

FOR ME, ROBERT H. JACKSON IS ALIVE

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As one without a law degree and with no credentials as a historian, it is a great honor for me to pay a layman's tribute to the most eminent alumnus of the Albany Law School: Robert H. Jackson. He is justly famous as one of the most eloquent Justices of the Supreme Court of the United States, but perhaps no judicial comments have ever equaled his opening and closing statements at the Nuremberg trials. His determination to make those trials reflect our highest principles of justice and morality is incomparable. Robert Jackson has been gone for fifty years, but his legacy lives on. With new and different war crimes trials on the front pages of every newspaper, Jackson's legacy takes on ever more powerful meaning.

I was Chief Interpreter for the American prosecution at the Nuremberg trials under Justice Jackson. I interpreted several of his pre-trial interrogations of such arch criminals as Hermann Goering, Joachim von Ribbentrop and Albert Speer. I heard him in court. Here I want to pay tribute to Robert Jackson, who inspired me to believe that my work at the Nuremberg trials was a contribution to human rights and the morality of nations, not an act of victor's vengeance visited upon the defeated.

Robert Jackson sparked the creation of a legal framework for the first trial ever of leaders of a sovereign nation. Before 1945,

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virtually all accused of war crimes escaped serious punishment. For instance, after World War I the victors identified over 900 Germans as perpetrators of serious atrocities in lands occupied by the Kaiser's army, but less than twenty were brought to trial before a German court. None received sentences befitting their crimes and most were released early in their jail terms.

Justice Jackson had to cope not only with the futility of leaving the prosecution of war criminals to their own government, but also he had several additional challenges. As a result of the unconditional surrender of Nazi Germany there was no sovereign nation to try its criminals, even if that course had been advocated. The so-called Allied Control Council, an arm of the United States, Great Britain, the Soviet Union and France, assumed all powers of sovereignty for defeated Nazi Germany. This included the legislative functions, executive powers and supervision over the judiciary. The Allied Control Council had the official task of organizing war crimes trials and creating the law that would govern.

The leaders of the "Big Three" (the United States, the Soviet Union and Great Britain) had expressed preliminary opinions about dealing with Nazi war criminals. At one point Marshall Stalin had suggested the summary execution of 50,000 Nazis, Churchill had suggested the shooting of fifty Nazi leaders and President Roosevelt had received a great variety of advice on how to deal with the surviving Nazis. Though some of the earliest recorded opinions about how to deal with Nazi Germany's leaders were not those of Robert Jackson, his view prevailed: that the Nazi leaders were to be tried essentially under procedures governing American domestic trials. The law under which they were to be tried, however, had to be created, or at least enunciated.

President Roosevelt died before the unconditional surrender of Germany, but President Truman, recognizing Jackson's stature and unparalleled passion to prosecute war crimes, named him Chief American Prosecutor. His first task was to achieve consensus with the other members of the Allied Control Council on many difficult matters. This included the construction of the legal framework which would govern the trial—no small task since existing law was clearly inadequate and since the legal systems of the four nations differed widely as to procedure. Other issues to be decided were the authority of judges and the role of prosecutors and defense lawyers. The four nations had to agree on whom to indict, the locale of the

court and the rules of procedure. Jackson insisted that rights for defendants should be most closely patterned after those prescribed by our American Constitution and the Bill of Rights.

Many books have been written about the difficult and drawn out negotiations between the victor nations. The most important chapters describe the crucial role that Robert Jackson played in enlisting the cooperation of his fellow victors of World War II to create the governing law and courtroom procedures for the Nuremberg trials. While victims and victors alike impatiently expected instant punishment of the Nazis, Jackson held out for a trial, which would make unimpeachable history. A myriad of problems had to be solved in the astonishingly short time between the unconditional surrender of Germany, finalized on May 9, 1945, and the London Declaration of August 8, which created the International Military Tribunal, the official name for the Nuremberg trials. The site chosen, Nuremberg, was a city known as the site of Hitler's pagan "party days" and the stage from which the infamous "Nuremberg Laws" were promulgated, which terminated the civil rights of Jews in Germany. Actually, the reason for the choice was that Nuremberg, alone of all German cities, had an intact jail and a restorable courthouse.

The Tribunal was to operate under a charter, promulgated by the Allied Control Council, comprised of statutory law defining the crimes to be prosecuted at Nuremberg and the procedures to be used. For better or worse, this was the legal basis for the Nuremberg trials. Justice Jackson was even-handed in relying on precedent in International Law as far as possible, but unafraid to plough new ground—based on customary morals never before codified. This of course followed common law practice which allows courts to rule where no precedent exists, with the understanding that higher courts or constitutional remedies can confirm, reverse, or amend such rulings.

This pioneering in the law, which Robert Jackson undertook knowingly and responsibly, gave rise to several difficulties that have haunted the record of the Nuremberg trials. First, to convict the principal Nazis, who themselves had never murdered anyone, a count of "conspiracy" to commit criminal acts was introduced, a legal concept anchored only in American jurisprudence. Since the indictments were based on a charter, the governing legal framework created after the crimes were committed, the defendants and their lawyers, schooled strictly in statutory law like "Le Code Napoleon,"

were expected to cry *ex post facto* or *nolle prosequi*. Here is what Jackson said in his opening statement:

The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.

This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of seventeen more, to utilize International Law to meet the greatest menace of our times—aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched....¹

In justice to the nations and the men associated in this prosecution, I must remind you of certain difficulties which may leave their mark on this case. Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole Continent, and involving a score of nations, countless individuals, and innumerable events....²

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The world-wide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the first World War, we learned the futility of the latter course....We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to

¹ ROBERT H. JACKSON, THE NÜRNBERG CASE 30–31 (1947).

² *Id.* at 32.

put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.³

Has there ever been a finer statement of purpose, or a more penetrating recognition that the law is the servant of freedom and human rights?

There was no appellate court to review the Nuremberg trials. The Control Council, which had promulgated the Charter, renounced authority to set aside any findings of the Nuremberg Court and kept only the authority to review and moderate sentences imposed on defendants. None were changed. The United Nations, years after the Nuremberg trials, adopted the Genocide Convention and other treaties, which endorsed some of the law that was pioneered at Nuremberg. Other charges, on which the defendants were convicted, however, remain as precedents that have never been validated or set aside by any higher authority than the Nuremberg Court. What motivated a distinguished lawyer, a Justice of the United States Supreme Court, a representative of the most powerful nation on Earth, a man who was concerned to have his nation perceived as moral, to venture into such legal *terra incognita* to prosecute war criminals?

On a human level, it was surely his belief in freedom and democracy and the responsibility he assumed to be true to the Founding Fathers of our country. Robert Jackson saw the law not as an end in itself, but as the primary tool with which to protect human rights, to bulwark human freedom and to punish "big men" for crimes for which "little men" were invariably sentenced.

I was twenty-two when I served at Nuremberg and I believed that I was contributing to the progress of world law. Robert Jackson was my inspiration. If less than a year of service produced such loyalty in me, and one year at Albany Law School produced such brilliance and courage, what will three years do for those of you who stand in the shadow of this great man?

I hope, from the bottom of my heart, that three years at Albany Law School will produce leadership like that of Robert H. Jackson, even if his eloquence will never be duplicated. The 60th anniversary of the start of the Nuremberg trials is approaching at a time when Slobodan Milosevic remains in the dock and Saddam

³ *Id.* at 33-34.

Hussein is being held for trial. Though the court at The Hague and the court yet to be established in Iraq will operate under law unlike that which governed the Nuremberg trials, their legacy will be ever present. It is the majesty of the law—ever more noble and desirable than the rule of man—and also our veneration for the principles of human decency that will be on trial.

Since Robert Jackson cannot now guide us in person, we can venerate his leadership and adapt it to our times. I hope that the students at Albany Law School will strive to emulate the example of its most revered alumnus: Robert H. Jackson, an eloquent voice and a foremost fighter for the right of man to be free.