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OF

The Virginia State Bar Association

HELD AT

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SECOND DAY.

EVENING SESSION.

August 8, 1947.

The Association was called to order at 9 o'clock P. M. by the President.

The President: May I express my personal thanks to you for your promptness and the very generous audience we have here tonight. I know it is a sincere indication of the appreciation we feel for our distinguished speakers.

My official duty this evening is a very pleasant one since it involves the presentation of a distinguished American jurist who really needs no personal introduction to any group of Virginia

lawyers. He is the Senior Justice of the United States Circuit Court of Appeals for this the Fourth Judicial Circuit whose career upon the bench has been a model of rectitude and wisdom. His personal charm and gentle personality has endeared him to every member of the bar. We welcome him among us and acknowledge our appreciation of his interest in and support of our endeavors as an organization interested in the administration of justice.

He knows as well if not better than anyone else what the distinguished speaker of the evening, who styles himself as a country lawyer, did at a certain international court since he sat as an Associate Judge on that historic tribunal. It seemed to me, therefore, most fitting that he should be asked to present the distinguished speaker of the evening and it is my great privilege and pleasure to present to you the Hon. John J. Parker, Presiding Justice of the United States Circuit Court of Appeals for the Fourth Circuit—Judge Parker. (Applause)

Judge Parker: Mr. Chairman, ladies and gentlemen: I thank Mr. Gay for his gracious presentation and I thank you for this opportunity of being with you again. If I may take a moment from the introduction of the speaker, I should like to say how much I enjoyed my visit with you, I believe it has been sixteen years ago, when we met at White Sulphur and then nine years ago when we met at Hot Springs, and I think it was very gracious of you to allow me to come here at this meeting and join with you in extending a welcome to the great American judge who honors us with his presence this evening.

It is a truism of history that out of every great conflict there has come something that has affected the life of mankind. The wars of Julius Caesar laid the foundation for the Roman Empire and gave the world the great concept of the State. The wars of the revolution and the Napoleonic wars were followed by the reorganization of Europe and the birth of a flourishing liberal democracy.

I ask myself what has come out of this great conflict through which we have gone and it seems to me that the answer is that

we are getting some sort of a world order based on law. Gradually it is coming, but the evidence is unmistakable that it is on the way. First was the adoption of the United Nations charter at San Francisco which, whatever else it means, at least means this, that we have prepared a world forum in which the conscience of mankind can express itself. Then came the adherence by the Senate of the United States to the constitution of the World Court which means that the force of the mightiest nation in the world has been thrown behind the principle of the judicial settlement of international controversies; and last, but not least, came the successful termination of the trial of the major war criminals at Nuernberg which means, whatever else it means, that the nations of Christendom have branded aggressive war as criminal and have declared that there shall be personal accountability for crime of an international character.

I shall not, of course, take up your time this evening talking about the Nuernberg trial, but I would like to say that it seems to me to be one of the outstanding events of modern history, and for three reasons. In the first place, it was a triumph of international cooperation. It is little short of a miracle that the trial should have been conducted in accordance with the highest standards of Anglo-Saxon jurisprudence when it had to be conducted in four languages by representatives of nations speaking different languages and accustomed to different systems of law and different systems of procedure. It was a triumph of international cooperation that that trial could be conducted at all; it was a triumph of international justice. Crimes had been committed on an international scale which shocked the conscience of mankind, which violated the elemental decencies of human nature and struck at the very foundation of human society. Civilization, I think, as we know it could not have lived if the men responsible for those crimes had not been brought to the bar of justice and held accountable. Lastly, it was a triumph of international law. Nazi leaders of Germany had made aggressive war in violation of solemn treaties and in the course of which they had violated all of the standards that had been painfully built up by the human race through the centuries. To

bring to trial a bunch of men who were guilty of that violation of international law would do more to establish international law as a binding force on the world than a thousand paper pronouncements.

Well, at Nuernberg we saw all of these things and more. It was a great historical inquiry into the causes of the great world war which showed by evidence so clear that the wayfaring man, though a fool, could not err: There is where the guilt for this war lay. It was a great public autopsy on a totalitarian state which showed in meticulous detail the course of the disease that destroyed a great people and led to the ultimate downfall of a great nation. It underwrote the great principle the foundations of the state are not material and physical; they are spiritual and moral, and when these spiritual and moral foundations are destroyed no nation can live or ought to live.

We are fortunate in having with us this evening the man who, more than any other man living, made this great trial a success. If there have been those who in the beginning doubted whether he should leave his place on the Supreme Court to carry on this work, no man of sense today in the light of what he has accomplished doubts the wisdom of what he did.

If he had not been willing to undertake the work it never could have been accomplished for, mind you, this was an American program. If it was to be successful it had to be carried on by an American lawyer and no lawyer could have approached the task where he had to deal with the Lord Chancellor of England and the leaders of the bar in France and Russia and leaders of the judiciary in France and Russia, no American lawyer could have approached the task with any hope of success where he was dealing with men to whom rank means so much unless he had had the status and the prestige of a Justice of our highest court, and not just any Justice of the Supreme Court could have done it because the task was a task requiring vision, it was a task requiring learning, it was a task requiring courage and industry and, above all, it was a task requiring that wisdom and versatility which comes only to a man who has had a wide and successful practice at the bar.

Mr. Justice Jackson was preeminently the man to undertake the task. It would have been easy for him to draw the robes of judicial office about him and say that since he was a judge someone else must undertake it. That would have been the easy and the selfish thing to do and most men, I think, would have taken that course, but Mr. Justice Jackson is the type of man who would have gone down to his grave with contempt for himself if, faced with a challenge of this magnitude, he had chosen the easy way. He has done something the magnitude of which only nations yet unborn will be able properly to appraise, but those who are living today know that he has wrought mightily for the welfare of our country and for the cause of peace and he is entitled to the thanks of every loyal American and of every man who looks forward to the peace of the human race. (Applause)

It is my pleasure, not to introduce because he needs no introduction, but to present to you a great lawyer, a great American, a great man. As Solicitor-General of the United States, as Attorney-General of the United States, as Justice of the Supreme Court, as the representative of the United States in the founding of the International Military Tribunal, he has brought credit to the American lawyer, he has brought honor to our Republic, he has wrought mightily in the realm of world peace. I present to you a man whom we all honor and who has probably been honored by more foreign nations than any other American lawyer since the founding of the Republic; a great Justice of our Supreme Court, a great lawyer, a great friend of us all. He honors us by taking as his subject this evening: "A Country Lawyer at an International Court"—Mr. Justice Jackson (Applause)

Mr. Justice Jackson: Judge Parker, ladies and gentlemen of The Virginia State Bar Association:—If I cannot claim to be at home at a meeting of The Virginia State Bar Association, at least I refuse to be a stranger in one. As a resident of Fairfax County since I went on the court my neighbors there voted me an honorary membership in the local bar association, but I have an even better claim to be among them. I was wandering in among

the judges today, hearing the Supreme Court get dusted off (laughter) and I don't think everyone knew what good claim I had to be present.

Out in Fairfax County where we live the name is carried in the telephone directory as Jackson, Justice. One morning the telephone rang and we were asked about how to deliver a telegram to a man whom we happened to know but who had just moved into the neighborhood. Of course, we gave the information, but when they delivered the telegram he was surprised to find he had been identified so quickly and he said, "How did you ever know where to find me?" "Oh," said the telegraph man, "that was easy. We just called the Justice of the Peace." (Laughter) So I claim that I am the first damn Yankee to be made a Virginia judge as quick as that.

I am greatly touched at what Judge Parker said tonight with his characteristic generosity. It was a source of great satisfaction to work at the bar with Judge Parker on the bench. It was a source of pride because I had something to do with setting up the tribunal, with its early organization, the charter under which it was to work, and I was concerned, as you would be under those circumstances, that the United States be represented on that tribunal in such manner that we would be proud of our representation on the bench. Judge Parker filled that bill. Judge Parker with his long judicial experience carried great weight with all of the foreign delegations and I want to say that personally when the days were blue—and some of them were very blue—he was a source of great encouragement and of fatherly friendship and advice to me personally, and I am pleased that he has come here tonight to sponsor me before this audience.

Mr. Justice Jackson then delivered his address on: "A Country Lawyer at an International Court."

(See Appendix, p. 190, *infra.*)

The President: Mr. Justice Jackson, may I say that I feel wholly inadequate to express to you what I know to be the very genuine appreciation of every person present for this notable

address. It has been I am sure informative to all the lawyers present and highly interesting to those who are not. I do not believe it is too much to say that your presence here tonight and the importance of the address you have delivered will always remain a notable occasion in the annals of this Association and we are very grateful to you for the courtesy and consideration which you have shown us in honoring us with your presence tonight. (Applause)

There is no formal business to come before this meeting and unless there is objection I will declare it in recess until tomorrow morning in this room at ten o'clock.

APPENDIX I

1947

A COUNTRY LAWYER AT AN INTERNATIONAL COURT

The Annual Address Before The Virginia State Bar Association, Roanoke, Virginia August 8, 1947

By THE HONORABLE ROBERT H. JACKSON,
Justice of the Supreme Court of the United States.

The Nuernberg trial is now history; its decision is precedent. I am not here to argue its merits because it is too early to know what its merits may be. We can only say what we expect, but the next few years will have to determine what Nuernberg really means to the history of the world. I do not expect there will be a test of the law intended to preserve the peace of the world for perhaps a generation. The countries of Europe, including Russia, are too weak today, too exhausted in resources, too weary in flesh to take up a fight again now. I do not believe that any people wants a renewal of conflict at this time and I do not believe the leadership of any people, including the leadership of Russia, wants a renewal of the conflict now, even though they want to get everything they can without conflict. But in twenty-five years, when this war shall have been forgotten and when they are back on their feet again, there is danger and the question is whether we shall have in the future the kind of society that wants to be governed by law or whether we will revert to the kind of society that wants to be governed merely by power. I should think, in the light of the suicidal character of this danger to most of the European countries, it should be easy to convince them they should turn to a world of law.

What I do want to do tonight, informally, is to tell you some of the things that lawyers would want to know about this trial. Not many of you will ever go through just that kind of a trial. We could find no ruling precedents. We had to beat our own path, and some of the things we did I am sure could be done much better if we could do them over again. Lawyers find interest in the trial not merely because of its effect on the peace of the world but because of its relation to the philosophy and practice of the law.

The first thing I want to say is that these trials were not gotten up for the purpose of vindicating some individuals' theories nor for the purpose of writing anybody's theories into the law. They were the product of the pressure of events more than of anybody's philosophy. There had been some general discussions at Yalta between President Roosevelt, Mr. Churchill and Mr. Stalin as to the trial of the Nazi war criminals, but nothing definite had been agreed until Germany surrendered.

ROBERT H. JACKSON

What conditions faced the United States? Most of the important German officials had surrendered to the United States; they seemed to think their chance of survival was a little better if they surrendered to us rather than to the forces pressing on them from the East. The United States found itself with many prisoners of war on its hands, many persons whom we had charged throughout the war with the most atrocious offenses, men who were charged with being guilty of starting the war and of waging it with a ruthlessness not paralleled since medieval times, and men who had been charged with crimes against our own military personnel.

What were we going to do with them? Only three things have ever been suggested as possibilities. First, you could let them go without trial and without punishment. But it did not seem sensible to turn these prisoners loose, after all the charges that we had made against them, without even a trial. It certainly would make cynics of the boys who had been asked to give their lives to capture them on the ground they were criminals. So it was unthinkable to let them go.

The next thing you could do was this: you could shoot them or hang them without a trial. They were in our power and everybody conceded it would have been legal on the part of the United States to have some executions. But we happen to have a philosophy about these things that we do not hang anybody without a trial. You might hang the wrong man. I do not believe that the United States would feel easy, or that history would speak well of us, if we executed a lot of men without even making a record of the reasons why we did it.

If you were not going to shoot them, without a trial, and were not going to let them go without a trial, there was nothing to do but to have a trial. The only other choice was to have hearings, make some definite charges against named men, bring forth the proof and then hear what they had to say for themselves, if anything.

There were people in the United States who believed we ought not to have any trials. Some people said it was perfectly legal to shoot these men out of hand and said it would be illegal to try them. I never could understand that philosophy myself, but some very eminent men lent their names to arguments of that kind.

Let us take Dr. Hans Morgenthau's statement; he is a professor at the University of Chicago. He was quoted in the Chicago Tribune as having said this: "I am doubtful of the whole set-up under which these trials will be held. What they should have done was set up summary courts-martial and then placed these criminals on trial within twenty-four hours after they were caught, sentence them to death and shoot them in the morning."

THE NATION, a supposedly "liberal" paper, published an editorial which took substantially the same position. It said: "In our opinion the proper procedure for this body [The International Military Tribunal] would have been to idenitfy the prisoners, read off their crimes with as much supporting data as seemed useful, pass judgment upon them quickly, and carry out the judgment without any delay whatever." Just how even this could be done without a trial is hard to see unless it is intended, as it appears, to advocate convicting men without hearing the defense.

Now, those of us who worked with this situation knew how impossible it was to convict these men fairly in twenty-four hours. Within twenty-four hours we didn't have any evidence against anybody, and we know now, after we have gone through the evidence, that there were different degrees of guilt among men who sat at the same table. So there was nothing for the United States to do, in justice to the individuals, except to put these men on trial. You could call it an inquest, call it a court-martial, call it a trial, but at least it was necessary that we make good the charges that had been repeatedly made during the war that these men had behaved in a criminal manner.

But there was no tribunal in existence and there was no code of procedure. There were lots of laws and treaties which the Germans had violated, and international agreements and international conventions. There were many sources of international law, but they had never been reduced to an agreement or code; they had never been approved by the different foreign powers and the four nations were accustomed to different systems of law.

The Soviets have a system of law which stems from the ancient Roman law, but it reached the Russian people by way of Byzantium and had a great deal of Eastern influence in it. The French received theirs from the Western Roman Empire. The British received some law from Rome via Normandy, and by other routes, and some developed on that little island as "common law." Some of that we borrowed to make up our system. So, we had four different systems of law, four different languages, (if we count the German with which we would have to deal, of course) and it was necessary, before starting a trial, to reach some kind of agreement as to procedure.

I was appointed to negotiate with these countries, and we met in London, and after about two months an agreement was reached which we called the Charter of the International Tribunal.

Great Britain was represented by two different governments. Starting out, we dealt with the Churchill government, through Lord Chancellor Simon and the Attorney-General, Sir David Maxwell-Fyfe. Then, when the elections occurred, we dealt with the Labor government, through Lord Chancellor Jowitt and Attorney-General Sir Hartley Shawcross. The Republic of France sent Judge Robert Falco, who was a judge of the highest court of that country, and Andre Gros, a professor of international law, accompanied him. Soviet Russia sent the Vice-President of the Soviet Supreme Court, I. T. Nikitchenko, and Professor A. N. Trainin, international law teacher. So, as you see, we had representatives of the legal profession rather than of the diplomatic world in attempting to reach this agreement.

I have taken some pride in that Agreement because, and I think Judge Parker will agree, it proved to be a workable instrument. We not only succeeded in trying these men, but there was less bickering about the admissibility of evidence and points of procedure than you will see in the average criminal trial in the United States. It amazed me that we could go through the trial with so little time spent in arguing points of procedure. In order to do this there had to be some give and take, and I think lawyers will be in-

terested in some of the outstanding points of conflict between the two systems, the civil law system and the common law system, which we had to reconcile.

Of course, we had the two great common law systems represented in Great Britain and the United States. France and the Soviet Union both represented the civil or Roman law system. But there were important differences between the two; they had evolved in different ways. Out of this difference in legal philosophy grew the principal points of difference we had to thresh out.

The first important difference was as to the kind of court we were to have. That was a very vital inquiry in an undertaking of this sort. The Americans, the British and the French were all in agreement that we wanted an independent judicial tribunal. We could call it a military tribunal, but we wanted it independent in the sense that the judges should hear the evidence and render their decision as their independent judgment upon the guilt or innocence of every one of the accused.

The Soviets had a decidedly different point of view. They said, "We do not need any question to be answered as to whether these men are guilty; Churchill, Stalin and Roosevelt have said they are guilty." We tried to point out to them that Churchill and Roosevelt, even in their own countries, had no power to say anybody was guilty and have it enforced in the form of a judgment. But they were genuinely opposed to our idea of a court because in Russia a court is not an independent agency of justice—it is an instrument of policy. The Russian court is frankly, and they say so in their text books, an instrument of policy designed to carry out the policy of the executive. We took the position that this court was not to be controlled by any national policy. It should hear the evidence and decide whether or not these men were guilty of the offense charged.

The Soviet finally agreed with us because they had no other choice. The plain fact is we had—most of the Virginia lawyers will understand when I say we had all of the aces. (Laughter) We had the important prisoners; they had surrendered to us. The Soviet only had two prisoners, and one of them was not of particular consequence. They did not have much evidence, and we had the evidence. They could not conduct a trial without us, and we could conduct a trial without them, and so we were in a position to be rather influential in framing the Agreement.

But these different ideas about the nature of the court persisted throughout the trial, as may be seen from one amusing incident. I got the prosecutors together and said, "I think each one ought to prepare a memorandum pointing out the things about which his country is likely to be criticized and give us the answer he would like to make. Perhaps I won't be able to go along with you, but we ought to know the position each one wants to take so we won't get mixed up like counsel on the same side of the case sometimes do." (Laughter) The British said that was fine, that they would get up a memorandum, and they did. The French agreed they would get up a memorandum. The Soviets asked for another meeting. (Laughter) When the next meeting came the chief Soviet Prosecutor, General Rudenko, said, "Let's each of us get hold

of his judge and make him agree not to let anything of that kind come up." (Laughter)

Throughout the case ran the differences of opinion; the British, French and Americans believing the court was an independent tribunal to make its own decision, (it didn't make any difference whether it pleased the prosecution or the Germans), the Soviets believing it was an instrument of policy, to carry out Soviet policy.

The next difference was closely related, and was the manner of the functioning of the prosecution in relation to the court. Under the Soviet system the court would determine who should be indicted and who should be prosecuted; under our system that would not be for the court to determine. Under their system it would be for the court to determine what witnesses were to be called. The court indicts, it tries, it runs the hearing; most of the questioning is done by the judges. Our idea of course, was that the prosecution would be entirely independent of the judges, the judges entirely independent of the prosecution. We would file our charges, we would come into open court and prove them as in any Virginia or New York or Federal court. We prevailed on that point too, but always, as I say, matters sometimes arose which showed that no ideas had fundamentally changed.

As to the question of the examination of the witnesses: under the Continental system, in Germany, in Russia, and in France, the witnesses are largely examined by the judges. Lawyers do not examine and do not cross-examine very much; they do occasionally, but it is rare. The court conducts the entire inquiry.

We could not use the word "cross-examination" in the Agreement between the four nations because there was no Russian equivalent into which it could be translated. But I think you will all agree that nothing tests the truth like cross-examination. When the Continental lawyers saw cross-examination really taking place, they came to believe in it. They came to see what it was worth. And I must say also that the Soviets came to think it was fun. They cross-examined everybody, and they asked questions that made me shudder because I think there is no quicker way to ruin a case than by cross-examination. They would hand a document up to a hostile witness and say, "I show you this exhibit. Is your reaction positive or negative?" (Laughter).

But the Soviets had this characteristic in cross-examining; they would always save face. If a court rules against an American or British lawyer, it generally gets an argument; they stand up and fight for their position. But if the court ruled against the Soviets, the prosecutor would get up and say, "Thank you; thank you, Your Honors. I had just finished with that subject." (Laughter)

But we were somewhat comforted because the cross-examining done by the Russians was not quite as reckless as that done by the Germans. I think the prize bit of blundering in cross-examination was that of counsel for Kaltenbrunner. Kaltenbrunner was a cruel man. He had been a former lawyer, disbarred in Austria, and he was head of the concentration camp system,—

one of the least decent of a bad crowd. His counsel was doing his best for him, and we respected him for that. We had a witness on the stand who had given damaging testimony about a number of the defendants, but he never mentioned Kaltenbrunner, and a witness cannot do a defendant much less harm than by not mentioning him. We were surprised, therefore, when Kaltenbrunner's counsel marched up to the microphone and said, "You haven't mentioned Kaltenbrunner. Do you know Kaltenbrunner?" "Oh, yes," said General Lahousen, the witness. "I remember meeting Kaltenbrunner on the afternoon after he had executed the students who had circulated the petition at the university." (Laughter) He went on to describe how Kaltenbrunner had handled that situation. I have never seen quite as bad an example of cross-examination as that.

In many matters we had to prevail upon the Soviets to agree with us. We had to get them to go along with our system of procedure because theirs wouldn't have seemed right to us; but there were some other things in which they thought our system was not good. It was something of a surprise one day in the negotiations at London to have the Soviet representative, General Nikitchenko, say that he thought our system of justice was not fair to defendants and they would never agree to it. Well, that was a bit of shock, but this was the point: He said, "You file an indictment which merely says, 'You are guilty; on such a day you committed a stated crime.' When we file an indictment we have to give the defendant a copy of every statement that has been taken against him and a copy of every witness' testimony and a copy of every document that we expect to use against him, and when this evidence is approved by the judge he is arrested and the trial is a short matter." He said, "Your system of just giving him a bare charge and then coming in later at the trial with the evidence, when it may be too late for him to meet it, makes too much of a sport of a trial. We don't like it."

You have to admit there is something to that point of view and you have to admit that their system of furnishing the defendant a complete statement of the evidence that is to be brought out against him and putting it up to him to overcome it has something to be said in its favor. We worked out a compromise, and our compromise was this: Our indictment was lengthened, and I think most American lawyers thought we had gone too far in offering so long an indictment because it contained a great deal more of evidence than an indictment in this country or in Great Britain would contain; it contained a great deal less, however, than it would have to contain in either France or Soviet Russia. We compromised about that.

The next problem was rules of evidence. Continental lawyers do not like our common law rules and the French, just as much as the Soviets were concerned about this. They were fearful of the suitability of our rules of evidence and we did not think we had much reason to insist on technical rules. It was not a jury trial and most rules of evidence are intended to protect the jury against hearing prejudicial matter. Then we had a case that would involve years of time and spread over the continent of Europe, and we were not sure

we could comply with all technical rules in the time available. We finally adopted a simple rule leaving much to the discretion of the tribunal. It was this: Any evidence should be admitted which the tribunal considered to have probative value.

That is pretty broad, and I believe in applying rules of evidence myself. But the tribunal applied this rule to keep out such things as anonymous letters or letters that had no apparent value; it admitted some affidavits where it was believed that the affidavits did have some probative value. The result was that there was no complaint when this case was over with, even on the part of German counsel, that evidence had been brought in that was not valid and proper evidence.

Another point on which we had a great deal of difficulty was the defendants' rights. We found it necessary to provide in the Agreement what the defendants' rights should be. We asked the Soviets what rights a defendant had under their system, and there did not seem to be very many. In fact, one of the irreverent members of our group said he thought the only right a defendant in Russia had was the right to be present at his own execution. Laughter) But the division became rather acute over this subject-matter. Under our system in most States in modern times, although it was not always so, the defendant, of course, has the right to testify in his own behalf under oath. We wanted the defendants to have that right. We thought no trial would be regarded as fair in which the defendants had not been allowed to give their testimony under oath. The Russians and the French thought it was not necessary for them to testify under oath, and they would not be allowed to do so under the German system; but they thought they should have the right to address the court, not under oath and not confined to rules of evidence, after all of the other proceedings had been taken. Under their system, the defendant himself has the right to speak the closing word.

Well, it seemed to us that we were going to have evidence that was pretty convincing and the way to compromise this was to let the defendants do both. So it was provided that they could testify under oath for themselves and it was also provided they could have a closing address after the prosecution had finished its speeches and after their lawyers had finished. Then each defendant should have the right to speak for himself. It could be a plea for mercy, it could be a challenge to the jurisdiction of the court, it could be anything he wanted to say. I understand that is the Russian practice of allowing the defendant to have the last word, and it is usually just that. (Laughter)

I could go on indefinitely with the story of how we compromised these various matters. I shall not bore you much longer with it, but I think you would want to know the difficulties we had, what led us to make the charges of crime that we did, and why we arrived at the definitions of crime. Of course, violations of the agreed rules of warfare everybody conceded were crimes under international law which should be charged. But there were bigger things than that. Here were defendants who, our evidence showed, had brought more than four million persons into Germany and forced them to

labor in German industry and agriculture. Those four million people had been torn from their homes, chiefly in the East; seized at church, seized at home, seized at meetings like this, and transported into Germany. Were we going to charge these defendants with a lot of minor offenses and not mention four million people who had been put into slavery?

Then there were the persecutions directed against the Jews, and the Poles, and the Slavs, and the Russians. There was the persecution of the Catholics and the persecution of the Free Masons. The Masonic lodges of Germany and of all the captured countries were seized, their records were seized, and their officers were thrown into concentration camps. Were we going to pass such things by? Those offenses were considered to be crimes against humanity, crimes whether there had been any war or not; things so inhuman that under no circumstance could they be regarded as other than attack on civilization itself.

Then there was the great question whether to make commencing a war of aggression one of the charges. There were those who thought we ought not to; there were those who thought we should. I was one who thought we should. It seemed to me the time had come in the course of civilization when to start an ideologic war, or to start a war simply to gain territory or gain control of other people, was a crime. (Applause) If it is not a crime to start such a war, then there is not much use of talking about the little crimes that occur in the course of a war. War, of course, is a whole system of crimes, of murders, of arsons, of destruction. Originally the early Christian scholars and the early students of international law thought there was a difference between a just war and an unjust war, but in the last two centuries we had gotten away from that idea and there grew up the thought that all wars were just and legal.

It seemed to us that it was time to put the law on the side of peace instead of leaving the law on the side of sanctioning war. I am not going into the difficulties involved in the discussion of the legal issues, but we did not believe that we were making new law. I am quite willing to bear the odium of making new law if it is necessary to make law to that effect. (Applause). However, it was always murder to march into another territory and kill; it was always arson to go into another territory and burn; but those who did it were able to plead as a defense that they were engaged in a legal war. When the Kellogg-Briand compact and other treaties were signed in which Germany agreed to forever give up war as an instrument of policy, it took that defense away from men who made war upon their neighbors; they could not plead war as a defense to their murders and their arsons and their destruction when the war itself was illegal. That was the position which we took with the tribunal—that murder was murder when it was in the course of an illegal war; and that has now become the law. There may be an argument as to whether it used to be, but there can be no denial that it is law today because the tribunal has acted and men who were heads of powerful states have hanged for violation of it. Today we can say that under this international law it is as dangerous to incite a war as it is to incite a riot on the streets of Roanoke tonight. Under

the old law you could be arrested if you incited a riot out here, but you could not if you started a war.

There are one or two other subjects I think you might want to hear about. What chance was given to these men to defend themselves? That is always fundamental in determining whether justice was done. Every one of these men had his counsel, counsel of his own choice if he made a choice. They were allowed to have attorneys who were ardent Nazis. We felt that it would not be proper to bar Nazis. We never objected at all to their having Nazi representation because we thought if a man could get counsel who was in sympathy with him, perhaps he would make the better case for him, and we were willing to face the best that they could offer.

German counsel, over twenty in number, were furnished office space and secretaries and supplies; they were provided with food and housing and transportation; they were furnished the documents before they were put in evidence, translated into their own language, and they were given copies in English and photostats of the original. Every witness they could persuade the tribunal would be helpful to their case was searched for by the United States Army; we sent airplanes to Switzerland and to Sweden to bring their witnesses to them. We furnished them a transcript of the testimony every day in German and a translation of it in English, and we mimeographed their speeches. They had twenty days to sum up while the prosecution had three, and we ought to have done it in a day and a half and they in three days. They had a chance to examine every witness, to examine every document and picture. They had every right that a defendant would have in the courts of this country, and they had many rights that a defendant would not have here.

What kind of evidence was used to convict these men? I was in Germany two weeks after the surrender organizing the collection of evidence because it seemed to me the whole success of this endeavor would depend on the use of legitimate evidence to bring about a legal conviction and that we must not merely whip up an hysterial and passionate plea that they be convicted whether there was evidence or not. We screened, as the military call it—I believe we lawyers would say we examined—we examined a hundred thousand captured documents. Those documents were all in the German language and it was a great task to get competent people to examine them in German. Over five thousand of those documents were translated into English, and when we used them in English we had to translate them into French and Russian also. Over four thousand of those documents were used in evidence, in whole or in part, and when I give you the number of document' you must bear in mind one document was Mr. Hans Frank's diary of forty volumes; another document was General Jodl's diary which ran into seventeen or eighteen volumes. The tribunal was able to say when this case closed that the convictions could rest on documents, about only two or three of which was there any dispute. Those documents were so well-authenticated that there were no disputes before the tribunal as to their authenticity, and don't forget we had against us the men who could say they were not authentic if they were not.

Let me illustrate the kind of proof we had because I think it is important in the impression you get of this trial. We charged that the war was started in deliberate aggression; we charged it was started not as a war of self-defense, but as a war of acquisition and aggression. Now, how do you prove that sort of thing? Well, we proved it from the Germans' own minutes of the meetings of the High Command with Hitler. By those minutes we proved—we had not only the minutes, but had the stenographer, the Colonel who wrote them down—that Hitler, in the spring of 1939, advised his General Staff that he had determined—to use his own words—to "attack Poland at the first suitable opportunity." Then we had the minutes of his meeting in the Reichschancellory on the 23rd day of May in which he disclosed that his real reason for the attack was not Danzig or any of the things given as reasons. He said this, and these were the words of the minutes and several of the witnesses and defendants were present who could have denied it, but instead of denying it admitted that this was true. Hitler told them: "It is a question of expanding our living space in the East and of securing food supplies." And, finally, we had the minutes of the meeting at Obersalzburg on the 27th of August, and this is what they show Hitler said:

"Destruction of Poland in the foreground. The aim is elimination of living forces, not arrival at a certain line. Even if war should break out in the West, the destruction of Poland shall be the primary objective. . . . I shall give a propagandist cause for starting the war—never mind whether it be plausible or not. The victor shall not be asked later on whether we told the truth or not. In starting and making a war, not the right is what matters but victory. Have no pity. Brutal attitude."

That was the spirit in which that war started, according to the Germans themselves. You wonder sometimes how it could be that we could have captured such documentation. It was amazing. I think no other people in the world would have kept such records. We had sometimes very revealing evidence about their intentions. For example, General Keitel had a meeting with reference to the rearming of Germany and, in substance, he said: "We are going to do this in violation of the Treaty of Versailles. You must not put anything in writing because if you do somebody may get hold of it and it will be used against us at Geneva"—and all of the time a stenographer at his elbow was taking it down and sending it around to all who were present; and we had found three copies of those minutes.

The Germans provided us with the evidence which can leave no doubt that the offenses we charged had been committed.

Now, just a word as to what good comes of all this in the long run. It seems to me that we cannot tell what will be the long view of the Nuernberg trials We cannot say that they will have any particular effect because we do not know what the diplomatic course and the military course will be—conceivably the world can get into such conflict that no progress that has been made in the world will be worthwhile. But these are the things which it seems to me have been accomplished by the Nuernberg trials.

In the first place, we have documented the history of this war. As Judge Parker has described it, we did a post-mortem on a totalitarian state. You can trace in Goering's admission after admission the steps they took to overthrow a free government and set up a totalitarian state. It would be well worth the American's time to learn how it was done because the Weimar constitution had almost as good protection on paper for civil liberty as our constitution has. Yet, they managed to set up the concentration camps and the Gestapo and a dictatorship because the German people did not recognize the symptoms of a coming totalitarianism. All of that is documented.

We have given the world an example of a trial and hearing instead of executing people in cold blood. I think anyone who watched what happened in Europe at the close of the war will agree there is too much blood-letting over there as a part of their politics. If one loses a campaign over there, he loses his head with it. Although these prisoners were completely in our power, the very fact that the United States paused and said, "We will execute no one until we have proved the case against them" is an example that will have its effect on affairs in Europe long after Judge Parker and I are gone.

We demonstrated that four nations with different languages, four nations with different legal systems, can cooperate in conducting a joint trial. It seems to me that is important for us, as lawyers, to know. It has always been our hope to substitute our process of trial and hearing and adjudication for violence and forcible action. We have demonstrated that if the nations want to do so, they can use our judicial processes successfully in spite of the barriers of language and the barriers of difference in legal systems. We have shown that the nations can agree on workable procedures and the idea is not merely academic, because it has been done. There is a precedent now, and we know how much precedents mean to the legal profession.

Certainly I would not for one moment contend that Nuernberg is so effective that there can be no future war; it does not do that any more than the punishment of a murderer makes it certain there will be not another murder. But it does seem to me we have a new and a sounder basis in international law for dealing with the problem of the aggressor and, at last, we have put the law where it is no longer saying that all wars are legal and have put it on the side of peace.

What we have done or what we have tried to do was to fullfil the words of Woodrow Wilson that we must "give to international law that kind of vitality it can only have if it is a real expression of our moral judgment." (Applause, audience standing).