

The Nurnberg Trial

CIVILIZATION'S CHIEF SALVAGE FROM WORLD WAR II

By ROBERT H. JACKSON, *Associate Justice, Supreme Court of the United States and Chief of Counsel for the United States for the Prosecution of Axis Criminality*

Delivered at the University of Buffalo Centennial Convocation, Buffalo, New York, October 4, 1946

MR. Chancellor, Trustees and Faculty, and friends of the University of Buffalo. The University of Buffalo is passing the century mark. But what is more significant is that it attains a venerable age without losing the spirit of youth. It today dedicates its century-old accumulation of experience and academic tradition to the intellectual and ethical advancement of the youth of the coming century. I take pride in being admitted to its circle and asked to speak on this occasion.

I think it was H. G. Wells who said that history is a "race between education and catastrophe." We cannot escape some anxiety in this era of scientific destruction lest education and catastrophe become partners instead of competitors. It is one of the paradoxes of our time that modern society needs to fear little except man, and what is worse, it needs to fear only the educated man. The primitive or illiterate peoples of the earth constitute no menace. The most serious crimes against civilization can be committed only by educated and technically competent peoples. I suppose that the populations of all the lately belligerent countries enjoyed during the Twentieth Century the most comprehensive and intensive public education in their respective histories. But this did not prevent two of the world's most bloody wars, the enslavement of more human beings than ever before, and an inquisition as cruel as that of any time. We can derive little comfort on this Centennial Day from reflecting on this coincidence of education and catastrophe.

I do not intend to belittle or disparage higher education. Indeed it is my conviction that improvement through education offers the last clear chance of civilization to avoid catastrophe. But if education is to be the instrument for our improvement, it must be more consciously and consistently aware of its mission and its obstacles.

Our entire culture inheritance has long been strangely hospitable to the idea that war is an acceptable and honorable means to a people's place in the world. History, literature, drama, sculpture, painting, even music, for many centuries vied with each other in glorification of war and of the warrior. While there have been occasional waves of pacifist literature and drama, as in the 1920's, and there have been such eminent pacifist writers as Tolstoi, the war school of thought always has predominated in popularity and influence. In many countries soldiering is still the most glamorous and honored of professions. When a warlike spirit, always wearing the mask of patriotism and self-defense, takes possession of peoples, little in our cultural background

is really offended. This educational background adds strength and respectability to the forces that would meet a crisis by going to war and by refusing to accept any alternatives.

Perhaps no branch of Western learning has been more tolerant of war than Nineteenth Century jurisprudence. Law always embodied more of people's customs than of their ideals. It condemned little men when they incited to a local riot but it majestically held aloof from dealing with men of rank who incite to war. It punished a single murder for personal ends, but a million murders for foreign policy ends was unquestioned. It said that killings in war were not crimes, because to kill and maim is part of war, and war itself was a legal activity.

At an earlier time a distinction was made in International Law between just wars and unjust wars. Grotius, father of the law of nations, and most of the early Christian teachers considered that there are principles of right and wrong by which to weigh the conduct of states, as there are for weighing the conduct of individuals. They taught, therefore, that while some wars are legal, there are also aggressive wars which are illegal.

In the Eighteenth and Nineteenth Centuries International Law ceased to follow these teachings. Instead, it taught that "sovereignty" placed each state above judgment by others and hence, that in law all wars by sovereign states must be accepted as legal. As one American authority put it, "Both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights." Of course, this legal doctrine that an invader intent on conquest and pillage stood on the same basis as a people defending its homeland, did not commend itself to the moral sense of mankind. But it has exerted a powerful influence on our thinking and particularly on foreign office thinking, which always tends to the conventional.

After many wars there have been high resolves to reorganize world politics in some way to preserve the peace. Statesmen have created leagues, alliances, and ententes. But the control of these was always in the hands of men who were educated in and accepted this background of International Law which taught that all wars are legal. They might urge policy objections to moves toward a war, but they did not believe that they could urge legal objections. To foment a war might be bad politics, but it could incur no legal penalties. With such an intellectual background it is not surprising that these associations were not potent in-

strumentalities for peace. It is an easy step from believing that war is never illegal to believing that war is never reprehensible. So the political machinery to prevent war always broke down when the stress came because its peace professions were superficial while its background of war psychology was deep and permanent.

Of course, an International Law which rested upon such foundations won little respect anywhere and invited the contempt of evil and aggressive men. To them it was only a compilation of pious preachments without practical sanctions. It is no coincidence—it should be a warning to thoughtful peoples everywhere—that both of the world wars which have been so catastrophic in our times began with men who openly avowed a cynical and contemptuous attitude towards International Law.

The first World War began, as you will remember, with a statement by Von Bethmann-Hollweg, Chancellor of Germany, to the Reichstag on August 4, 1914, as follows:

"Gentlemen, we are now in a state of necessity, and necessity knows no law. Our troops have occupied Luxemburg; perhaps they have already entered Belgian territory. Gentlemen, this violates the rules of International Law. . . . The wrong—I speak openly—the wrong that we now do we will try to make good again, as soon as our military ends have been reached."

A quarter of a century passed. Adolf Hitler, head of the German State, assembled his generals on August 22, 1939 to announce his readiness to strike Poland. He said:

"I shall give a propagandist cause for starting the war; never mind whether it be true or not. The victor shall not be asked later on whether we tell the truth or not. In starting and making a war, not the right is what matters but the victory—the strongest has the right."

Since the second World War the United Nations have repeated the effort to reorganize international political forces to secure a permanent peace. But it also seemed timely that an effort be made to conform our jurisprudence and the cultural background of international relations to the needs of a peaceful society. It was in this spirit that the project for the trial of war criminals was fashioned, and it is this aspect which I would like to have you consider today, for the Nurnberg trial is not unlikely considerably to influence legal thought in this Institution's second century.

When we seek to identify the sources of catastrophe in modern life in order that we may inquire whether they will yield to control by law, we find that the chief source is war, another is tyranny—the oppression of individuals and minorities by governments in power. These are ancient evils, they are as old as the race. And they are related evils. Tyranny is often the first step in a plan for war, as has been shown in the case of Germany. War, on the other hand, often causes or invites dictatorship for it provides the most subtle of pretexts as well as some necessity for centralization and increase of authority. Sometimes, instead of marching hand-in-hand, these venerable evils confront a people as alternatives—the choice being submission to a foreign tyranny or going to war. At all events, war and dictatorship are so interrelated that I am convinced little progress can be made towards permanent peace without solving the problem of protecting the elementary rights of minorities. The vice of suppression is not confined to its effect on minorities. The denial of free speech, free press, and free assembly to a minority also denies its advantages to the majority itself. The results were seen in Germany where, as a Field Marshal and a General and many witnesses have testified, they dared not inform Hitler of facts which would show his policy was leading to destruction, because no opposition

was tolerated even if it consisted of correcting misinformation.

The long-range significance of the Nurnberg trial lies in the effort to demonstrate or to establish the supremacy of law over such lawless and catastrophic forces as war and persecutions, and to clarify and implement the law for the practical task of doing justice to offenders, and for the academic task of setting straight the thinking of responsible men on these subjects. I believe that it affords a foundation for believing that we may establish fairly workable legal controls of these disastrous forces, if the men of good will in all countries will really face the problems involved.

These problems have been recognized and attacked in the Nurnberg trial, whether adequately or not. The significant features are embodied in the International Agreement signed in London on August 8, 1945. This Agreement regards the citizen or official who commits crimes against the peace and dignity of international society as answerable to it for the offense, just as one may be answerable for crimes against the peace and dignity of the United States or the State of New York. It departs from the old theory that International Law bears only on states and not on statesmen, and that "sovereignty" is a shield against all the world for any action done under the laws of a state or under its orders.

The Agreement makes explicit as offenses against International Law, crimes not before prosecuted but long considered criminal by the common sense of mankind. These are the planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or conspiracy or participation in a common plan to do so. Another crime is the persecution of individuals or minorities on political, racial or religious grounds where it is a domestic policy in preparation for such war, or is a policy toward inhabitants of occupied countries. This, of course, does not fully protect minorities against discriminations and persecutions wholly disconnected with conduct of war, but it does reach its international aspects insofar as the peace of the world is affected.

Some have objected that in treating aggressive war as criminal we were making new law by this Agreement. We thought there was a sufficient basis in existing International Common Law to support it as a codification. The world whose peace Hitler attacked was not in a legal sense the world of Von Bethmann-Hollweg. Much had happened which Hitler ignored but which established a basis for this Agreement. But if we are wrong, I should be quite willing to share with those who negotiated and signed the instrument for other countries, the odium of making such new law. I would be in a distinguished company in the error, including the Lord Chancellor of Great Britain, a Judge of the French Cour de Cassation, and the Vice-President of the Supreme Court of the Soviet Union. At all events, whether they be regarded as a codification or as an innovation, these principles are law today, over the signatures of the four most powerful of nations, and with the adherence of seventeen others. They are now embodied in the Tribunal's judgment. That these rules of law apply to victor as well as vanquished has been assumed without dissent at Nurnberg. To remove any lingering doubts, it was stated in opening the case on behalf of the United States:

"* * * while this law is first applied against German aggressors, this law includes and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment."

I think nearly all who have followed closely developments in Europe will agree that so long as mass persecutions of minorities exist in Europe, they will be provocations,

excuses, or steps to war. Herman Goering, at Nurnberg, on cross-examination revealed the philosophy of modern totalitarianism with a cynical candor reminiscent of Machiavelli. The purpose of the Nazi dictatorship from its seizure of power was, he said, to overthrow the Versailles Treaty by whatever means were necessary and it took immediate steps to prepare for the expected war. He boasted, "We tolerated no opposition unless it was a matter of no importance." He recounted the steps which any dictatorship finds necessary to suppress opposition. Political parties other than the Nazi Party were outlawed. Criticism of the government by individuals was forbidden lest it develop a party of opposition. To detect unrest and dissention, they set up a secret political police. To punish and terrorize resistance concentration camps were established. To enable imprisonment of political enemies without judicial inquiry they used the device of "protective custody," which meant, as he frankly said, that persons were arrested not for any crime they had committed but for what it was suspected they might do if left at liberty. Opposition to the state or to the only legal political party was, of course, the offense of which most victims were suspected. Goering thus charted the road to the destruction of German liberties by the National Socialist dictatorship.

But Germany is not the only country whose governing party has practiced this method of maintaining itself. Opposition or non-conformity to existing regimes today will earn the same fate in much of eastern Europe as it did in Germany before the surrender.

Existing frontiers of Europe leave much overlapping by groups of diverse racial strains or political or religious adherence, which subjects smaller groups to the caprice of dominant ones. But to redraw these boundaries generally puts other minorities at the mercy of newly dominant groups. Every shifting of a frontier means that countless settled people must either accept an alien, and in many cases arbitrary, rule or pick up and move. It is this helplessness of these minorities which makes all resettlement of the map of Europe so bitterly controversial and every decision so cruel.

It is also the helplessness of minorities in the face of government absolutism which makes the internal politics of many countries so violent and uncompromising. The disadvantages of a losing party have no limits except the forbearance of the party in power. This spirit is illustrated by the letter of a Balkan friend to Mrs. Churchill consoling her upon the prospect that Mr. Churchill having lost the election, would be exiled or shot. The amusement of the British at this anxiety is not comprehensible to those whose governments have such unrestrained disposal of life and liberty of citizens. It is this absolutism, and the fear of it, that makes compromise so difficult and a fight to the bitter end so probable between Chinese Nationalists and Chinese Communists, between Jews and Arabs in Palestine, between Hindu and Moslem in India, and between Communists and anti-Communists the world over.

The method and degree of persecution of minorities extend from mild forms of discrimination or confiscation to outright murder. The Nazis adopted as "final solution" of their relations with Jewish and Communist minorities mass extermination. Communists had gone to the same extremes in "liquidating" their opposition minorities, and the practice is by no means obsolete. Exile is a relatively gentle penalty for non-conformity. Mass deportation on an unprecedented scale is going on in Europe today.

Czechoslovakia, from experience rightly fearful of its Sudetan Germans and Hungarians, is trying the technique of deportation. To rid itself of the minority danger, it

plans to rid itself of these particular minorities. Some three million Sudetan Germans are being expelled from its borders. Elsewhere in Europe, too, millions of families are being uprooted and forced to abandon lifetime homes and to seek new homes in lands no more hospitable. But no matter how many forced migrations, there will still be more of some peoples and less of others, which means there will always remain a majority and a minority in racial origin or faith or political belief. So long as there are three persons left in a society, a minority problem is not only possible but quite likely.

But no intelligent dealing with the minority problem can be made merely by embracing the cause of every minority because it is a minority. The conflict is acute today because many countries of Europe learned by bitter experience that a dissident minority, following the line of a foreign government, is a real and continuing menace to a nation's security. The behavior of a minority as well as of a majority may be hateful, intolerant and provocative, and if many minorities are not cruel and oppressive it is only for lack of power. The Nazis were once a minority and as such practiced all the cruelty and violence by which their administration of government will be remembered. The minority problem must be dispassionately faced, it is a most difficult problem of adjustment of rights and obligations, and its tensions are manifestations of some of the most deepseated, although not the most admirable, traits of human character.

No doubt the stubbornness of the minority problem in the world is also accentuated by the fact that restraints upon government to protect minorities are inconsistent with the political concept of "democracy" held by many people. For example, the Communist concept is that the Communist party is a people's party, that this party alone and with no opposition party should dominate government, and that therefore any restraint upon government is a restraint upon the people themselves quite intolerable. It is because of this conception that the Soviet partisans persist in calling their system a "democracy," which in view of its absolutism seems incomprehensible to us. An analogous concept was held by the Nazi party in Germany. Whatever other merits are claimed for it, this system of "democracy" cannot be reconciled with our own system for protection of minorities by Constitutional limitation of the power of any majority. There is simply no way known by which you can have both unrestrained majority rule and legal minority protection.

The pendulum is on the swing in Europe. In many countries it is far over in the direction of unrestrained absolutism in the name of "dictatorship of the proletariat." Many of those who are working to swing it back would only carry it to another dictatorship differing not in absolutism, but in the composition of the ruling class. To those reared in the philosophy of our Constitution the most discouraging phenomenon today is the weakness of any real liberal tradition or movement in central or eastern Europe.

The liberal for generations was preoccupied with the struggle to put limitations on monarchy which was a long prevailing form of tyranny. Some Americans still think of monarchy and arbitrary government as synonymous. But so well was the hard struggle fought that today in western Europe, individuals and minorities are as free under kings as under any form of government. In England, Sweden, Norway, Denmark, Belgium, and The Netherlands, thought, speech, press and assembly are relatively free—nearly, if not quite, as free as in the United States—due to written or customary limitations upon government.

Paradoxically, the individual minority is least free to ex-

press itself in the countries where the absolute form of "democracy" prevails. The past two decades should have taught us that absolute rule in the name of the people can be as tyrannical as the rule of an absolute monarch. The dictatorship of many may be as ruthless towards minorities as the dictatorship of one or a few. One of the greatest problems which the world faces is that of establishing limitations on the absolutism of majorities which will protect the fundamental human rights of minorities.

While the United States cannot claim perfectly to have solved its domestic minority problem, I do think our system of Constitutional limitations on government contributes to the solution the example of a fairly successful method—the only hopeful one I can see. Like other countries, we have bigotry and intolerance among majorities and minorities in our society and regrettable incidents as a result. But oppression is not an official policy of the government and never can constitutionally become such because we have placed limitations on the measures which any majority or any official of a state or a federal government can take against an individual or a minority. We have created personal rights which exist not by grace of any current administration but as matters of law. We have imposed upon every popular or legislative majority certain denials of power, and these constitute the protections for our individuals and minorities—not always complete, but certainly of very great value. The enforcement of these restraints are entrusted to our Courts, Courts independent of the Executive and Legislature, Courts not subject to popular choice, popular removal, or popular review. These measures have put limits on oppressions and minorities live in no helplessness here as many do in Europe.

The victory has not ended or given promise of ending the oppression and injustice which breed international discords. We conquered a country whose predominant faction was practicing terrorism in most barbaric forms and on a vast scale. But the defeat of one group of oppressors does not end oppression. In many of its aspects persecution of minorities is an internal matter between the government and its citizen. But its disruptive effect on the international order is so direct that tyranny on a sizable scale anywhere is a matter of international concern.

At Nurnberg prosecutors representing all four nations sought to condemn the German defendants not only for resort to a war of aggression but also by showing their persecution and suppression of political opposition, their persecution of the Churches and minorities, their persecution and extermination of the Jews, their part in enslavement of labor and deportation of populations. The prosecution

has advocated a high standard of behavior towards other nations and towards one's own peoples as the basis for condemning the Germans—standards by which their own future conduct will be judged. No one of the prosecuting nations can long depart from these standards in its own practice without inviting the condemnation and contempt of civilization. There is great need that the statesmen pick up where lawyers leave off at Nurnberg. Peace cannot be secured and persecutions cannot be ended except by better formulation of the principles of non-aggression, and the adoption of at least a minimum of civil rights for peoples everywhere. And what we may some day hope for is some permanent forum where the victims of persecution may invoke protection of the law before instead of after it culminates in war, as those whose civil rights are violated in the United States may resort to the Courts for protection. Certainly the example of the nations cooperatively applying these principles to the Germans creates a precedent that should encourage the demand for a really effective International Law.

Of course, many things quite irrelevant to its own merits may happen which will tend to discredit the Nurnberg experiment. If the East and the West cannot or will not bridge the gaps in interest and method and political viewpoint now evident and so often overdramatized, it may be that the good effects of this drawing together in jurisprudential principles and procedures will be dissipated. But after a year of successful day-to-day reconciliation of differences of tradition and viewpoint with representatives of the other great powers of the earth, I find it difficult to believe that we will not be able to live together without sacrificing either the peace or fundamental interests.

It will take time—more time than any of us will ever see—to learn the ultimate effect of the Nurnberg trial on International Law, and to what extent it may deter attacks on the peace of the world and persecutions of minorities. Whether the Agreement among nations that underlies this trial is but a flash of light in an otherwise dark century, or is the harbinger of a dawn, will depend in large degree upon the adherence it wins in circles such as this where the coming generations will shape the concepts by which they in their time will be guided. But the Nurnberg trial has been a sincere and carefully planned effort by the nations to give to International Law what Woodrow Wilson described as "the kind of vitality it can only have if it is a real expression of our moral judgment." I shall not be surprised if a distant day will recognize this legal condemnation of oppressions and aggressions as civilization's chief salvage from the second World War.