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A Tribute to Robert H Jackson – Recalling America’s Contributions to International Criminal Justice

by

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⁺ To the memory of David W Scott QC (1936-2019): laid to rest in Ottawa, 28 March 2019. A true giant among courtroom advocates: a career marked by the insistence that power must be tempered by accountability to the law: a personal life lived to the creed that privilege impels responsibility to society

Introducing 'Rule of Law among Nations'

It is an immense honour to be here. But the honour is special indeed; because it was around this time 74 years ago — more precisely on 13 April 1945 — that Robert H Jackson (as an associate justice of the US Supreme Court) addressed this same gathering, in a classic speech titled 'Rule of Law among Nations' – a speech that resonates with this year's conference theme 'International Law as an Instrument'.

That speech is an essential primer: not only for international lawyers. But, more so for policy decision makers of all nations that care for a better world for humanity.

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

And Jackson wasted no time in getting to the heart of the matter. 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.'

Please download and read it. Every sentence is a gem.

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Mr Justice Jackson was a giant among the first generation of international prosecutors. The second generation of international prosecutors – my own generation – came 50 years later, to serve at the ad hoc tribunals for the former Yugoslavia, Rwanda and Sierra Leone. He has been a source of immeasurable inspiration for us. We deeply revered him.

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But, what is his legacy in relation to the International Criminal Court, where I now serve on the Bench?

Jackson's Legacy relative to the ICC

In his essay, titled, 'Robert H Jackson and the Triumph of Justice at Nuremberg'¹, Henry T King Jr declared that *'There would be no Nuremberg without Robert Jackson.'*

I doubt that many would have the courage to quarrel with that view. After all, as of the time of adoption of the Rome Statute, Henry T King Jr himself, Whitney R(obson) Harris, and Ben Ferencz were the last surviving Nuremberg prosecutors, whom many of us have been lucky to meet in our own generation.

Luckily, Mr Ferencz is still with us. He is this year's recipient of the Anne Frank award. He turned 99 two weeks ago – on 11 March 2019 – and is well on his way to 100.

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It must of course be said that the validity of the 'no Nuremberg without Robert Jackson' hypothesis rests on its own historical facts, more so than it does on any appeal to the bare authority of Henry T King Jr.

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

Well, let's see.

Execution v Criminal Trial of Axis Leaders

We may begin with a certain debate that divided the Allies as the 2nd World War was winding down. That debate concerned how to deal with the Axis leaders.

The options were either summary execution or criminal trial. As we know by now, many powerful voices — notably the leadership of His Majesty's Government — favoured summary execution.

¹ Henry T. King Jr., *Robert H. Jackson and the Triumph of Justice at Nuremberg*, 35 Case W. Res. J. Int'l L. 263 (2003).

Consider the message conveyed in the aide mémoire of 23 April 1945 that Sir Alexander Cadogan (then the Permanent Secretary to the UK Foreign Ministry) delivered to Judge Samuel Rosenman (the White House Counsel). In it, His Majesty's Government said as follows, among other things:

'1. H.M.G. assume that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they have either themselves perpetrated or have authorized in the conduct of the war.

...

'2. It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of tribunal claiming to exercise judicial functions, or whether the decision taken by the Allies should be reached and enforced without the machinery of a trial. H.M.G. thoroughly appreciate the arguments which have been advanced in favour of some form of preliminary trial. But H.M.G. are also deeply impressed with the dangers and difficulties of this course, and they wish to put before their principal Allies, in a connected form, the arguments which have led them to think that execution without trial is the preferable course.'

Within the US Government of the day, Henry King tells us, opinion was divided.

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It was in those circumstances that Mr Justice Jackson weighed in – with his speech of 13 April 1945.

Reviewing 'Rule of Law among Nations'

Jackson took no position on the propriety of summary execution, as a political option. According to him:

'If it is considered good policy for the future peace of the world, if it is believed that the example will outweigh the tendency to create among their own countrymen a myth of martyrdom, then let them be executed. But in that case let the decision to execute them be made as a military or political decision.'

Jackson insisted, however, that if the path of criminal trial were to be chosen, then the trials must be genuinely conducted according to the due process of the rule of law. As he put it:

'We must not use the forms of judicial proceedings to carry out or rationalize previously settled political or military policy. Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people.

... [A]ll experience teaches that there are certain things you cannot do under the guise of judicial trial. Courts try cases, but cases also try courts.'

In the final analysis, Jackson insisted:

'The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict.'

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ICC is not there merely to Convict

Dear friends, Robert Jackson renounced *'farcical judicial trials'*. And he was insistent that *'the world yields no respect to courts that are organized merely to convict'*.

Let's stay with that thought for a minute. In a manner of speaking, I regret to say this: Jackson's reproach resonates still amongst us. It does so because ICC judges continue to face pressure to convict accused persons, so that the world can see that the Court is 'succeeding'.

This attitude comes even from amongst legal academics – of all people. Few things dismay more than to hear teachers of law lead the chorus of those who would chant that the ICC 'has failed' or 'is failing' or 'is in a crisis'. Invariably, the reasons for such angst engage the complaint that ICC judges have actually acquitted someone at the end of a long trial or following an appeal.

But, it is even beyond astonishing: if you considered that none of those who engage in these commentaries is able to claim greater familiarity with the evidence or the dynamics of the given case.

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A challenge to that view often drags out a grudging acknowledgement of the importance of due process, along these lines: *'Yes, of course, the court is not all about convictions. But there have been more acquittals at the ICC than convictions, in the important cases.'*

But, I do maintain, ladies and gentlemen, that it remains an impoverished acceptance of justice – even dangerous – if a positive view of the judicial process must depend on an expectation of convictions (either exclusively or in favourable comparison with acquittals), rather than an insistent regard to the due process of the law.

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I must urge a serious reconsideration of that attitude. For, it comes with a real risk of miscarriage of justice.

At the moment, I am able to say firmly and clearly that such a risk is minimal at the ICC. The judges now on the Court are not impressed by the prospect of unpopularity of the decisions they make. Still, we want to be sure that there is no possibility whatsoever that a judge (or even a prosecutor) may prove unduly anxious to avoid bullying criticisms of having 'failed', whenever there is a judgment of acquittal in a criminal case. At the very least, it will fuel concerns that, in the event of a conviction, such a conviction could only have been a product of that anxiety.

And that is part of the lessons that we must take from Jackson's speech of 13 April 1945, when he said that *'Courts try cases, but cases also try courts'*. He returned to this theme on 21 November 1945, in his opening statement at the Nuremberg trial. There, he famously said this:

'We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. 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.'

As we reflect on that injunction, it is imperative that we keep firmly in mind that the Rome Statute only consecrates a determination *'to put an end to impunity for the perpetrators of [the crimes over which the Court has jurisdiction] and thus to contribute to the prevention of such crimes.'* That determination insists only that no one should be beyond answering proper questions of accountability. But, the determination could never properly assume that an accused person is the perpetrator of the crime charged against him or her. It requires a fair trial to answer such questions of accountability.

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. After all, the speech was delivered right here in Washington DC. 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.

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, and apprehended, and tried in accordance with the judicial processes of criminal law.'* That was a reiteration of the same message which he had made 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.

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In appointing one of the topmost judges in the country and in the world, as the US representative and Chief Counsel to Nuremberg, one central message that Truman

communicated to the world was how seriously the US Government took what needed to be done in Nuremberg.

Wearing that armour of prestige and respect, 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, a proper judicial mechanism needed to be crafted for the 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

I note that one of your panels today dealt with the subject of immunity. Article 27 of the Rome Statute rejects immunity – even for Heads of State. For reasons that Professor Sean D Murphy and some of you may know, I will not enter into any discussion of that subject on this occasion.

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But, I can say 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.

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.'

Those must rank amongst the most profound rule of law maxims of all time. And we may ponder all the different ways in which the abjuration of the indicated paradox may have application, beyond the specific subject of immunity of individuals; especially within the general theme of Jackson's speech of 13 April 1945, to the effect that the rule of international law must guide the conduct of nations low and mighty, for the sake of humanity.

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What is so remarkable about Jackson's robust promotion of the anti-immunity norm, in 1945, is that 26 short years earlier – in 1919 – Robert Lansing (Woodrow Wilson's Secretary of State and a former Legal Advisor to the State Department) had relied on *The Schooner Exchange* judgment to oppose the anti-immunity idea – just as robustly during the negotiation of the Treaty of Versailles.²

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But, largely due to Jackson and his Nuremberg legacy, we now see that norm clearly codified in the Rome Statute, which, above all is 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.

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.

² Bill Schabas correctly captured the story in his new book, *The Trial of the Kaiser* – a most fascinating read.

We may begin with the UN GA resolution 95(I) of 11 December 1946. In it, the UNGA *'affirm[ed] the principles of international law recognised by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal.'*

But, res 95(I) went further to direct the 'Committee on the Codification of International Law' [as the International Law Commission was then called] to formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. And the Codification Committee was to do so *'in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code.'*

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

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A year later – specifically on 21 November 1947 – the UNGA adopted res 177 (II), directing the ILC 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].'*

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The following year – specifically on 9 December 1948 – the GA adopted res 260 B (III), directing the ILC to study the desirability and possibility of creating an international criminal court.

UNGA res 260 B (III) was adopted at the same time as res 260 A (III) pursuant to which the Convention against Genocide was adopted – another salutary by-product of the Nuremberg-era that prided the idea of international law as an instrument to make the world a better place for humanity.

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. That is to say, the Draft Code of Offences against the Peace and Security of Mankind and the project of establishing an international criminal court, both of them inspired by the

Nuremberg experience, are what we now have in the Rome Statute. It is thus correct to insist that without Mr Justice Robert H Jackson of the US Supreme Court, there would be no ICC.

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 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.

Amongst them were Judge Gabrielle Kirk-MacDonald, Judge Patricia Wald (who passed away this year) and Judge Ted Meron – all of them stalwart jurists who helped to shape the jurisprudence of international criminal law, from the bench of the ICTY. Judge MacDonald and Judge Meron also served as Presidents of the ICTY.

The ICTR also saw a number of Americans serve as senior prosecutors and defence counsel.

At the Special Court for Sierra Leone, Mr David Crane, Mr Stephen Rapp and Ms Brenda Hollis served admirably as Chief Prosecutors at different stages in the life of that international court. And I am proud to say that I served under Mr Rapp and Ms Hollis as a senior prosecutor at the Special Court for Sierra Leone.

And the ICC itself numbers amongst its staff Americans who have served – and still serve – as prosecution counsel and other legal staff. To look at it differently, notwithstanding that the United States is not a State Party and does not contribute to the budget of the Court, the Court has continued to give employment to American citizens.

The US Role at the ICC PrepCom

Beyond operational personnel, Americans and the US delegation played key role in the establishment of the ICC. Once more, we must acknowledge the relentless campaign of American citizens, notably Ben Ferencz (following his experience at Nuremberg), for the creation of the Court.

It must be particularly recalled that the United States did play an important role, as indicated earlier, in the negotiation of the text of the Rome Statute itself, before its adoption.

It may be enough to cite here, by way of example, the Statement of the US delegation dated 23 March 1998, just three months ahead of the Rome Conference. Allow me to quote parts of it:

[...] 'The United States believes that crimes against humanity must be deterred in times of peace as well as in times of war and that the ICC Statute should reflect this principle.'

[...] 'The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 [of the Geneva Conventions] should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts.'

[...] 'It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC's jurisdiction.'

'The United States is eager to work with other delegations to build strong consensus on these matters.'

Those were impassioned views from America, in the normative design of the jurisdiction of the ICC. And not only were America's exhortations in these regards well-placed, they were evidently well-received by other States in what we now see of the Rome Statute.

All that and more would show that rather than obstruct or disrupt the negotiation of the Rome Statute, the US delegation played roles that were instrumentally constructive.

The ICC's Complementarity Doctrine

Against that background, it is a matter of much regret that a strident level of recrimination is now being directed against the ICC, on the basis of a worry that the Court usurps national sovereignty.

I am bound to insist with respect that the 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 the closest 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 States, who are able, 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 chronicles 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 High Commissioner for Human Rights published its 'Report of the Mapping Exercise documenting the most serious violations of human rights and international

humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003’.

As these things often are, the report is a depressing catalogue of sundry violations that provoke questions of genocide, crimes against humanity and war crimes, allegedly committed within those 10 years – with impunity.

The failings and inadequacies of the 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’*³.

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 on a mission. He published his report on 11 August 1993. He reported that *‘Massacres of civilian populations have been perpetrated either by the Rwandese security forces or by certain sectors of the population.’* He raised the question whether these massacres could qualify as genocide. He ultimately answered the question in the affirmative – because the victims were predominantly Tutsis, who had been killed simply because of their ethnicity. He noted that the killers had enjoyed impunity. One year later, on 6 April 1994, the genocide against Tutsis broke out, in unequivocal terms.

But, what was particularly interesting for us is that, at all material times, the judicial system of Rwanda was 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.’

The 1994 Rwandan Genocide left at least 800,000 dead (among them judges and lawyers) – leaving alive less than 300 legal professionals (i.e. judges and lawyers). That is to say, a judicial system which, 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.

³ Mapping Report, para 51.

For a more recent example, we may note that Kurdish authorities in north-eastern Syria have called for international assistance to administer justice, saying they are unable to cope alone with former Daesh [the so-called Islamic State] fighters in their detention. Just this week, the authorities there made a public plea for the establishment of an international criminal court that will try the alleged former jihadists in accordance with international standards.

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These stories of serious shortcomings in national judicial systems would be very much the same in many places with chronic 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.

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But, no one Good Samaritan country is able alone to help the world in this regard. Limitation of means is not the only obstacle to good intentions, even for the most able country. But, limitation also comes in the manner of the usual proscription of national exercise of extra-territorial jurisdiction.

The Joint Effort of Nations

It is here that the ever so gentle urge of Eleanor Roosevelt – the ‘Mother of Human Rights’ – continues to carry resonance. 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.’

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And, it is in that context of ‘joining other nations under a joint flag to accomplish something good for the world’ that we should invite back Robert H Jackson, as he spoke to the zero-risk option that has kept some States from joining the ICC. As he put it:

'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 allow me to add that when international law operates to make our world a better place for humanity in the long run, it would have worked to 'our national advantage' – though it may not seem like it in the short run.

ICC Consistent with States' Interests

Courts do not exist merely to make life inconvenient for the Executive Branch. But, in the nature of things, the idea of checks and balances portends that Courts will occasionally differ from the Executive Branch on how to look at things. Indeed, all through history, such tensions have occurred from time to time in liberal democracies such as Australia, Canada, United Kingdom, United States and elsewhere. But such occurrences never justified any attempt to destroy judicial independence or public confidence in the judicial system.

The true test of moral courage lies in the ability to resist that temptation, not in yielding to it. One of America's founding fathers teaches that it is a mark of courage to protect the judiciary, given its comparative weakness relative to the other branches. Alexander Hamilton explained that sentiment in the following famous words memorialized in *Federalist Paper No 78*: 'the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.' And, the judiciary, he continued, has 'neither FORCE nor WILL, but merely judgment.'

The need to protect the judiciary at all times requires always keeping in mind that the overarching purpose of society, which the judicial system serves, is lasting order and stability in society. That purpose remains the same for the ICC, given not only the need of victims for justice, but also humanity's need for international peace and security. These purposes are entirely consistent with the ultimate interest of every State – including the United States.

A Call on America to Join the ICC

I note here that this annual meeting gathers together jurists from all over the world. If you go back far enough, there would be episodes of extreme parochialism that have blotted the history books of many of our various countries – including my own.

But, there is no escaping the fact that America has, more than most, done much, in our world's recent history, to further the cause of international criminal justice in a joint effort with other nations.

It did so at Nuremberg, it did so for the former Yugoslavia, and for Rwanda and for Sierra Leone and for Cambodia.

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And when America joined other nations to create the ICC, 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, including the US, 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 20 years ago.

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Ladies and gentlemen, it is time for America to join her closest Allies and Friends at the table of the Rome Statute. In the meantime, it is important for her to support the Court, whose values and objectives are entirely consistent with the best instincts of America and her values.

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

And, it is with all due sense of responsibility that I directly request the leadership of the United States to give this support to the ICC.

I call upon America's Allies and Friends to continue to encourage her in that regard.

And I call upon the American Society of International Law – and every other civil society organisation – to encourage that outcome, without further delay.

Thank you.

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