

## ROBERT H. JACKSON: NUREMBERG'S ARCHITECT AND ADVOCATE

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It is a great privilege for me to join in this celebration of the life of Robert H. Jackson. I have this privilege because I served under Justice Jackson, the United States Chief Prosecutor for the International Military Tribunal at Nuremberg ("IMT" or "Tribunal"), in 1945–46. So much has been written about his service as chief prosecutor that I can attempt no more than to remind you of his approach to Nuremberg and his priorities for his work there. Since that work was addressed in part to posterity it is useful, from time to time, to recall Jackson's accomplishments and aspirations at that trial.

Justice Jackson considered his work in connection with Nuremberg the greatest accomplishment of his life.<sup>1</sup> His contributions there went far beyond those of a conventional prosecutor. He shaped what became known as the London Charter ("Charter"), agreed to by France, the Soviet Union, the United Kingdom and the United States on August 8, 1945. The Charter set forth the offenses over which the IMT would have jurisdiction and established the general procedural framework for the trial.<sup>2</sup> He also was involved in the selection of the American judges who were to be members of the Tribunal.<sup>3</sup> He energized the American Army's

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<sup>1</sup> Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG, at vi, xxxvii (1954).

<sup>2</sup> Charter of the International Military Tribunal, reprinted in ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, at 420 (1949) [hereinafter IMT Charter].

<sup>3</sup> TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 94 (1992).

search for documentary and other relevant evidence. He helped pick the courtroom, which would be equipped for simultaneous translation in four languages during the trial. He had the responsibility for establishing a large scale law office in a city that Allied bombing had turned into heaps of rubble. Finally, he had the ultimate responsibility for the recruitment and organization of a staff to deal with the mass of evidence that eventually flowed to the prosecution. Jackson later said, amusedly: "This is the first case I have ever tried when I had first to persuade others that a court should be established, help negotiate its establishment, and when that was done, not only prepare my case but find myself a courtroom in which to try it."<sup>4</sup>

The context out of which the Nuremberg trials arose will help us understand Jackson's approach there. Before Germany's surrender, reliable evidence had shown: first, ruthless pre-war Nazi assaults on Jews, Christian churches, independent labor unions, opposition parties and dissidents in Germany, as the Nazis achieved and consolidated their power; second, deliberate and indisputable aggression against Czechoslovakia, Poland, most of the rest of Europe and then against the U.S.S.R. and the United States; third, concomitant to those wars, the systematic and massive pillaging, plundering and devastation of a continent, and the deportation of millions of slave laborers, all centrally organized; and fourth, deliberate mistreatment and execution of prisoners of war, and the murder of millions of Jews, Slavs, Gypsies and dissidents. The concentration camp and slaughter of Jews became the emblems of the Nazi regime. World War II has understandably been called "the largest single event (and the Holocaust the greatest crime<sup>5</sup>) in human history."<sup>6</sup>

Many of those horrors had, of course, been war crimes. As Peter Calvocoressi observed: "In the eyes of the law not all is fair in war, whatever may be the case in love."<sup>7</sup> For a long time, war crimes had resulted in individual punishment. But given the human misery resulting from Nazi aggressions and modern warfare in general, it

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<sup>4</sup> Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488, 503 (1955) (quoting Gordon Dean, *Preface* to ROBERT H. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS xiii (1946)).

<sup>5</sup> Leopold Gratz, President of the Austrian Parliament, quoted in Arthur Spiegelman, *Head of Austrian Parliament Meets Jewish Leaders*, REUTER LIBR. REP., Sept. 15, 1987 (on file with author).

<sup>6</sup> JOHN KEEGAN, THE SECOND WORLD WAR, Foreword (1990).

<sup>7</sup> PETER CALVOCORESSI, THREADING MY WAY 132 (1994).

was not sufficient, in Jackson's view, to file charges based solely on misconduct during the war; it was necessary also to condemn aggressive war, as a violation of international law, and to subject participating leaders of aggressor states to individual punishment.

Jackson achieved this objective with the inclusion of Article 6(a) of the Charter. That article provided jurisdiction for the Tribunal over Crimes against the Peace, "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."<sup>8</sup> This article was included despite initial objections from the French and Soviet representatives. The French had urged that Article 6(a) violated the general rule against retroactive legislation —an argument later adopted by the German defense team and many other critics of the Nuremberg trials. The French also "were puzzled by the [Anglo-American] concept of a common plan or conspiracy," which was foreign to their code-based jurisprudence.<sup>9</sup> The Soviets had sought to avert any general condemnation of aggressive war by restricting Crimes against the Peace to such offenses committed by the Nazis. Jackson, desiring to establish a general principle applicable in the future to all nations, including the Allies, succeeded in avoiding that limitation.<sup>10</sup>

More conventionally, Article 6(b) of the Charter dealt with "War Crimes," described as "violations of the laws or customs of war," including, for example, enslavement of civilians, pillage and plunder.<sup>11</sup> Article 6(c) addressed:

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime

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<sup>8</sup> IMT Charter, *supra* note 2, at art. 6(a)

<sup>9</sup> See William M. Jackson, *Telford Taylor Panel: Critical Perspectives on the Nuremberg Trials*, 12 N.Y.L. SCH. J. HUM. RTS. 493, 495 (1996).

<sup>10</sup> See TAYLOR, *supra* note 3, at 499–500. Such a general condemnation would have been uncomfortable for the Soviets in light of their actions in Finland and Poland. Moreover, they may have objected to a general condemnation of aggression in light of the doctrinaire Communist distinction between "imperialist" and "people's" wars. They acquiesced to such a general condemnation in return for an agreement that the Tribunal's jurisdiction be limited to crimes of the Axis powers. The Russians agreed because Jackson threatened that the Americans would abandon the Nuremberg project and try captives in national, rather than international, tribunals if aggressive wars were not generally condemned.

<sup>11</sup> IMT Charter, *supra* note 2, at art. 6(b).

within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>12</sup>

The indictment filed by the prosecutors generally followed the provisions of the Charter.

There was an explicit mention of conspiracy, or “common plan,” in Article 6(a), but not in the other subsections of that article. The Charter rejected acts of state and superior orders as defenses, which, as Jackson observed, in combination, would have provided all the defendants with immunity. The Charter did provide, however, that superior orders could be pleaded in mitigation. It also authorized the Tribunal to declare organizations, such as the German Schutzstaffel (SS), illegal. About those organizational provisions, I am going to say only that they created overwhelming practical and moral problems and were of little use.<sup>13</sup>

Count one, conspiracy to commit Crimes against the Peace, was viewed as the core of the entire case and was the primary responsibility of the U.S. prosecution. In discharging that responsibility, Jackson decided to rely primarily on documents generated by the Germans, who had a propensity to keep extensive records. A documentary case, although drabber than one relying primarily on live testimony, would avoid the risk of mischief through propaganda and doubts about the credibility of German witnesses testifying in support of the prosecution. As a result of this decision by Jackson and his staff, the prosecution’s case was established largely by German documents, the authenticity of which was rarely challenged, although occasionally their accuracy was questioned by the defense.

Although the Charter expressly provided that its provisions were not subject to challenge during the trial, Jackson, in his opening statement, addressed important criticisms that had been mounted against some of the Charter provisions and the idea of the trial itself. Resort to a trial had been attacked as exploiting judicial forms in order to validate preordained and political decisions. For example, Chief Justice Stone condemned the trial, in private correspondence, as a “high grade lynching party.”<sup>14</sup> The explicit or

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<sup>12</sup> *Id.* art. 6(c).

<sup>13</sup> See Harold Leventhal et al., *The Nuernberg Verdict*, 60 HARV. L. REV. 857, 887–902 (1947).

<sup>14</sup> Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193, 212 (1953). For a fuller exposition of the Chief Justice’s disapproval of the trial and Jackson’s role, see *id.* at 209–14. Stone was also troubled by the

implicit preference of such critics was “executive punishment,” whereby some Nazi leaders would be selected for execution, without affording them an opportunity to hear and respond to the charges against them. Jackson rejected this plan as repugnant to our ideas of due process. The nature and consequences of the trial, including the complete acquittal of three defendants and the partial acquittal of other defendants, completely validate, in my view, Jackson’s insistence on a trial rather than summary punishment. As Jackson famously and eloquently put it in his opening statement: “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.”<sup>15</sup>

A trial, moreover, would subject the prosecution’s evidence to the responses and criticisms of the defendants and thereby create a useful record of the Nazi regime, its indisputable aggressions and its monstrous atrocities.<sup>16</sup> Such a record would presumably foreclose plausible denial and avert martyrdom for the major Nazi leaders. The evidence of the Holocaust was so compelling in 1945 that I doubt that anyone foresaw today’s so-called Auschwitz lie—the recent denials that the Holocaust actually happened. The trial record surely serves as a corrective for such fantastic revisionism.

The heaviest critical fire was directed at the Charter provision that condemned Crimes against the Peace and imposed individual punishment for committing them. Jackson responded to his critics by noting that the character of international law precluded the strict and automatic application of the rule against retroactivity. That rule flourished in comparatively well-developed legal systems, but not in primitive or immature ones. Thus, during the early development of our common law, offenses like killing and robbery, that had shocked the moral sense of the community, had been retrospectively transformed into crimes for which individual punishment was exacted. Similarly, individual punishment for war crimes had become an established feature of international law without any express provisions for individual punishment in organic documents such as the Geneva Convention. International law was,

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burdens imposed upon other justices as a result of Jackson’s absence from the Court. See William H. Rehnquist, Remarks of the Chief Justice at the American Law Institute Annual Meeting (May 17, 2004), available at [http://www.supremecourt.gov/publicinfo/speeches/sp\\_05-17-04a.html](http://www.supremecourt.gov/publicinfo/speeches/sp_05-17-04a.html) (last visited Nov. 12, 2004).

<sup>15</sup> ROBERT H. JACKSON, THE NÜRNBERG CASE 31 (1947).

<sup>16</sup> HARRIS, *supra* note 1, at xxxvi.

at best, an underdeveloped system, lacking a legislative body, and, like the early common law, dependent on case-by-case development. The strict and automatic application of the principle against retroactivity in such a system would have created too large a gap between the law and the developing moral sense of the world community. In the end, the key argument is that the principle against retroactivity was a principle of justice and that the reasons behind it were totally inapplicable to the Nazi leadership.<sup>17</sup>

I was once convinced that the foregoing considerations trumped the *ex post facto* objection, but I am now more doubtful about that conclusion. The international formulations relied on by Justice Jackson were silent about individual responsibility for aggressive war. Indeed, such responsibility was disclaimed during the confirmation discussions in the United States Senate of the Kellogg-Briand Pact, a pact on which Jackson heavily relied. Thus, Senator Borah, the chairman of the Senate Foreign Relations Committee, had declared that the pact was an appeal solely to the conscience of the world and that its breach was not to lead to any punitive consequences.<sup>18</sup> Henry L. Stimson, Kellogg's successor as Secretary of State, had expressed similar views.<sup>19</sup> Subsequently, when Stimson was Secretary of War under President Franklin D. Roosevelt, he initially opposed the idea of Crimes against the Peace.<sup>20</sup> Finally, the practice of states after the Pact's ratification was not consistent with the declarations concerning the idea of personal accountability for aggressive war.<sup>21</sup> On the contrary, for example, the Soviets had, in connection with the German aggression, annexed Polish territory and had engaged in aggressive war against the Baltic States and Finland.<sup>22</sup> This conduct was hardly consistent with the notion that "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."<sup>23</sup> Despite these legal

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<sup>17</sup> JACKSON, *supra* note 15, at 121–23.

<sup>18</sup> 70 CONG. REC. 1062, 1065 (1928) (statement of Sen. Borah). Determination when force was needed for self-defense is a matter for the individual conscience of state leaders.

<sup>19</sup> George A. Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 31 (1947).

<sup>20</sup> TAYLOR, *supra* note 3, at 37. For a fuller discussion of the evolution of the American position on the criminality of aggressive war, see Jonathan A. Bush, "The Supreme . . . Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324 (2002).

<sup>21</sup> See Finch, *supra* note 19, at 35.

<sup>22</sup> Wilbourn E. Benton, *Introduction to NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS* 16 (Wilbourn E. Benton & Georg Grimm eds., 1955).

<sup>23</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2)

objections, it is plain that, as Rebecca West observed: "It is the virtue of the Nuremberg trial that it was conceived in hatred of war, and was nurtured by those starved of peace."<sup>24</sup>

Another ex post facto problem was raised by the Charter's provisions concerning Crimes against Humanity insofar as they covered pre-war mistreatment and persecutions of Jews, Gypsies and others. Jackson did not directly address that retroactivity issue in his opening statement. Furthermore, the statement did not clearly separate: a) such pre-war offenses that were linked to the master plan for aggression and b) those pre-war atrocities that were independently criminal under the Charter because of their "magnitude and savagery."<sup>25</sup> Lord Shawcross, who had been the British Chief Prosecutor at Nuremberg, later referred to the ex post facto concern generated by a broad view of Crimes against Humanity under the Charter that would have encompassed pre-war German atrocities. He pointed to the 1933 International Conference for the Unification of Criminal Law held in Madrid, which rejected Raphael Lemkin's proposal to outlaw genocide. Shawcross explained that that rejection was grounded in concern about retroactivity.<sup>26</sup> The ex post facto concern, and the concern about encroachment on domestic matters with respect to Crimes against Humanity, apparently continued to have vitality in some quarters at Nuremberg.<sup>27</sup>

Perhaps such concerns also led to the brief treatment of Crimes against Humanity in the Tribunal's Judgment. In under half a page of its 166 page Judgment, the Tribunal, while disavowing any general declaration of the scope of such crimes, concluded that under the Charter it had jurisdiction over Nazi pre-war atrocities, regardless of their magnitude, only if proof established the link between those atrocities and Crimes against the Peace. The Tribunal determined that the proof of such linkage was inadequate. As for wartime Crimes against Humanity under the Charter, the Tribunal determined that such offenses had been linked to the master plan and had also constituted War Crimes. Plainly, the

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(1987).

<sup>24</sup> Rebecca West, *Foreword to AIREY NEAVE, ON TRIAL AT NUERMBERG* 7 (1978).

<sup>25</sup> JACKSON, *supra* note 15, at 63.

<sup>26</sup> Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 146–47 (1947) (citation omitted).

<sup>27</sup> See PETER CALVOCORESSI, *NUERMBERG: THE FACTS, THE LAW AND THE CONSEQUENCES* 57–58 (1948) (quoting the statement of the British Chief Prosecutor, which had emphasized that misconduct would be a crime against humanity only if it was connected with Crimes against the Peace or War Crimes).

Tribunal's approach deprived Crimes against Humanity of any separate significance under the Charter.<sup>28</sup>

Jackson's closing statement wove together the evidence against the Nazi system and the evidence of the individual defendants' roles in the planning and execution of the crimes within the Tribunal's jurisdiction. It was an eloquent summary of the evidence before the Tribunal and a devastating assault on various defenses raised by individual defendants. The masterful sense of history and the power of his opening and closing statements made a unique contribution to the trial and made Jackson's disappointing cross-examination of Goering an easily forgettable detail. The last paragraph of his closing statement illustrates his forensic craftsmanship. Quoting from Shakespeare's *Richard III*, Act I, Scene II, he declared,

It is against such a background that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of this trial as bloodstained Gloucester stood by the body of his slain King. He begged of the widow, as they beg of you: 'Say I slew them not.' And the Queen replied, 'Then say they were not slain. But dead they are....' If you were to say of these men that they are not guilty, it would be as true to say there has been no war, there are no slain, there has been no crime.<sup>29</sup>

Neither Jackson's opening nor closing statements, nor the Tribunal's Judgment, dealt with the central difficulty highlighted by Nuremberg: the law was applied only to the defeated. Under the Charter, the victors' conduct was off limits. But to those who looked beyond the confines of the Charter, the "victor's justice" was, of

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<sup>28</sup> This was the result of the Tribunal adopting a substantially narrower interpretation of the notion of conspiracy than that advocated by the prosecution. See Leventhal et al., *supra* note 13, at 868–70. Defendants Streicher and Von Schirach were the only defendants convicted solely of Crimes against Humanity (count 4). The indictment, however, had not charged them with War Crimes (count 3). The restrictive construction of Crimes against Humanity was abandoned in Control Council Law No. 10, which governed "denazification" and "Subsequent Proceedings," i.e. other trials held at Nuremberg by our own government, as distinguished from the international trial. See Telford Taylor, *The Nuremberg War Crimes Trials*, reprinted in TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 125 (1949). Nonetheless, it was uncertain whether that law extended jurisdiction beyond that exercised by the International Military Tribunal. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 50–51 (1997).

<sup>29</sup> JACKSON, *supra* note 15, at 163.

course, troublesome. For example, the Soviets who sat on the Tribunal were not compelled to answer for Soviet aggression against Poland, the Baltic States, or Finland. Nor were the United Kingdom and the United States required to face in any forum the questions raised by the bombings of Dresden, Hiroshima, or Nagasaki. For some, the unequal application, compounded by the Soviet presence on the Tribunal, compromised the morality of the trial. But to say that the law applied unequally is not to say that the actions were equal, or that the Allies' bombings should necessarily have been judged to violate international law, but only that the victors were not called upon to justify actions that many found troubling. To others, the Nazis' monstrous barbarities, and the fact that it was their aggressions that had precipitated the ensuing horrors, warranted the apparently unequal application of the law.

Furthermore, Nuremberg merely reflected this troubling inequality; it did not produce it. It was the product of an underdeveloped and fragile international system. Long before Nuremberg, the victor had applied an unequal standard in dealing with traditional war crimes. The victor has punished the misconduct of the enemy; severe misconduct by victorious forces has gone largely unpunished. Unless we were to comb our own ranks for major violators of the rules of war, the logic of the inequality argument would have required us to give the Nazis complete immunity for all their War Crimes as well as their Crimes against the Peace. Even the critics shrank from that position. We were justified in rejecting it because of the overwhelming depravity of the Nazis and because they had launched wars of aggression.

The short term consequences of Jackson's work at Nuremberg are relatively clear. First, he helped demonstrate that an international trial, which melded the differing procedural traditions of the Anglo-American and continental systems, was feasible. Nuremberg also demonstrated that such a trial could be conducted fairly with due regard for the elements necessary for the defendants to make their case within the substantive framework established by the Charter. Polling indicated that most Germans shared that viewpoint.<sup>30</sup>

Jackson's work enlarged the scope of international law so that it

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<sup>30</sup> RICHARD L. MERRITT, DEMOCRACY IMPOSED: U.S. OCCUPATION POLICY AND THE GERMAN PUBLIC, 1945–1949, at 159 (1995). In a survey taken in October 1946, soon after the IMT's Judgment, seventy-eight percent of Germans in the American Occupation Zone said that the trial had been conducted fairly and only six percent felt that it had been conducted unfairly. *Id.*

addressed the responsibility and accountability of individuals and not merely the abstraction of the sovereign state. His principle purpose, the proscription of aggressive war and the punishment of architects and major executors of such wars, was absorbed into the body of international law. Twenty-three nations adhered to the London Charter, and the principles of the Tribunal's Judgment were unanimously accepted by the General Assembly of the United Nations on August 2, 1950. His work gave support to the creation of a standing court to deal with crimes against international law. Although aggressive war was condemned as an international crime by article five of the statute providing for the establishment of such a court, the effectiveness of that provision was suspended for at least seven years pending agreement over what constitutes aggressive war.<sup>31</sup> Although, conceptually, the IMT in effect deprived Crimes against Humanity of any significance under the Charter, Nuremberg's record of German atrocities promoted the expansion of humanitarian law through the Genocide Convention as well as other agreements and declarations.<sup>32</sup> It is my hunch that Nuremberg's record also encouraged national governments and their citizens to soften or dismantle forms of discrimination that had previously victimized minorities.

Naturally, Jackson did not expect Nuremberg to transform the anarchic area of international relations so as to eliminate aggressive war entirely, or to obliterate the dark forces that lead to the mass slaughter of fellow citizens and neighbors of different color, religion, or opinion. Although there was no war between major powers in the second half of the Twentieth Century, there were catastrophic violations of humanitarian law and serious outbreaks of aggression. This is not the occasion to deal with those tragic events or the trials that followed some of them. Instead, it is appropriate to recall Jackson's accomplishments and hopes at

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<sup>31</sup> Rome Statute of the International Criminal Court, July 17, 1998, arts. 5(1)(d), 5(2), 121, 123 U.N. Doc. A/CONF. 183/9 (1998), reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 40, 97–98 (M. Cherif Bassiouni ed., 1998). The statute became effective upon its sixtieth ratification, but the United States has not ratified the treaty, and consequently, has not acceded to the ICC. Moreover, the court's jurisdiction over the crime of aggression is limited to those countries that accede to a future amendment to the Rome Statute that defines that crime. Regarding the difficulties of such a definition, see Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986). The Charter's conception of War Crimes and Crimes against Humanity provides a foundation for an expanded and more explicit definition of such crimes in the Rome Statute.

<sup>32</sup> Benjamin Ferencz, *Nuremberg: A Prosecutor's Perspective*, reprinted in WAR CRIMES: THE LEGACY OF NUREMBERG 35 (Belinda Cooper ed., 1999).

Nuremberg. He hoped to strengthen the legal and moral foundations for proscribing Crimes against the Peace and Crimes against Humanity by imposing personal responsibility on major leaders for violating those laws. He sought to change a culture that supported or was indifferent to such transgressions. He hoped that these changes in law enforcement and culture would also deter potential violators, although he did not spell out a theory of effective deterrence.<sup>33</sup> In short, he sought to contribute to the prospect of a more peaceful and less inhumane world.

Soon after the Tribunal issued its Judgment, Justice Jackson delivered a memorable address to the Canadian Bar Association. He dealt with, among other things, Nuremberg's accomplishments and, more importantly, its challenge to future generations. I can think of no better conclusion here than his conclusion there:

It is possible that strife and suspicion will lead to new aggressions and that the nations are not yet ready to receive and abide by the Nuremberg law. But those who gave some of the best effort of their lives to this trial are sustained by a confidence that in place of what might have been mere acts of vengeance we wrote a civilized legal precedent and one that will lie close to the foundations of that body of international law that will prevail when the world becomes sufficiently civilized.<sup>34</sup>

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<sup>33</sup> For a discussion of the problems of deterrence and counter-deterrence, see Leventhal et al., *supra* note 13, at 902–06 and Bernard D. Meltzer, *Remembering Nuremberg*, OCCASIONAL PAPERS FROM THE LAW SCHOOL, THE UNIVERSITY OF CHICAGO No. 37 (1995), reprinted in WAR CRIMES: THE LEGACY OF NUERMBERG 27 (Belinda Cooper ed., 1999).

<sup>34</sup> Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A.J. 813, 887 (1949).