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ROBERT H. JACKSON AND THE TRIUMPH OF JUSTICE AT NÜREMBERG

Henry T. King, Jr.[†]

I. Introduction

It is a great pleasure to be here today as Michael Scharf has assembled a premier cast of specialists in international criminal law. It has been inspiring to hear the remarks of this morning's panelists and I look forward to those that follow. I thank you, Michael, for the invitation.

It is illustrative that the subtitle of this session, "Views from the Trenches," alludes to battles and war, because it is in times of conflict when the most horrendous crimes are committed and the rule of law faces its most extreme threats. Unfortunately, history reveals that international law failed to prevent and respond to such threats in the era prior to World War II. Simply, the international community in the pre-World War II era was one where the State and sovereign reigned supreme and international anarchy was the order of the day.

The horrors of World War II compelled humanity to revolutionize the rule of law with regard to the primacy of the state and sovereign. The genesis of the revolution occurred at the Nüremberg trials and I am here today to provide insight into the battles that were waged within the trenches of that particular war.

II. The Genesis of Nüremberg

It is common to hear Nüremberg referred to as a birth, the first, or the genesis of modern international law. Indeed, there are many "firsts" attributable to Nüremberg. For instance:

Nüremberg was the first time in modern history when victors placed justice over revenge. As World War II began to wind down, the question arose as to what to do with the alleged perpetrators of the worst conflagration in history. There were those who, in keeping with the status quo, proposed summary execution of those alleged to be responsible for this horror. They included distinguished statesmen such as Winston Churchill and Henry Morgenthau, the U.S. Secretary of the Treasury. Cordell Hull, the U.S. Secretary of State, favored drumhead courts martial designed

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primarily to convict and execute the defendants.¹ Josef Stalin was reported by Winston Churchill to favor summary executions but was willing to go through a judicial process designed to convict the defendants.² For their part, certain British officials wanted to take the top Nazi criminals out and shoot them without warning and announce to the world that they were dead.³

But a dissenting voice was heard – that of Henry L. Stimson, the U.S. Secretary of War, who favored a trial – a fair trial. His voice was powerfully joined by that of Supreme Court Justice Robert H. Jackson who on April 13, 1945 in an address before the American Society of International Law announced that he favored a trial of the Nazis based on justice.⁴ Jackson said that the U.S. should want nothing to do with any proceedings which were designed only to convict defendants.⁵ Jackson wanted convictions of defendants based on solid evidence.⁶ If the evidence to convict was not there he favored the freeing of the defendant.⁷ According to Jackson, the trials should be based on the principle of justice – for all.⁸

Jackson's approach was certainly contrary to that of the Treasury. He later recounted that Treasury sources proposed to turn over to the Soviet Union as many as half a million young Germans regardless of personal guilt for "reparations" and that when he protested he was accused of being "soft" on the Nazis.⁹

But Jackson's speech of April 13, 1945 did attract favorable White House attention, and on May 2, 1945, President Harry S. Truman put the interests of the United States and what to do with the Nazi war criminals into Jackson's hands.¹⁰ Jackson reported back to President Truman on June

¹ FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS [1943] 1, at 611-12 (1963) [hereinafter *U.S. Diplomatic Papers*].

² See 1 DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT* 28 (1999).

³ See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 30 (1992).

⁴ Justice Robert H. Jackson's address before the American Society of International Law (Apr. 13, 1945), in Robert H. Jackson, *The Rule of Law Among Nations*, 31 A.B.A. J. 290 (1945).

⁵ *Id.* at 293.

⁶ *Id.* at 292.

⁷ *Id.* at 293.

⁸ *Id.* at 294.

⁹ See David J. Scheffer, *The Tool Box, Past and Present, of Justice and Reconciliation for Atrocities*, 95 AM. J. INT'L L. 970, 973 (reviewing GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000)).

¹⁰ 1 SPRECHER, *supra* note 2, at 35-36.

6, 1945, and it is this report that outlined much of the architecture of Nüremberg and provided the basis for negotiations with U.S. allies resulting in the London Charter of August 8, 1945.¹¹

It was indeed Jackson's steadfast conviction in a just trial that led to the creation of the London Charter of August 8, 1945 and served as the model for the arrangements creating the tribunals discussed today. For instance in negotiating the London Charter, Jackson insisted on a presumption of innocence while the U.S.S.R. representatives endorsed a presumption of guilt.¹² Jackson stuck to his convictions on this issue and he prevailed. The result at Nüremberg was that three defendants who otherwise might have been convicted were acquitted.¹³ This gave meaning to the Nüremberg trial as a symbol of justice which otherwise it might not have had. It demonstrated that at the most momentous trial in history the principles of fairness should prevail.

At Nüremberg Jackson further insisted that its defendants have counsel of their own choosing. Thus a cadre of top German lawyers, including the leaders of the German bar, were offered as defense counsel to the Nazi defendants.¹⁴ I can say first-hand on the basis of personal experience that they put up a terrific defense for their clients. Few who were there will ever forget the efforts of Otto Kranzbuehler, counsel for defendant Karl Doenitz the Nazi U-boat chieftain and Hitler's anointed successor, and of Hermann Jahreiss, the "grey eminence" of the German defense staff and counsel for defendant Alfred Jodl, the commander in chief of the German armies on the western front. They fought hard for their clients and Kranzbuehler, indeed, was successful in getting the sentence for his client, a confirmed Nazi, limited to 10 years in Spandau prison.¹⁵

In the evidentiary phase of the Nüremberg trials Jackson's approach offered fairness to the defendants. Jackson wanted the primary Nüremberg case against the Nazis to be substantiated by their own documents. He wanted less reliance on the testimony of witnesses and this approach precipitated a critical dispute with William J. Donovan, his presumed deputy, who wanted the case to be based on greater use of witnesses.¹⁶ Jackson prevailed and Donovan went home.¹⁷ It was Jackson's view that Nüremberg would have greater historic credibility if the Nüremberg cases were based on the defendants' own documents. Ultimately, the defendants

¹¹ See 1 *id.* at 41-46.

¹² See 1 *id.* at 29-30, 43-44.

¹³ See 1 *id.* at 1406-09.

¹⁴ See 1 *id.* at 992.

¹⁵ 1 *id.* at 995.

¹⁶ See Daniel Smith, *The Legacy of Nuremberg: Sustaining Human Rights*, 25 CORNELL L.F. 3, 4 (1999).

¹⁷ *Id.*

at Nüremberg convicted themselves through Jackson's approach. This approach fortified the credibility and historic significance of the trial. It also meant that where there was no documentary support for a conviction, the defendant had to be acquitted — as in fact was the case with three of the defendants.

Nüremberg is credited with being the birthplace of the human rights movement.¹⁸ For example, under the Crimes Against Humanity Count of the London Charter certain offenses against human beings which warrant punishment are defined.¹⁹ In stating that these are offenses, this count supports the view that human beings have the right to protection against such crimes. The thrust of this is to recognize, by negative implication, certain international human rights. Additionally, in the crimes against humanity count as developed in the London Charter for use at Nüremberg, local law offers no out for those charged with these crimes.²⁰ Put succinctly, this meant that Hitler's oral order for "the final solution" offered no defense for those defendants who were tried for crimes against humanity. This was the first time that it had been said that authorization by local or national authorities is not a defense in human rights cases.²¹ It meant that for the first time in history human rights had achieved an international dimension.

The Nüremberg rulings in the slave labor cases involving Albert Speer, Fritz Sauckel and Erhard Milch confirmed that forced slavery was an international crime and should be punished as such.²² The rulings in the Goering and Frank cases on offenses against Jews are a vital part of Nüremberg. But above all, in the subsequent Nüremberg proceedings, the findings of the Courts in the Einsatzgruppen, Medical Experiments, and Justice cases reflect the conviction that human rights are not solely a matter of national jurisdiction but that a higher law — international law — is applicable in such cases and that human beings have status under this law.

As a follow-up to Nüremberg the U.N. sponsored several human rights conventions and covenants. There was first of all the Universal Declaration

¹⁸ See David Pitts, *Nuremberg War Crimes Legacy – Part One ("Crimes Against Humanity")*, Washington File, Mar. 9, 2001, available at <http://usembassy-australia.state.gov/hyper/2001/0309/epf508.htm> (last visited Jan. 16, 2004).

¹⁹ *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis (Memorandum Submitted by the Secretary General)*, U.N. General Assembly International Law Commission, at 3-5, U.N. Doc. A/CN.4/5, U.N. Sales No. 1949.V.7 (1949).

²⁰ *Id.* at 4.

²¹ See Henry T. King, Jr., *Robert Jackson's Vision for Justice and Other Reflections of a Nuremberg Prosecutor*, 88 GEO. L.J. 2421, 2425 (2000) (reviewing DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT* (1999)).

²² See HENRY T. KING, JR. & BETTINA ELLES, *THE TWO WORLDS OF ALBERT SPEER: REFLECTIONS OF A NUREMBERG PROSECUTOR* 19, 21, 135-36 (1997).

on Human Rights,²³ followed by the Genocide Convention²⁴ and the Convention Against Torture.²⁵ These conventions have been ratified by many countries in the world today. They constitute collectively an International Law of Human Rights based on conventions and customs and also the Nüremberg principles, which were endorsed by the U.N. General Assembly on December 11, 1946.²⁶

The Security Council resolutions covering crimes in the former Yugoslavia and Rwanda incorporate the Nüremberg principles in the protection of international human rights when they refer to “crimes against humanity and genocide.”²⁷ The same can be said for the Rome Statute covering the establishment of an international criminal court.²⁸

Nüremberg is the genesis of the concept of universal jurisdiction. With exception to its limited application in piracy cases, the concept of one sovereign placing on trial those who committed crimes against non-citizens of the sovereign outside of the sovereign’s territorial jurisdiction was unheard of. Jackson said in his opening statement at Nüremberg on November 21, 1946, “[t]he real complaining party at your bar today is Civilization”²⁹ and he added that “[t]o pass these defendants a poisoned chalice is to put it to our lips as well.”³⁰ The Nüremberg Court (IMT) applied the concept of universal jurisdiction when it said that the nations who were plaintiffs at Nüremberg were doing collectively what each one of them could have done individually.³¹ In essence what Jackson was saying was that some crimes which were dealt with at Nüremberg were so terrible (i.e. crimes against humanity) that they could be dealt with by any court

²³ *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/RES/217A (1948), available at <http://www.un.org/Overview/rights.html> (last visited Jan. 16, 2004).

²⁴ *Convention of the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260A, U.N. GAOR, 3rd Sess., 179th mtg., U.N. Doc. A/RES/260A (1948).

²⁵ *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93rd mtg., U.N. Doc. A/39/46 (1984).

²⁶ *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95, U.N. GAOR, 1st Sess., 55th mtg., U.N. Doc. A/236 (1946).

²⁷ SCOR Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993); SCOR Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994).

²⁸ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998).

²⁹ ROBERT H. JACKSON, *THE CASE AGAINST THE NAZI WAR CRIMINALS* 90 (1946).

³⁰ *Id.* at 7.

³¹ See Nicolaos Strapatsas, *Universal Jurisdiction and the International Criminal Court*, 29 Man. L.J. 1, 20 (2002).

taking jurisdiction because they were crimes against all humanity – literally and collectively.

The court in the Eichmann case applied this concept in convicting Adolf Eichmann of crimes against Jews which had at the time of their commission no legal standing in Israel because Israel was not then a nation state.³² There was no Israeli law in effect when they were committed which Eichmann could be charged with violating. But, said the Court, these were crimes which were so massive that they were crimes against all humanity and it held that Eichmann should pay with his life for their commission.³³ The U.S. Court of Appeals in the Demjanjuk case endorsed this concept³⁴ and it is included in the Restatement of the Foreign Relations Law of the U.S.³⁵ The concept is now firmly entrenched as witnessed during its recent application during the trials of Chilean dictator Augusto Pinochet.³⁶

III. Criticisms

While we now view Nüremberg and its many firsts as a positive, indeed a defining moment in international criminal law, we must remember that at the time, Nüremberg faced strong criticism. For instance:

Chief Justice Stone of the U.S. Supreme Court stated that Jackson was “away conducting his high-grade lynching party”³⁷ and that the proceedings were about “the power of the victor over the vanquished.”³⁸ At the same time Stone said he would not be disturbed greatly if the power of the victor “were openly and frankly used to punish the German leaders for being a bad lot.”³⁹ Jackson, in commenting on Stone’s statement, said that “[i]t is hard to find a statement by a law-trained man more inconsistent with the requirements of elementary justice.”⁴⁰ Similarly, U.S. Senator Robert Taft condemned the Nüremberg Judgment as *ex post facto* law and argued

³² *Attorney-General of Israel v. Eichmann*, 36 I.L.R. 5, 10-11 (D.C. Jm. 1961), *aff'd*, 36 I.L.R. 277 (S. Ct. 1962).

³³ *See id.* at 10-11, 14.

³⁴ *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

³⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986).

³⁶ *See, e.g., R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L. 1999).

³⁷ ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 716 (1956).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Benjamin Kaplan, *Book Review*, 68 HARV. L. REV. 1092, 1096 n.10 (1955) (reviewing WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* (1954)).

that the proceedings “would discredit the whole idea of justice in Europe for years to come.”⁴¹

Jackson felt that American media coverage of the trial was at best occasional, sketchy, and sometimes inaccurate, “nor was there in this country wide and sustained reader interest comparable to that in Europe.”⁴² He said that as a result “no sound and general foundation of public information about the trial was laid.”⁴³ He felt that this made it possible for those hostile to the trial to stigmatize it with slogans “which required no information to utter and none to understand.”⁴⁴

I note that the most telling responses to the critics of Jackson and Nüremberg were those of the defendants at trial. Hans Frank, the defendant who had served as the Nazi Governor General of occupied Poland, stated, “I regard this trial as a God-willed court, destined to examine and put to an end the terrible era of suffering under Adolf Hitler.”⁴⁵ With the same theme, but a different emphasis, defendant Albert Speer, Hitler’s war production minister, said: “The trial is necessary. There is a shared responsibility for such horrible crimes even in an authoritarian state.”⁴⁶ Dr. Theodore Klfish, a member of the German defense team, wrote: “It is obvious that the trial and judgment of such proceedings require of the tribunal the utmost impartiality, loyalty and sense of justice. The Nüremberg tribunal has met all these requirements with consideration and dignity. Nobody dares to doubt that it was guided by the search for truth and justice from the first to the last day of this tremendous trial.”⁴⁷

It was not only Jackson who faced criticisms and concerns with going to Nüremberg. In today’s world a young lawyer interested in international and/or criminal law would never reject an offer to serve on an international tribunal, but when I was offered the position many of my colleagues expressed deep concerns.

They felt that I was losing my place in line for success as a Wall Street lawyer. They said that I was moving into the unknown and that not enough was known about Nüremberg to determine whether it would be

⁴¹ Henry T. King, *Nuremberg to Rome: A Critical Review of the Recent U.N. Treaty Negotiations at Rome in Light of the Vision of Justice Robert H. Jackson*, Address at Case Western Reserve University School of Law (Nov. 11, 1998).

⁴² Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE TRIAL OF MAJOR GERMAN WAR CRIMINALS AT THE END OF THE WORLD WAR II AT NUREMBERG GERMANY 1945-1946*, at pxxxvi (1999).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 2 SPRECHER, *supra* note 2, at 895.

⁴⁶ 2 *id.* at 1096.

⁴⁷ Henry T. King, *Remarks at the Robert H. Jackson Center* (May 1, 2003), available at <http://www.roberthjackson.org/theman2-6-6.asp> (last visited Sept. 30, 2003).

worthwhile and lasting and not just a “puff of smoke” which would soon be forgotten by future generations. They said that when I got back from Nuremberg I would be without a job and that the Nuremberg experience would not help my credentials. Finally, in a nutshell, they argued that I was moving from a job where my place was secure to a position fraught with uncertainty and possible future insecurity.

Beyond the psychological impact of Nuremberg being the first trial, there was the practical aspect of actually trying the Nazis. There was no precedent in legal history. As Jackson himself put it so well,

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.⁴⁸

There were no lawyers with experience in Nuremberg-type crimes. Most lawyers thought it was impossible to succeed. Jackson had to deal with lawyers from five different legal systems, some skilled in the common law system and others in Roman law.⁴⁹ He combined this diversity into a legal framework which accomplished his objective of a fair trial.

The dimensions of the trial were stupendous. It was the largest trial in history; over 300,000 affidavits were submitted to the Court.⁵⁰ Each side limited themselves to 2,700 documents. Translating was at first a seemingly impossible problem to deal with but IBM worked out arrangements for simultaneous translation of the proceedings into five languages.⁵¹ The trial lasted from November 20, 1945, to October 1, 1946, when the verdicts of all defendants were read, thus making it one of the longest in history.⁵² More than 2,000 people were in one way or another involved in the proceedings.

⁴⁸ Chief Justice William H. Rehnquist, Remarks at the Dedication of the Robert H. Jackson Center (May 16, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-16-03.html (last visited Sept. 29, 2003).

⁴⁹ See KING & ELLES, *supra* note 22, at 17.

⁵⁰ *Id.*

⁵¹ See EDWIN BLACK, IBM AND THE HOLOCAUST 421 (2001).

⁵² See KING & ELLES, *supra* note 22, at 17.

IV. Personal Notes

From the perspective of a prosecutor who worked on the largest, first ever, international trial, I feel that Nüremberg may be different from those tribunals which we have discussed this day. I remember the following:

I had virtually no supervision as I prepared the case against Erhard Milch from start to finish. It was the perfect environment for self-starters like myself.

We had some brilliant trial attorneys on our staff but their experience in New York courts was not always transferable to Nüremberg and some went home in disappointment.

The U.S. media never established in the public mind an understanding of the proceedings. This was perhaps because the U.S. had not been a primary physical situs of the hostilities as was the case in Europe. The Europeans grasped the issues at hand far more readily. I recall particularly that the media was very hostile to Jackson in reporting on his cross-examination of Goering. This made news but the importance of Nüremberg did not.

My wife, Betty, was unusually supportive. She was the primary reason I went to Nüremberg and she attended every session of the Milch trial which was the case I had prepared and tried in part.

V. Conclusion

There would have been no Nüremberg without Robert Jackson. He was courageous beyond limit and stuck to his vision of a trial in which justice would prevail.

Jackson accomplished his goal without the support of the American Bar and the American media and he seemed perilously alone in his quest for justice.

Through Jackson's reliance on documents the Nazis convicted themselves at Nüremberg, and this provides critical support for the credibility of the tribunal Jackson had envisioned. The Tribunal in its judgment noted that the Nazis were convicted largely by "documents of their own making."⁵³

The chorus of voices of critics of Nüremberg are answered by the statements of those who were there, including Albert Speer and Theodore Klefish of the German Defense Team.

Justice was triumphant at Nüremberg. The world is better for it. Nüremberg's impact is universal. Civilization took a giant leap forward at

⁵³ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 173 (AMS Press 1971) (1947).

Nüremberg and now we have the opportunity to institutionalize Nüremberg on a permanent basis through the establishment of the International Criminal Court at The Hague. This is, indeed, a golden moment in history and we must make the most of it.