s has now become a stationary object in the rear-view mirror, as the world drives down the lane of heartaches for many of the victims of apparent mass atrocities. And looking at the state of current affairs, it should be difficult to reproach anyone who may worry that the politics of the Security Council may not permit a new ad hoc tribunal to be created now, should grave violations be committed in ways that conjure up the ghosts of Srebrenica or Rwanda.

That underscores in a very particular way an enduring value for the ICC, that we should not take for granted.

## Further Values of the ICC

There are, indeed, many reasons to insist that the mere existence of this permanent judicial mechanism for accountability does truly serve as an inconvenient obstacle to freewill on the part of those inclined to commit crimes of atrocity.

The value of the ICC in this respect is particularly evident in the context of elections in my own native region of Africa.

I was the presiding judge in a case where an expert witness testified that prior to the election violence that formed the subject-matter of that case, past elections in Kenya had perennially been marred by ever-increasing incidences of violence. But, following the commencement of the ICC proceedings that addressed the 2007/2008 violence, subsequent elections in that country have seen a marked decrease in the occurrence of violence during elections.

I have also been told by leaders of States, government ministers and civil society leaders that the ICC's existence was a very significant factor that prevented bloodshed in the context of elections in their countries. This is because everyone had seen that whoever would commit such violence might end up before the ICC to answer for their actions.

That deterrent value alone is enough of a reason to support the ICC.

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But the Court's critical value goes beyond that.

The ICC also has palpable value – I must insist – in the order of economic and human development.

For, there cannot be sustainable economic development, where conflicts, atrocities and fear reign supreme. Socio-economic development will remain a pipe-dream where: people are being killed, or injured and traumatised for life in violent conflicts or violent repression; children cannot go to school, because of war; farmers cannot go to their farms because of military operations, or landmines; investors are frightened away by conflict and insecurity; and, precious resources – already scarce in

many cases - are wasted on weapons, rather than education, healthcare and human development infrastructures.

Moreover, these negative implications do not stop at national borders. The effects of violent conflicts and other forms of oppressive strife entail economic stagnation or retardation not only in the countries directly embroiled in those unfortunate circumstances: they also impede regional development.

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And conflicts and social insecurity also propel mass migration or refugee flows, which can impact even countries on distant continents overseas. For instance, for many centuries, America had always held attraction for *'huddled masses yearning to breathe free'*, as Emma Lazarus put it in her magnificent sonnet *'The New Colossus'*, which is mounted on the pedestal of the Statue of Liberty that she nicknamed *'Mother of Exiles'* in the poem.

As long as there are conflicts, atrocities, insecurity and despair, there will be *'huddled masses'* of refugees fleeing the violence and other oppressive circumstances that make life unbearable in their homelands; and they will try to find security and stability in safer places. The lesson in that is that no physical barrier is strong enough – deep enough, high enough, long enough, wide enough or hazardous enough - to keep any country permanently insulated from the human tide of misery that is unleashed in those circumstances when the crimes that the Rome Statute proscribes are committed, with no international mechanism in place to insist upon accountability in the long run.

Justice plays its important part in helping to deter those conducts and events that drive these mass migration or refugee flows. It does so by exerting the needed pressure against those conducts. And that is one more reason that compels sustaining and supporting the ICC – and not subverting it.

## **A Call on America to Join the ICC**

Ladies and gentlemen:

It is not overweening to describe the US, as I did earlier, as the foremost lighthouse of our collective civilisation. If you go back far enough, there would be



episodes of extreme parochialism and other aberrations that have blotted the history books of many a nation – including my own. So, this leading lighthouse may not be perfect. And, it need not be: for, life's lessons teach us often to accept the best that is available in the circumstances, rather than bank all present opportunities in the wait for the future perfect. That is to say, this lighthouse of our collective civilisation is the best that the world has known.

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And when America joined other nations to negotiate the text of the Rome Statute, they were primarily moved by the concern that during the centuries of our generation – as with past generations – *'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'*. And, the founders of the ICC recognized *'that such grave crimes threaten the peace, security and well-being of the world'*. Those sentiments are branded into the Preamble to the Rome Statute.

If one contemplated the state of the world today, one confronts the stark reality that those concerns are as urgent now as they were when the ICC was created 21 years ago.

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Ladies and gentlemen, it is time for America to take her leading place amongst nations at the table of the Rome Statute.

The past, the present and the future victims of genocide, crimes against humanity, war crimes and wars of aggression need her to do so.

The absence of America from the international order has left the world without its familiar and reassuring leading light of international order according to the rule of law. The current fog of political circumstances that has made this so, has left the world listless with grief and confusion and a deep sense of loss.

America, the World misses you. Come back and take the place that is rightfully yours.

Thank you.