Justice Jackson Weighs Nuremberg's Lessons

In a reply to critics of the trial he finds that it has made 'undiscriminate vengeance' obsolete.

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NUREMBERG (By Wireless).

THE Nuremberg trial of the Nazi war criminals proves that always it is worth while to give men a hearing before you decide whether to execute them. That is not a universal custom in Europe and it never was a Nazi practice. And there are people in the United States who say that "they" (we are seldom told just who) should have been shot without all the bother of a trial.

The choice that faced President Truman was a simple one. We had captured many enemy war leaders whom the world accused of serious crimes. Three things could be done with them: First, they could be turned free, ignoring the accusations; second, they could be punished without trial; third, there could be hearings to see just who ought to be punished and for what.

We may disregard the few sympathizers who would have set the prisoners free. The only real criticism of the President's decision to hold the trials comes from the "shoot 'em at sight" school.

Typical of this criticism of the trial is a recent article in The Atlantic Monthly, which regards the Nuremberg trial as "dangerous precedent." But the writer goes on:

"In my opinion there are valid reasons why several thousand Germans, including many defendants at Nuremberg, should either by death or by imprisonment be permanently removed from civilized society."

Among the hundreds of thousands of Nazis taken prisoner, who are these "several thousand" who should be killed or imprisoned? Are they to be identified by name, by position and rank, or by other criteria, or by no criteria? And how shall we know which of the "several thousand" ought to die and which should be merely imprisoned? And what are the "valid reasons" for discriminating between them—without an inquiry into the facts? And what better means of investigating facts is there than a trial which endeavors to find the truth after hearing both the accused and the accuser?

THE article suggests an alternative to the Nuremberg trial:

"It would have been consistent with our philosophy and our law to have disposed of such of the defendants as were in the ordinary sense murderers, by individual, routine, undramatic military trials."

In the first place the Nuremberg trial is taking place before an International Military Tribunal, American participation in which was undertaken by the President as Commander in Chief. True, most of the judges are men eminent in law rather than military affairs. Why it would be "consistent" and "undramatic" to arraign world notorious characters like Goering, Ribbentrop, Keitel, Raeder and others before a half dozen generals, but objectionable to arraign them before leading jurists sitting in the same capacity, we are not told.

But the worst feature of this formula is its perfect prescription for letting big men go and punishing little ones. Most of the top Nazis are not "in the ordinary sense murderers." Their fingers pulled no triggers. They turned on no gas in extermination chambers. They beat to death none of our crashing airmen. The top Nazis only made plans and gave orders and left murder in the ordinary sense to little men. Many of these little men have been tried before American military courts, convicted and executed. But the real challenge was always what to do with high-ranking plotters and planners and top-level criminals. That is the challenge the Nuremberg trial is answering.

But The Atlantic Monthly article offers a different plan: "For those who were not chargeable with ordinary crimes but only with political crimes, such as planning an aggressive war, would it not have been better to proceed by an executive determination—that is, a proscription directed at certain named individuals?"

It may be due to my experience over here, but I shudder to read this advocacy, especially by a Federal judge, of "proscription"—taking life or liberty—even from enemies, by "executive determination" on charges of "political crimes." The Nuremberg evidence shows that to have been the device used by Hitler and Himmler in sending an endless procession of untried men to death or concentration camps.

WHATEVER defects may be charged to the Nuremberg trial, its danger as precedent and its offensiveness to American ideas of justice, liberty and law are as nothing compared to the dangers from killing or punishing people for political crimes by executive order. That it can be "better" or less offensive to notions of justice to kill men without a trial rather than with a trial is a proposition hardly defensible to my mind.

The consequence of giving the top Nazis a genuine trial is, of course, labor, inconvenience and expense. We have had to listen to their excuses, and let the world hear them as well, which at times has been provoking. But it does seem to me that it was the decent and orderly way to proceed and it has produced worthwhile by-products as well.

If we had stood these twenty-two defendants against the wall and shot them "by executive determination," in ten years the United States would be defenseless against the suspicion that we did not give them a trial because we could not prove their guilt or because they could prove their innocence. Our position would be as weak as that of the Nazis regarding the Roehm purge, in which, by executive order, they killed without trial and on charges of political crimes many of their opponents. Whatever cause they may have had, they did not submit to any public inquiry and they cannot today escape the inference of mere murder. Such a procedure on our part would lay the foundations for martyrdom and a resurgence of nazism in Germany.

Whatever we ultimately do with these men we will do after an open hearing and upon evidence recorded for the world's scrutiny. We as well as the Nazis can be judged on this record, and we do not shrink from the judgment.

ANOTHER lesson of the Nuremberg trial is that captives can be given a dispassionate hearing even in the immediate aftermath of war. Every defendant at Nuremberg has counsel chosen by himself or assigned by the tribunal.

Counsel have access to their clients and to all witnesses here in Nuremberg. Every document used by the prosecution has been furnished to the defense in German. Every document requested by the defense, if approved by the tribunal as relevant, has been produced by the prosecution if in its possession, (Continued on Page 59)

Prosecutor of the Nazi gang—Justice Jackson in the courtroom at Nuremberg.

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and, if not, has been searched for by the Allied forces.

Moreover, every defense witness approved by the tribunal has been brought here by the Allies. Witnesses and defense counsel have been billeted, messed and guarded by the United States Army. They have been provided office space, stenographic help and office supplies. No American citizen on trial in American courts could receive as extensive free assistance as these Nazi defendants have received. But I think the example in the first international criminal trial of a generous opportunity for a full defense is wholesome.

IT is to the credit of the judges and lawyers of western Europe that they seem universally to recognize that, if ever peace is to come in their lands, undiscriminating and vengeful executive action must give way to fair trials even for their hated oppressors. Lawyers were often leaders of the resistance. As intellectuals they were marked for extermination. Many of them bear marks of violence.

At a dinner given recently by the Paris bar nearly half the members present had been in German concentration camps, in hiding during the occupation or in exile. In Czechoslovakia I was greeted by the Lord Mayor of Prague and fourteen members of Parliament—all former concentration camp inmates. The same is true in Belgium, the Netherlands, Denmark and Norway. But they have generally counseled proceeding against traitors, collaborators and murderers with caution and moderation. One never hears among them the "shoot 'em at sight" philosophy, even though they have suffered in a way we cannot know.

The trials of Quisling in Norway and of Karl Hermann Frank in Prague have been conspicuously dignified and fair. Strangely enough, among the vast and varied mail I receive here, complaint against the trial and exhortation to shoot the defendants at once come chiefly from Germany and the United States — rarely from the occupied countries which suffered most.

Of course, this moderation and fairness cannot be vouched for in some of the Eastern states, but even there the example may not be lost.

But, say the critics, it would be all right to try the Nazis for murder, but it is all wrong to try them for making aggressive war. I happen to be convinced that in the London agreement of Aug. 8, 1945, signed by judges of the highest courts of England, France and the Soviet Union, as well as by me, and since adhered to by eighteen nations, we merely codified what was existing international law when we said that to wage and plot a war of aggression is a crime.

IF, however, our critics pay us the compliment of insisting that we really made a great new step in enforcing international law, I shall not protest. It was a silly state of affairs that men were everywhere punished for inciting a riot and nowhere punished for inciting a war. I am willing to share the odium of correcting that anomalous situation. It was an immoral doctrine against the common sense of men that wars of aggression must never bring retribution upon their instigators. If there is one thing on which simple human beings would all agree it is that war makers should be punished for their crime—the crime which ranks above and includes all others.

The mere fact that four dominant nations without reservation have codified and expressly and clearly stated this principle seems alone to evidence progress. But they are jointly proceeding in good faith to make practical application of the principle. Is there not also hope for the future to be derived from the experience at Nuremberg, which discloses much common ground in legal concepts among peoples commonly thought to be far apart in such matters? Popular thought is focused on political relations in which there are dramatic differences of interest and of view. Political policy is usually the expression of immediate interests, often shortsighted or temporary ones, while a people's law is more apt to express settled and abiding convictions.

DESPITE our diversity of legal traditions and culture and interests, I have found from my Soviet, French and British colleagues at Nuremberg that our fundamental views of what is right and what is wrong, what is fair dealing and what is foul play, what is socially harmful and what is to be fostered, are not so far apart, and such differences as do exist are very apt to be exaggerated. It is in such fundamental accords that I find real hope of understanding between the Western and the Eastern worlds.

But it sometimes is said that the concurrence of other nations—Russia usually being meant—in outlawry of aggressive war is but lip service

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Justice Jackson addressing the court at Nuremberg.

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and that it has not lived up to the profession and does not mean to. All nations have violated this principle in the past. In fact, it was not clearly recognized as a legal principle until after the first World War. But I think the criminality of aggressive war-making is a conviction held as deeply by the Russian people as by our own.

IF it were not that most of our legal differences are superficial, it would hardly have been possible for the four Allied nations to have engaged in constant day-to-day cooperation over the period of this trial. It is in our procedures, our way of going about trials, that the greatest differences exist between us. But even there we have so far reconciled our ideas that we have been able to divide responsibility for different phases of the case, and frequently the interests of all four prosecuting powers have been represented before the tribunal by a single lawyer alien to three of the powers for whom he spoke.

This cooperation is not the less significant because it is among lawyers traditionally prone to differ and argue to the extent that even partners in the same firm will often disagree violently about the best way to conduct a case. In Nuremberg we do not have to speak of international cooperation in terms of hopes. We may speak of accomplishments—it is a going concern despite a worldwide atmosphere of suspicion, hostility, recrimination and stalemate.

If it had not been for this cooperative attitude this trial could not have been so expeditiously conducted. I know that it is generally thought to be a long and slow-moving trial. But that superficial view dissolves in face of facts.

If you, reader, should be run down by an automobile today you will be very lucky if you get your case to trial within a year. But this case involving nations, involving millions of murders, went to trial on the 20th day of November, less than seven months after the surrender of Germany. Until that surrender our evidence, our defendants, our witnesses and even our courthouse were in the hands of the enemy.

But it is said that it has taken too long to try the case—almost seven months so far. This is less time than is taken in the United States by the average anti-trust case and less than it usually takes for a commission to fix street fares in a medium-sized city. The trial of Warren Hastings took seven years. In the perspective of history, I am more fearful that the Nuremberg trial may be regarded as having been done too hastily rather than too thoroughly.

But if all other reasons favoring trial instead of executive determination were insufficient, the exposition and authentication of the documentary evidence alone would justify it. It was the necessities of a trial which forced a genuine search for and disclosure of the documentation of this war. The surrender came in May, 1945, and before the month was out we were in France and Germany organizing the search for documents and other evidence. The Allied armies had moved so fast that the orders to destroy records went unheeded as the Nazis took to their heels.

WHETHER these documents would ever have been preserved or made available except for this trial may be doubted. The terrible experience of this generation would soon be forgotten or disbelieved had not documents spelled it out in ghastly details, but if they had been simply found and published, *ex parte*, no one would have known whether they were genuine. What makes them now undeniable is that they have been submitted to examination in adversary proceedings, where they have been authenticated by those whose interest was to deny and whose knowledge of their truth or falsity was unquestionable.

As a result, experts will long draw lessons for their specialties from the Nuremberg evidence. The record of the plottings and incitements, preparations and intrigues that preceded and accompanied the second World War is vastly richer than has been available to scholars concerning any other war.

SURELY those who draw new treaties will find important lessons in these documents as to why former treaties were futile and how they were circumvented. Friends of liberty will find grim instruction in the rise of the Nazi party, its methods of seizure of power, and its establishment of dictatorial control over the German people. Jurists will find admonition in the way the rule of law was set aside, an independent judiciary destroyed and party and class use of the courts as instruments of political policy was established.

Diplomats will read the disclosures of secret maneuvers engineered by foreign offices with deep interest. Naval experts will find instruction in naval policy development and deception. Military men will unfold the story of first secret and then open preparation for war and of its measures and counter-measures. Psychologists will find the mass movement, the fanatical leadership and the blind following of pathological interest.

These documents, carefully indexed, are soon to be published by the Government Printing Office for the information of our people.

So I think the great lesson which Nuremberg has taught the world, irrespective of the outcome of this trial, is that while a hearing to make sure you are punishing the right men and for the right reasons does take time, does cost money and does allow them to reiterate their defenses, it is worth while. Undiscriminating vengeance and killings without hearings are made obsolete by Nuremberg and only the obsolete minded will mourn the loss.