

President COUDERT: It is with the greatest pleasure that I introduce to you the next speaker, who is not only so well known to the country, and here in Washington, but so well liked. As the question of an international court comes before this country and before the nations of the world, we all have in our minds that the greatest and most successful international court in history so far has been the Supreme Court of the United States. I remember Chief Justice White's saying to me one day as we walked out of the Court House and down the Capitol steps from the old Court (I happened to have been there and argued a case in the Court), "I am very much troubled in the case of *Virginia v. West Virginia* because I don't know how the judgment of our Court is to be executed and carried out and, if it isn't carried out, it is a very serious thing." He was evidently much concerned about it. Yet the judgments of that Court have been carried out despite what President Jackson said about Marshall's making the law: "Now let him come and enforce it."

So, we are very proud of the Court because, rapidly as it sometimes makes and unmakes the law, it still leaves us reasonably contented and happy, and we know that, anyhow, nine honorable gentlemen are doing their best and that their best is very much better than any civil or class war could possibly be.

Therefore it is a great pleasure to me and to all of us to have a Justice of that great Court here tonight to address us on international law and an international court. Let me say, because it is personal to me, that aside from the regard we all have for Mr. Justice Jackson, I come from the state of New York, and I want to tell you that long before he was appointed Attorney General or was appointed to the Court, we had the highest affection for and opinion of Bob Jackson just as a brother lawyer among lawyers. Mr. Justice Jackson.

[The audience arose and applauded.]

Honorable ROBERT H. JACKSON: Mr. President and Fellow Members of the American Society of International Law: It is a great pleasure to be with you. When your President asked me to come he said that my remarks could be strictly informal, that they would not be expected to contain anything new and, he rather intimated, nothing very enlightening. Under those limitations and understandings, I accepted.

ADDRESS

BY MR. ROBERT H. JACKSON

Associate Justice of the Supreme Court of the United States

Few groups are likely to assemble today that would better know the shortcomings of international law than this group which I am privileged to address. You are aware of the confusions, of the incompleteness, of the lack

of ordinary sanctions, and of all that might be said in criticism of international law. Yet here you are, assembled in Washington, at no little personal inconvenience, to reiterate your inveterate belief that international law is an existing and indestructible reality and offers the only hopeful foundation for an organized community of nations. There is no paradox in this. 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. I am happy to join you in what amounts to a timely and resolute confession of faith.

The bitter lessons of this decade could not fail to arouse among Americans a broader and deeper interest in the techniques by which conflicts between states may be adjusted without war. We have been a freedom-loving people. Our Constitution and our philosophy of law have been characterized by a regard for the broadest possible liberty of the individual. But the dullest mind must now see that our national society cannot be so self-sufficient and so isolated that freedom, security, and opportunity of our own citizens can be assured by good domestic laws alone. Forces originating outside of our borders and not subject to our laws have twice in my lifetime disrupted our way of living, demoralized our economy, and menaced the security of life, liberty, and property within our country. The assurance of our fundamental law that the citizen's life may not be taken without due process of law is of little avail against a foreign aggressor or against the necessities of war. Either submission or resistance will take life, liberty, and property without a semblance of due process of law. It has been our boast and real achievement that the individual in our country has been free to lead his own life. But we look upon a whole generation of youths that are given no choice as to what they will do with the best years of their lives. One of the ominous signs of our times is that the progressive mobilization of the resources, manpower, and business of the country has necessarily been accomplished at the cost of surrendering or impairing one after another of our traditional individual liberties. It ought to be clear by this time that personal freedom, at least of the kind and degree we have known in this country, is inconsistent with the necessities of total war and incompatible with a state of militarization to remain in constant readiness for one. Awareness of the effect of war on our fundamental law should bring home to our people the imperative and practical nature of our striving for a rule of law among the nations.

I am not one who expects the world to be remade by a single document or a single conference, or in a single decade, or even in a single century. One who contemplates the slow and evolutionary nature of all advancement in the field of law will expect no miracles now. It may be timely to recall Woodrow Wilson's words to the International Law Society in Paris in 1919: "May I say that one of the things that has disturbed me in recent months is the unqualified hope that men have entertained everywhere of immediate

emancipation from the things that have hampered and oppressed them. You cannot in human experience rush into the light. You have to go through the twilight into the broadening day before the noon comes and the full sun is on the landscape; we must see to it that those who hope are not disappointed, by showing them the processes by which that hope must be realized—processes of law, processes of slow disentanglement, from the many things that have bound us in the past.” What wisdom was in these words the world now knows.

But we are at this moment at one of those infrequent occasions in history when convulsions have uprooted habit and tradition in a large part of the world and there exists not only opportunity, but necessity as well, to reshape some institutions and practices which sheer inertia would otherwise make invulnerable. Because such occasions rarely come and quickly pass, our times are put under a heavy responsibility. It is not enough that we restore peace. Peace indeed is fast becoming inevitable. When this war closes, sheer exhaustion of resources and weariness of flesh will be enough to keep a peace of sorts for perhaps twenty, twenty-five, or thirty years. Our problem is how to rise above the temporary pressures and irritations to long-range objectives.

All else will fail unless we can devise instruments of adjustment, adjudication, and conciliation, so reasonable and acceptable to the masses of people that future governments will have always an honorable alternative to war. The time when these institutions will be most needed will probably not come until the names that signify leadership in today's world will have passed into history. I wrote that line before the name of our own great leader had passed into history. Men now unheard of will have pushed up into leadership of a new generation that will have conflicts of interest and clashes of ambition just as every generation before has done. Advancement of civilization does not diminish, it rather multiplies, the occasions and causes of serious dispute among states. But they are less likely to break into war among peoples whose habit it is to regard peaceful ways of settlement as honorable and customary. Future governments in time of threat and crisis will find it possible to accept alternatives to war only if their constituents consider that the peaceful alternative causes no “loss of face.” Governments in emotional times are particularly susceptible to passionate attack in which this emotion is appealed to, sometimes crudely and sometimes by more sophisticated formulae such as “impairment of sovereignty,” “submission to foreign control,” and like shibboleths. We may as well face the fact that it will not be enough to have a mechanism for keeping the peace which a few scholars and statesmen think well of. If it is really to work, it must have such widespread acceptance and confidence that peoples as well as philosophers support it as a thoroughly honorable and reasonably hopeful alternative to war.

This leads me again to quote President Wilson's words to the Interna-

tional Law Society in 1919. "International law," he said, "has perhaps sometimes been a little too much thought out in the closet. International law has—may I say it without offense?—been handled too exclusively by lawyers." If I were to add to his statement, I should say, "It has been handled—and not from any fault of their own—by a too exclusive group of lawyers." Our membership list, which I take to be some index of interest in the subject, indicating at least those who keep informed through our excellent *Journal*, leads to the conclusion that our society is a rather exclusive group. Some perhaps think it is a society of Brahmins, but it would be nearer the truth to say that it is a collection of pariahs. The fact is that very few judges of our high courts, a small proportion of our lawyers, a good representation of schoolmen, and a sprinkling of laity comprise the group that gives sustained attention to developments in the field of international law. In some degree this is inevitable. But certainly far too many think of international law as a speculative avocation, completely forgetting that from the beginning the Supreme Court has held customary international law to be part of the law of the land, as treaties are declared to be by the Constitution.

The profession generally has, I think, vaguely realized and appreciated the work of the Permanent Court of International Justice in the few but important cases that have been submitted to it. But to most of the bar such international tribunals as we have had were inaccessible professionally as well as geographically and bore little on the profession's work-a-day problems. While private claims based on alleged violation of international law or treaties are numerous, no permanent judicial machinery has been available for their adjudication. We still leave the traveler, the business man or the owner of property in a foreign country who suffers a violation of international law or treaty rights pretty much in the unhappy position of having no sure or easy remedy and the bar still thinks of them as the affair only of diplomats. Claims commissions have settled many such disputes, of course, and the problem of providing judicial remedies is receiving more thought than ever before.

It seems to me that we now have an opportunity, not likely soon to recur, to bring international law out of the closet where President Wilson found it and impress it upon the consciousness of our people. At no time have the materials of persuasion been more abundant or more compelling. I should not be greatly surprised if today the people are not actually less timid on the subject than those who should lead in this field. I would expect a pretty general response in the United States to hold but sober efforts to increase the resort to techniques of arbitration, adjudication, and conciliation in the future world organization. The trouble has been that the advocates of international law have had too little of what Mr. Justice Holmes called "fire in the belly," while the extreme nationalists have had too little else.

It is important that we do not allow the assumptions that lie at the foundation of any worthwhile international judiciary to become obscured in issues or pressures about details. These are not unimportant matters, but they are subsidiary to what I consider the great principles on which an international tribunal must be based. It is undeniable that wide difference of philosophy exists among judges and lawyers within the United States as well as among different national groups as to the appropriate function of courts in society. Anglo-Americans and many others generally have adhered to the concept of a court as an independent body which neither serves nor controls policy and whose members owe a duty to truth in fact-finding and to the science of law in decision that transcends any duty to nation, to class, to governments, or to party. That ideal, needless to say, is not always attained even among those who profess it, but by and large it has represented the ideal which the legal profession has tried to approximate in practice. It would, however, be unwise to overlook that this is quite contrary to the concept prevailing among nearly all of our enemies, among some of our allies and some neutrals, and beginning to have a considerable and influential school of thought in the United States. They think of courts as dependent and controlled arms of the policy-making part of government, as legitimate instruments to promote policy, and as bodies whose fact-findings and decisions may properly reflect the national interest, the class or party interest which is responsible for their creation, as the case may be. It would be very difficult for an international court long to succeed if such irreconcilable conceptions of its character and function continued to divide the powerful constituents of our international organization.

It seems to me that much hinges on acceptance of the concept of the Court as an independent body above obligation to any nation or interest. I do not see how we, or any nation of like philosophy, could submit controversies to a court otherwise conceived, and certainly we could not concede any measure of compulsory jurisdiction to it. Nor do I see how any reputable professional man of the Anglo-American tradition could lend his name to a tribunal not of that character. Of course we deal here with a difficult point because it is so little a matter of the statute creating the Court and so much a matter of the spirit of the judges and the foreign offices and of prevailing attitudes among peoples.

It is a plain corollary of the principle that courts must not be swayed by policy, that they must not decide matters of policy. It is difficult to say that a nation, class, or party is not justified in trying to control in the interests of its policy those institutions which try to share policy. This reason leads me strongly to approve Paragraph 56 of the Report of the Informal Inter-Allied Committee from which I quote: "Nothing seems to us more important, from the point of view of the prestige of the Court and of enabling it to play its proper part in the settlement of international disputes, than that its jurisdiction should be confined to matters which are really 'justiciable,'

and that all possibility should be excluded of its being used to deal with cases which are really political in their nature and require to be dealt with by means of a political decision and not by reference to a court of law." Words of wisdom, if any such were ever spoken. This principle leads to some doubts as to advisory opinion jurisdiction which, if retained, as probably it should be, should at least be carefully circumscribed and cautiously exercised. But in all events the Judges must be above policy pressures by any nation and can claim that immunity only so long as they are free from exerting policy pressures.

I am not stressing this difference of opinion about the function of courts in criticism of our allies or in rancor toward our enemies. Always among them have been scholars and jurists who hold to the ideal of an independent bench. And among us, also, there are some who candidly would use courts as an instrument of power and many more who favor all of the premises of that philosophy without recognizing the conclusion to which they lead. The ease with which men thoughtlessly fall into step with this philosophy is strikingly demonstrated by the attitude of many people toward the trial of war criminals.

I have no purpose to enter into any controversy as to what shall be done with war criminals, either high or humble. 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. 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.

Of course, if good faith trials are sought, that is another matter. I am not so troubled as some seem to be over problems of jurisdiction of war criminals or of finding existing and recognized law by which standards of guilt may be determined. But all experience teaches that there are certain things you cannot do under the guise of judicial trial. Courts try cases, but cases also try courts.

You must put no man on trial before anything that is called a court, if you are not prepared to establish his personal guilt. I do not, of course, mean that every step must be taken in accordance with technical common-law rules of proof. The evidence to be received depends upon what the circumstances make available. But there is no reason for a judicial trial except to reach a judgment on a foundation more certain than suspicion or current rumor. Men of our tradition cannot regard as a trial any proceeding that does not honestly search for the facts, bring forward the best sources of proof obtainable, critically examine testimony. But, further, you must put no man on trial if you are not willing to hear everything relevant that he has

to say in his defense and to make it possible for him to obtain evidence from others. Nothing more certainly discredits an inquiry than to refuse to hear the accused, even if what he has to say borders upon the immaterial or improbable. Observance of this principle is of course bound to make a trial something of a sounding board for the defense. We all remember the war-guilt trials which were begun by the Nazis and their collaborators in France. The Court was at once put to the choice of suppressing the defense or of allowing the trial to become an instrument for disseminating the views of the accused. Any United Nations court that would try, say, Hitler or Goebbels would face the same choice. That is one of the risks that are taken whenever trials are commenced. 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. I am not arguing against bringing those accused of war crimes to trial. I am pointing out hazards that attend such use of the judicial process—risk on the one hand that the decision which most of the world thinks should be made may not be justified as a judicial finding, even if perfectly justified as a political policy; and the alternative risk of damage to the future credit of judicial proceedings by manipulations of trial personnel or procedure to invest temporarily with judicial character what is in fact a political decision. I repeat that I am not saying there should be no trials. I merely say that our profession should see that it is understood that any trials to which lawyers worthy of their calling lend themselves will be trials in fact, not merely trials in name, to ratify a predetermined result.

Brother Coudert belabored the pessimists, and I shall take on the cynics. Of course there is a school of cynics in the law schools, at the bar and on the bench who will disagree, and many thoughtless people will see no reason why courts, just like other agencies, should not be policy weapons. It is a popular current philosophy, with adherents and practitioners in this country, that law is anything that can muster the votes to be put in legislation, or directive, or decision and backed with a policeman's club. Law to those of this school has no foundation in nature, no necessary harmony with higher principles of right and wrong. They hold that authority is all that makes law, and power is all that is necessary to authority. It is charitable to assume that such advocates of power as the sole source of law do not recognize the identity of their incipient authoritarianism with that which has reached its awful climax in Europe.

But we can have nothing in common with the cynics who would have us avoid disillusionment by having no ideals, who think that because they do not believe in anything, they cannot be fooled. We must keep the faith roughly stated by Lord Chief Justice Coke that even the King is "under God and the law." I confess even to mid-Victorian romanticism which be-

lieved that "Thrice armed is he whose cause is just." Of course, these are difficult concepts for the most wise to delimit and apply and easy for the most shallow to ridicule. But unless there is something of substance in those teachings, there is nothing to law except the will of those who have the power.

It is chiefly those who hold this idea of law who belittle international law because, they say, it lacks formal commitments of force to back up its precepts. This attitude, which considers itself a very practical one, I think misconceives the nature of law, the almost inevitable character of so many of its principles in a world ordered by any semblance of reason, and the influences which give law acceptance, vitality, and authority. The fact that a principle of international law does not readily translate into a court mandate, with an executive power committed faithfully to execute it does not mean that it may with impunity be violated. Twice Germany has demonstrated that flagrant disregard of international law will call into being an *ad hoc* international police force for its vindication. In August 1914, Von Bethmann-Hollweg stood before the German Reichstag at the beginning of a war in which Germany held every card but one. He confessed the lack of that one. He said, "Gentlemen, we are now in a state of necessity, and necessity knows no law. Our troops have occupied Luxembourg; 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."

Bethmann-Hollweg's miscalculation consisted of believing that international law was backed by no force because no such force was then visible. But he was at least intellectually honest enough to know legal right from legal wrong. His successors belong to the school which denies there can be a legal wrong if it has the votes or the artillery on its side. By every calculation based on naked force Germany should sit astride the world today. But lawlessness, violations of what plain people think of as "rights"—rights of minorities, rights of individuals, rights of peaceful nations—have twice roused moral forces which have supplied the military force to undo German might. Nothing disintegrates power like lawlessness, nothing makes force so effective as the sentiment of people that it is somehow defending the right and is exercised in harmony with the higher moral values. So I think we need not worry too much about absence of sanctions for international law or let disputes as to details obscure the ultimately important things. We may go forward on the assumption that reason has power to summon force to its support, confident that acceptable moral standards embodied in law for the governance nations will appeal to the better natures of men so that somehow they will ultimately vouchsafe the force to make them prevail. If this were not so, the quicker "civilization" were blown to bits, the better.

It is futile to think, as extreme nationalists do, that we can have an in-

ternational 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. In our internal affairs we have come to rely upon the judicial process to settle individual controversies and grievances and even those between states of the Union, not because courts always render right judgments, but because the consequences of wrong or unwise decisions are not nearly so evil as the anarchy which results from having no way to obtain any decision of such questions; in which case each will take the law into his own hands. And in a somewhat similar sporting spirit we must look upon any international tribunal, not as one whose decision always will be welcome or always right or wise. But the worst settlement of international disputes by adjudication or arbitration is likely to be less disastrous to the loser and certainly less destructive to the world than no way of settlement except war. And we will not suffer the worst of decision, but will benefit from the judicial process at its best if we insist upon the independence and intellectual integrity of any international tribunal which purports to arbitrate or adjudicate controversies between states. I always have found a great measure of professional pride and inspiration in the story I have heard and often repeated about Lord Alverstone. In the Alaskan Boundary dispute between the United States and Great Britain, an arbitration commission was set up, consisting of an equal number of nationals of each. Of course no decision could be reached unless at least one arbitrator voted against the interests of his own country. It so happened that Lord Alverstone, named to the commission by Great Britain, joined in an award in favor of the United States. The storm of criticism among his countrymen was fierce. The answer attributed to Alverstone embodied in few words about all that I have taken a half hour to say. It was an attitude followed by Mr. Justice Van Devanter, who joined in deciding a later arbitration against the United States. It is, I think, the shortest explanation of the success with which this country and Great Britain for well over a century have been able to settle their differences by peaceful means. Alverstone's reply to criticism was simply, "If when any kind of arbitration is set up they don't want a decision based on the law and the evidence, they must not put a British judge on the commission." That is the spirit in which disputes between states or between individuals must be decided, and the spirit in which decisions must be accepted, if the world is ever truly to be ruled by law instead of by the wills of men in power.

President COUDERT: I am sure we all owe Mr. Justice Jackson a vote of thanks for his admirable address. I frequently find myself admiring some of his opinions, especially some of his dissenting opinions, but I don't think

he ever rendered a better opinion than the splendid scholarly and inspiring opinion he gave us here tonight. On behalf of all of us, Mr. Justice Jackson, I want to thank you. I also want to thank him for that excellent suggestion that perhaps we have been considered as a little esoteric body of conspirators possessing a monopoly on wisdom and emanating a kind of obscure legalistic philosophy. The real fact, if the inside fact must be known, is that we do everything that we can to increase our membership, and we have always regretted through the years that we have not been able to obtain a little more than 1100 members because the lawyers of the country, unfortunately (and I say this fearlessly, even though some of my friends of the American Bar Association are here), have not until very recently taken the trouble to interest themselves in the law of nations, the most important law there could possibly be, and the disregard of which we have seen in the worldwide catastrophes that have overtaken us since 1914. We are now making, Mr. Justice Jackson, the best kind of campaign that modest, self-effacing gentlemen can make for an increment in membership, and we are very glad to have you arrayed in it.