The Chairman:

I regret to say that the time has now come when we must conclude this discussion. The Supreme Court of the United States is waiting, and I don't believe in keeping the Supreme Court of the United States waiting. Therefore, this discussion is now concluded, with renewed thanks to our distinguished speakers.

Thank you very much.

(President Lewis C. Ryan resumed the Chair.)

The President:

Ladies and gentlemen, the Annual Address of the Association will be given this year by one of our own members. For many years, he has been an active figure in the life of this

Association. His interest in the Association has never diminished. His host of friends in the Association have rejoiced in his rise to national fame, and we rejoice again today in having him back here again with us.

Driven with extra work because of his absence from the country and because of the death of the Chief Justice, he quite naturally was reluctant to accept our invitation. I assured him that he need not prepare a formal address; that I thought you would like to hear an informal talk about his experiences at Nurnberg.

I also told him that this would be a sort of old-fashioned family reunion. I think that that objective was assured when Harrison Tweed agreed to give a cocktail party.

I am very happy to be able to present to you the former Solicitor General and Attorney General of the United States, our Chief Prosecutor at Nurnberg—the Honorable Robert H. Jackson, Associate Justice of the United States Supreme Court.

(Rising applause.)

Hon. Robert H. Jackson: Mr. President, fellow members of the New York State Bar Association and guests: I wanted to accept your invitation when it was first extended because no group could assemble in which I could count so many personal friends of long standing as in a meeting of the New York State Bar Association.

I should feel extremely flattered at this attendance except for the fact that Harrison Tweed and your President felt it necessary to offer a bonus by way of a cocktail party.

I gladly accepted the invitation to talk informally about the Nurnberg trial of the major Nazi leaders because it was the supremely interesting and important work of my life and an experience that would be unique in the life of any lawyer. The proceeding itself was invested with a certain melancholy grandeur both from its nature and from the character of the parties. The society whose peace and dignity it was to vindicate was the entire community of nations, more than a score of which became parties to the Agreement under which the trial was conducted. As prosecutors, we spoke in the name of the four most powerful nations of the earth, a constituency such as no lawyer before us had represented. The crimes charged were of

a magnitude and ferocity unparalleled in the history of criminal assizes. The defendants were the surviviing leaders of the most absolute and aggressive government of modern times. No lawyer who loves advocacy could resist the opportunity to participate in such litigation.

But after somewhat improvidently accepting the assignment, I realized how much of preparation must precede the day of trial. The prosecuting nations used four different legal systems and it was uncertain whether we could agree on the principles and procedures of the trial. There was much relevant law but no codification of it, and no tribunal to apply it was in existence. The trial obviously should be held in Germany, but there was no tenantable court house standing in that land and we must select and restore and adapt one to our purpose. There was another deficiency which can be disastrous in a lawsuit—we had many and serious charges but almost no real evidence. We were sure it existed, but it was scattered and hidden in many countries. No staff experienced in the problem and organized to work together was in being, and the nature of the mission required, in addition to lawyers, secretaries and clerks, a large technical staff of translators, interpreters and specialists which at its peak totaled over 700 persons. The search for evidence must go on in many laguages, and all must be rendered into the four working languages of the Tribunal. Not the least of our problems was that back of us was an uninformed but incessant clamor for haste. As a country lawyer I was accustomed to preparing cases from the very beginnings, and to making a little evidence go a long way. But I do not mind confessing that there were times when the obstacles in the way of this trial seemed almost overyhelming.

With so little precedent or experience to guide us, certainly many mistakes were committed. When enough time passes to lend a helpful perspective, I hope to point out to the profession, for assictance of those who engage in future international trials, what some of those mistakes were and their consequences. But I need not dwell today upon the mistakes—there are enough others who find them a congenial theme. This first international criminal assize has passed into history. The ultimate place of this trial in legal history and its contribution to jurisprudence

will be determined by those whose conclusions rest on research, for the popular reporting was inevitably but strikingly inadequate. Its place will not depend on what I say about it and I shall spend no time in controversy about its ultimate meaning, for it is too early to know. But like every great historic inquest, it holds lessons for those whose dispassionately study the actual record of the case.

The Nurnberg experience is instructive in many aspects. Its record is one of the only authentic sources of historical information as to the diplomacy, economics, military policy and political methods of totalitarian government. I wish every American citizen, at least every American lawyer, could read the testimony on cross-examination of Herman Goering. His answers always did two things: first, by their air of defiance and cynical wit they won the applause of the galleries and the admiration of shallow sympathizers, and, secondly, by their substance and implication they made his conviction inevitable and led the Tribunal to say of him in its judgment, "His guilt is unique in its enormity. The record discloses no excuses for this man." His unfolding of the Nazi plan to destroy the Weimar Republic, to set up in its place a police state, to lead that state to rearm, to conduct wars of aggression, to terrorize opposition and exterminate those it hated, is one of the most cynical discussions of policy since Machiavelli. It should be known to Americans what the early symptoms of totalitarianism are, for only in its early stages can such a movement be stopped by peaceful means. But I shall not in this presence dwell upon these lessons of the trial. We, as lawyers, are more concerned with its purely professional aspects.

Of course, the student of International Law will find the Nurnberg trial an event of unsurpassed significance. The organic act governing the trial rejected, and I hope permanently reversed, a trend in International Law—the trend which declared all wars to be legal. It accepted instead, and I hope permanently established, the doctrine that wars of aggression are not merely illegal but are criminal. It also rejected the idea that International Law creates duties and obligations only upon States and followed the idea that it creates duties and liabilities

for individuals who are in a position to determine the policies of states.

But the Nurnberg undertaking affords for lawyers an actual working experiment in comparison of laws. We have heard it said that a person who studies only one system of law learns no law at all. This overstatement emphasizes the truth that one who pursues only one system of law is in no position to appraise the value of that system in general and in not much better position to value its particular rules. I can think of no subject more instructive to those who make the law, as judges from time to time do, than what is called comparative law. Only after we see by what principles and procedures other civilized and progressive peoples solve their legal problems does our praise of our own have any real significance, and only then can our effort to improve our own law take full advantage of available experience of others.

From the questions that I am often asked, I am sure that American ignorance about Russia's legal system equals any possible ignorance of the Russians about our own. These questions often indicate a conception of Russia as a great space with no law at all—a vast anarchy. Nothing is farther from the truth. The Russians have a long juristic tradition, and in their own way are stcklers for legitimacy and correctness. They have had an elaborate codification of law since 1648 and a tradition of Roman law that goes back to Byzantium. As a result of the Bolshevik revolution, Russian law received a more radical overhauling than has occurred in modern times with any other country. But the first Soviet codes were drafted after consulting the most advanced codes of Continental Europe. Basic differences in economic and political conceptions and conditions, of course, led to many modifications of earlier Russian and of contemporary Continental law. But for its own purposes and conditions, the Soviet Union has a system of civil and criminal law, as elaborate and as mature as our own, with roots as deep in history, and I doubt if its application is any deeper in confusion.

From the beginning of our negotiations of an Agreement for the trial it was apparent that we must reconcile not only the legal concepts prevailing in England and France, but also those

in the Soviet Union, with our own if they were to associate with us in a joint prosecution. The first task was to reach agreement as to the substantive law to be applied and the procedure to govern the trial. We could not risk leaving these matters to possible disagreement at the trial. We must settle a procedure which would conform to the ideas of fairness in all four prosecuting countries. We must also design a procedure that would not bog down in technical disputes and would answer the demand of outraged populations of occupied countries for prompt and efficient results. There was material available from four bodies of legal tradition and experience. England and the United States, with some variations, each had common law systems; France and the Soviet Union, with greater variations, each had Continental or civil law systems.

Fortunately, these countries were represented in negotiation of the Agreement by eminent, able and constructive-minded members of their respective legal professions. Our negotiations gave little time to considerations of a political character. The greater part of our conferences was spent in what really was a legal clinic in comparison of laws in an effort to select what was best fitted for our purpose and to adapt it to the needs of the trial and to the professional habits of the lawyers who would have to make it work in practice. These negotiators were practical men. They included, among others, two Lord Chancellors of Great Britain and two Attorneys-General—those from the Churchill administration being succeeded during the negotiations by those of the Labor Government. France sent a Judge of her highest court, the Cour de Cassation, and a distinguished professor of law. The Soviet Union was represented by a Vice President of the Soviet Supreme Court and by one of her leading professors of jurisprudence. Each delegation had considerable specialized help. I had the counsel of experienced members of the American Bar and also had the help of specialists in German, Soviet, French and Britsh law.

At the time our Agreement was concluded and signed, August 8, 1945, we did not know who the judges would be nor even whether they would be selected from the bench and bar or from the military forces. While we had to leave great discretion to the Tribunal to deal with the unexpected, we also

wanted to so far settle conflicts in legal concepts in a binding Charter that judges would not get snarled up in technical disputes. I make no effort to disguise my pride and satisfaction that we produced a governing document under which this complicated trial was conducted, with less dispute between defense and prosecution over procedure than occurs in the usual American trial. Moreover, what disagreements did arise were decided by the Tribunal without a single dissent being publicly noted on any matter of procedure or evidence. And of the hundreds of eminent jurists, lawyers, officials and publicists from many nations who visited the trials, not one has complained that the defendants did not have every essential of a full and complete hearing and fair opportunity to develop their defenses.

Time will not permit me to more than point out the principal conflicts of legal ideas that developed and how they were resolved. Each would warrant an essay in itself, but I am trying to give an overall picture of our method of international cooperation in the face of legal conflicts rather than a lecture on comparative law.

The first point of difference was as to the function of the Court. The Soviet delegation frankly said they did not believe in an independent judicial judgment as to guilt. This is consistent with the Soviet theory of the place of courts in government. They hold that the court is and ought to be "one of the organs of governmental power, a weapon in the hands of the ruling class for the safeguarding of its interest." That does not mean that the government dictates every decision to a Soviet judge. As I interpret it, it more nearly means that the judge occupies about the relation to the government that our administrative tribunals do. After long consideration of the united viewpoint of the British, French and Americans that this tribunal must be entirely independent and completely free to arrive at a verdict of guilty or not guilty, the Soviet delegation agreed and I have every reason to believe they carried out the agreed nature of the Tribunal in good faith. It is true that the Soviet judge filed a public dissent from the acquittals. It may be only a prosecutor's prejudice but they seemed to me

so right that my only surprise was that they were alone in doing so.

A second difference in understanding concerned the function of an indictment. As you know, under our British and American practice, an indictment does little more than to inform generally the nature of the crime. I was somewhat surprised to have the members of the Soviet delegation complain that our practice is unfair to defendants. The point of the objection was that under the Soviet system, the indictment must include every document and the statement of every witness which is expected to be used against the defendant so that he may be informed not only of the nature of the charge but of the evidence on which it is based. The Soviet suggested that unless this were done, the defendant might be surprised at the trial and the hearing thereby become something of a game instead of a real inquest into guilt. It must be admitted that there is a great deal of truth in this criticism. We reached a compromise by which the indictment was to be more explicit than in our practice, but less complete than in Soviet practice. The different conceptions, however, were not fully reconciled in the Agreement and when it came to the drafting of the indictment, the Soviet prosecutor was still in favor of furnishing the defendents much more information in the indictment than either the British or ourselves. The French ultimately agreed with us. But the indictment at Nurnberg is a very long and detailed document, largely due to Soviet insistence.

Another point of difference concerned the rights of defendants. Under Soviet, French, German and nearly all Continental law, a defendant cannot be a witness for himself. That, too, was our own tradition until early in the last century. We insisted, however, that no trial would be regarded as fair in Britain or America if the defendant were not permitted to testify in his own behalf. The Continentals were equally insistent on their system. Their practice is to allow the defendant after all of the evidence is in, personally to make an address to the court in which he may plead for mercy, deny guilt or make any kind of statement without oath. It is usually called "the last word" and cynics say that in the Soviet procedure it is just that. However, the Germans won by this difference of

opinion for we compromised by providing that these defendants should have both privileges—that they could testify in behalf of themselves and that they could also have "the last word."

Another difference concerned the crime of conspiracy. As you know, this is the great dragnet procedure of our law. We know, too, that it is a somewhat dangerous procedure. Lawyers of the Roman tradition do not understand the common law concept which makes it possible thus to hold defendants responsible for crimes committed by others. They do understand aiding and abetting. It was finally agreed that the conspiracy principle should be embodied in the Charter of the International Military Tribunal. Nevertheless, the difficulty of understanding persisted. The difference of viewpoint again appeared in the drafting of the indictment. The task of proving the conspiracy was delegated to the American prosecution, but even at the trial we sometimes had difficulty convincing our associates that the sweep of the conspiracy charge could be so broad. This difference of viewpoint entered into the judgment and apparently accounts in no small degree for the discrepancy between the judgment and the Charter on this subject.

I shall not undertake to discuss that discrepancy beyond quoting from the analysis of Mr. Stimson in the current issue of "Foreign Affairs":

"If there is a weakness in the Tribunal's findings, I believe it lies in its very limited construction of the legal concept of conspiracy. That only eight of the 22 defendants should have been found guilty on the count of conspiracy to commit the various crimes involved in the indictment seems to me surprising. I believe that the Tribunal would have been justified in a broader construction of the law of conspiracy, and under such a construction it might well have found a different verdict in a case like that of Schacht.

"In this first great international trial, however, it is perhaps as well that the Tribunal has very rigidly interpreted both the law and the evidence."

Another point of difference concerned rules of evidence. Both the Soviet and the French delegations were fearful that the trial might become involved in what appears to them a maze of sterile intricacies concerning admissibility of evidence.

It was obvious also to the British and American delegations that in a trial involving decades of time and events that occurred all over continents, it might be impracticable always to meet technical requirements as to proof. One simple rule was adopted. "The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure and shall admit any evidence which it deems to have probative value." This would be a dangerous rule to entrust to a partisan or inexperienced tribunal. It was applied to exclude some offerings both by prosecution and by defense. But in the main, it served the purpose of centering the controversy on what, if anything, documents proved rather than on technical questions of admissibility.

Another point of difference was the extent to which the Tribunal should be authorized to utilize Masters in taking and sifting evidence and making recommendations. Much time could have been saved and I should think it quite consistent with our practice if many subjects had been investigated and reported upon by Masters. Both the French and the Soviet Delegations were reluctant to authorize their use. They regarded it as an abdication by the court. We finally got into the Charter a rather ambiguous phrase to the effect that the Tribunal should have power to "have evidence taken on commission." This was utilized in hearing the defenses of the various organizations with much the same effect as the appointment of a Master, but it was always so conditioned that there was no delegation of the court's own function of decision.

Another problem was to avoid the defendants utilizing the Tribunal as a sounding board for propaganda and thereby discrediting the trials as had been done in some other instances. It was a difficult line to draw in advance because what seemed to the Germans like defensive matter was obviously to impress us as propaganda. We provided for what in effect was an offer of proof so that the Tribunal could rule upon the relevance of any line of testimony before it was offered at length. I think it is due to the German lawyers to say, however, that our fears in this respect were perhaps exaggerated. While some of the defendants, notably Goering and Streicher, attempted with

more or less success to make speeches obviously intended for an audience outside of the Tribunal, the German counsel themselves generally behaved with a sense of professional responsibility. While they contested the right of the Tribunal to try the defendants and contested nearly every legal proposition advanced by the prosecution, they did so in keeping with good professional traditions.

As to the trial itself, many problems arose on which there was sometimes difference of opinion between delegations and just as often difference of opinion between members of my own staff. And we settled them in the same way—by candid discussion. There was never a moment when there was an acrimonious meeting of prosecutors beyond that which is quite customary when lawyers and even sometimes when judges differ in opinion.

One of these differences of opinion was as to whether we should rely chiefly upon documents or on the oral testimony of living witnesses. It seemed to me that our stock of authentic documents was so complete that our case would have a more solid foundation if it was built on documentation than if it was built on witnesses whose motives, memories and accuracy would always be open to question. After all, the purpose of this trial was not merely to convince contemporary opinion. Contemporary opinion had its mind made up from observing the events. The purpose which was served by making a record in many of these matters was to have a record for subsequent time. The Tribunal was able to say that it based its decision on documents only questioned in two or three instances and I feel that our decision was a wise one.

Another difference was as to whether we would endeavor to use some of the defendants as witnesses against others. There was strong animosity among the defendants and some of them intimated a willingness to be of service. We decided to reject any such plan of proceeding despite its attractions. It seemed to us that testimony under such circumstances would always carry the smell of a bargain and that we could not afford to smear our case in history by the inference that we were dealing with some guilty men in order to convict others. Apart from these principles, however, there was no necessity for doing so.

We felt that we had documents which made a *prima facie* case against every defendant and that he would be compelled in his own defense to take the stand and that we could then get any evidence that was of advantage to us on cross-examinaton. Except for two defendants who did not testify in their own behalf, this plan proved satisfactory.

Another point on which we differed, more in our practice than in principle, was the matter of cross-examination. On the Continent, as you know, cross-examination is very little used by members of the bar. Witnesses in criminal cases are examined by the court itself, and therefore the Continental bar is not experienced in cross-examination. In fact, there was no Russian equivalent for the term "cross-examination." The French made little attempt to use cross-examination. Most of the cross-examining was done by the British, who are adept at it, or by the Americans. The Soviets at first hesitated—and then apparently they found it to be great fun, and cross-examined everybody.

If the Continental lawyers had had the advantage of a little practice, they would have known some of the dangers of cross-examination. There were several classic illustrations of those dangers.

The example that stands out as indicating the ineptitude of cross-examiners, was provided by the lawyer for Kaltenbrunner, who was himself a lawyer—a disbarred Austrian advocate. We had on the stand a witness who had been high in the Intelligence Service in Germany. He was giving rather damaging testimony as to some of the defendants—but he had never mentioned Kaltenbrunner, who had been the head of the concentration camps.

Of course, a witness cannot harm a defendant less than to not mention him. We were therefore somewhat amazed when Kaltenbrunner's counsel aggressively went forward and said to the witness, "You have not mentioned Kaltenbrunner. Do you know Kaltenbrunner?"

The witness in substance said, "Yes, I first met Kaltenbrunner on the afternoon of the day on which he executed the students at the university for circulating the petition. I shall

never forget the cynical way he spoke about the job which he had just done."

I would not want to leave the impression that all our difficulties were in the realm of ideas. One of the very serious problems when the Tribunal first met was what is should wear. And there were also grave problems as to the costume of the prosecutors. It is almost universal in Europe that advocates at the bar of a court wear gowns to symbolize the detachment with which they are supposed to act. The Soviet Delegation to the Court opposed the wearing of gowns as being "medieval." They preferred uniforms and wore uniforms of military character throughout. The British judges wore their gowns but decided to forego their wigs. The American judges wore their robes, as did the French. The German lawyers invariably appeared at the bar in robes, some of them of very striking colors. The Russian prosecutors all wore uniforms while the American, French and British wore uniforms, if in the service and otherwise civilian attire. But leading jurists on two of the Delegations that visited Nurnberg from occupied countries expressed surprise—and, I may say, something like disappointment—that we of the prosecution should address the court except in robes. They did not understand the informality with which our bar carries on its functions. The reason that I mention this is that throughout Europe the office of advocate is a most dignified and responsible office and the man who is honored by it is expected in every appearance and move to make a return to his profession of that dignity and respect. And this comparison of lawyers is not wholly irrelevant when we are considering comparative law.

I can sum up my experience shortly. The points of agreement between the different legal systems of the world are far more impressive and far more important than their points of disagreement. In all lands our profession struggles with problems that are much the same and they work out answers that are suprisingly alike. We are, after all, not merely members of local groups. We are members of a worldwide profession whose quest is justice and whose guide is law.

The President:

Ladies and gentlemen, I am sure that the sight of this great

crowd—which surpasses anything in our history—speaks louder than anything I might say in appreciation of Justice Jackson's appearance here this afternoon. I know how grateful you are for this very interesting and stimulating address, and that you join me in saying to him, "Many, many thanks."

Before adjourning to the cocktail room, may I remind you that tomorrow morning, in this room, we will have a joint session with the Judicial Section. We will have three distinguished speakers: Judge Samuel Seabury; Mr. Charles Fahy, former Solicitor General of the United States and Chief Legal Adviser to the American Delegation in the United Nations; and Dr. Ivan Kerno of Czechoslovakia, one of the most eminent lawyers of Europe.

The meeting now stands adjourned until tomorrow morning at ten o'clock.

At 4:40 P. M., the meeting was adjourned until Saturday, January 25, 1947, at 10 A. M.