# EDITORIAL COMMENT

## ROBERT H. JACKSON

In the death last October of Justice Robert H. Jackson of the United States Supreme Court, the nation lost an honored jurist and public leader who had served it well as lawyer, Department of Justice official, Attorney General, and Justice of the Supreme Court. The cause of international law lost a distinguished advocate and diligent worker, and the American Society of International Law a valued and faithful member. Joining the Society over two decades ago as a practicing lawyer in Jamestown, N. Y., Mr. Justice Jackson remained active despite the demands of government service. He served on the Executive Council from 1946 to 1949, and as honorary vice president since 1949. In 1945, 1949 and 1952 he addressed the annual meetings of the Society, and on numerous occasions spoke to groups of lawyers on matters of international law.

Justice Jackson was esteemed for his conscientious devotion to his judicial duties. Those who knew him well regarded him as a very simple and easy mixer, a man who did not stand on his dignity and was the antithesis of a "stuffed shirt." His friends and associates remarked his qualities of warmth, geniality, penetration, perception of the real issues in a matter, breadth of view—all of which made him a big man and a lovable one. In the pages of our JOURNAL he may best be commemorated by trying to look at and re-assess some of his ideas about international law and his work in our field.

Among his opinions as Attorney General and on the Court[1] may be found illuminating discussions of international legal points, but his work there was better known in other areas of the law. Though in earlier years a famed protagonist of the New Deal and often mentioned as a potential President or Chief Justice of the United States, his name may well be best remembered in history for his efforts in connection with the Nürnberg trials of war criminals.

Most of those in the best position to know feel that Justice Jackson deserves a large measure of the credit for what was attempted and accom-

[1] One must at least mention his opinion of Aug. 27, 1940, sustaining the President's power to conclude the "destroyer-bases deal" as an executive agreement, 39 Ops. Atts. Gen. 484; this JOURNAL, Vol. 34 (1940), p. 728; his discussion of the bases, dissenting, in Vermilya-Brown Co. *v.* Connell (1948), 335 U. S. 377, 390; and his comments, concurring, in U. S. *v.* Spelar (1949), 338 U. S. 217, 224. Of more than passing interest, see Chicago & Southern Air Lines *v.* Waterman S. S. Corp. (1948), 333 U. S. 103, Hirota *v.* MacArthur (1948), 335 U. S. 876, and (1949), 338 U. S. 197, Johnson *v.* Eisentrager (1950), 339 U. S. 763, Zittman *v.* McGrath (1951), 341 U. S. 446, and Orvis *v.* Brownell (1953), 345 U. S. 183. Justice Jackson's Cardozo Lecture, "Full Faith and Credit, the Lawyer's Clause of the Constitution," Columbia Law Review, Vol. 45 (1945), p. 1, is a masterful discussion of constitutional controls over private international law questions between States of the United States.

plished at Nürnberg. Many lawyers from many lands played important parts, and one can seldom measure with certainty the individual contribution of each, but Justice Jackson appears to have been the dominating personality in the steps leading up to the trial and in the conduct of the trial itself. What really put across the Nürnberg trial plans in compelling over-all fashion was his Report to the President dated June 6, 1945.[2] In it he specified the possible ways to deal with the Nazi leaders:

> What shall we do with them? We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.[3]

He had already insisted that "We must not use the forms of judicial proceedings to carry out or rationalize previously settled political or military policy."[4] He urged real judicial trials by an international tribunal, recognition of individual responsibility for violations of international law, and stress on the crime of aggressive war and the over-all Nazi conspiracy as well as traditional war crimes in the sense of violations of the laws of warfare.

Impelled by his common law background to emphasize the importance of the judicial function, Justice Jackson felt the opportunity for constructive action as well as the responsibilities involved. He wrote:

> Any legal position asserted on behalf of the United States will have considerable significance in the future evolution of International Law. In untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.[5]

In the London Conference held June 26–August 8, 1945, by representatives of the United States, United Kingdom, Soviet Union and France,

[2] Report of Robert H. Jackson, U. S. Representative to the International Conference on Military Trials, London, 1945 (Dept. of State Pub. 3080), p. 42.

[3] *Ibid.*, at p. 46.

[4] Address before American Society of International Law, April 13, 1945, Proceedings, 1945, p. 10, at p. 15.

[5] Report (cited above, footnote 2), at p. 53.

Justice Jackson largely succeeded in obtaining agreement on the principles for which he stood. He deserves much credit for the success of that conference in overcoming wide differences between the substantive and procedural legal ideas of divergent national systems, and in obtaining agreement both upon a fair judicial procedure and the law to be applied by the Tribunal. Through patient merging of the principles of the legal systems concerned, a procedure was developed which caused remarkably little trouble and which has generally been regarded as fair to the accused. His opening statement for the prosecution on November 21, 1945, set the pattern for much of the thinking of the trial. He served skillfully in the detailed prosecution, and his report to the President on October 7, 1946,[6] and various addresses since have well summarized his views and evaluation of the whole endeavor.

Seeking to explore the thinking behind Nürnberg, we observe that Justice Jackson had great faith in the "existing and indestructible reality"[7] of international law and the hope which it offered as a "foundation on which the future may build."[8] Even in the dark days of early 1941 he wrote that "the structure of international law, however apparently shaken, is one of the most valuable assets of our civilization."[9] He added that "Lodged deeply in the culture of the world, unaffected by the transitory political structures above it, is a bedrock belief in a system of higher law."[10]

By the time of his Havana address of March 27, 1941,[11] Robert Jackson had already expressed the ideas underlying the change of American policy from traditional neutrality to Lend-Lease and "all aid short of war." Discrimination between the belligerents was justified on the illegality of Hitler's resort to war in violation of the Kellogg-Briand Treaty for the Renunciation of War, as well as upon the notion of collective self-defense. Speaking of this treaty and the Argentine Anti-War Treaty, he said at Havana that they

> rendered unlawful wars undertaken in violation of their provisions. In consequence, these treaties destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars. It did not impose upon the signatories the duty of discriminating against an aggressor, but it conferred upon them the right to act in that manner.[12]

Showing the thinking which later prevailed at Nürnberg, he concluded:

> To me, such an interpretation of international law is not only proper but necessary if it is not to be a boon to the lawless and the aggressive. A system of international law which can impose no penalty on a law-breaker and also forbids other states to aid the victim would be self-

[6] *Ibid.*, at p. 432.

[7] *Loc. cit.* (above, footnote 4), at p. 11.

[8] Jackson, "Challenge of International Lawlessness," Am. Bar Assn. Journal, Vol. 27 (1941), p. 690.

[9] Address before Inter-American Bar Association at Havana, March 27, 1941, this JOURNAL, Vol. 35 (1941), p. 348, at p. 349.

[10] *Loc. cit.* (above, footnote 8).

[11] See footnote 9 above.

[12] *Ibid.*, at p. 354.

> defeating and would not help even a little to realize mankind's hope for enduring peace.[13]

While various others had urged that Nazi leaders be tried for the crime of aggressive war as well as for violations of the laws of warfare, Justice Jackson emphasized this approach. As he saw it, the facts clearly established the guilt of the Nazi leaders in this respect, and he based the legal conclusions on Germany's violation of the Kellogg-Briand Pact as well as other treaties into which Germany had freely entered:

> Unless this Pact altered the legal status of wars of aggression, it has no meaning at all and comes close to being an act of deception.[14]

The Tribunal was to adopt his reasoning as to the legal effect of this treaty, and to agree that it

> constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law into harmony with the common sense of mankind, that unjustifiable war is a crime.[15]

Repeatedly he emphasized that the charge of aggressive war was being used not to make criminal those acts which were otherwise lawful, but to deprive the violators of the excuse that their acts were done in lawful war:

> Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught.[16]

He had little patience with the contention that the trial of these Nazi leaders for planning, initiating and waging aggressive war would result in *ex post facto* application of criminal law. He believed that such acts had already become criminal by 1939 when they were committed, and that even assuming that they had not, yet the prohibition of *ex post facto* laws was not an absolute but a principle which should be used to attain just results. On various occasions he stated:

> International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has the right to initiate customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by the normal processes of legislation for there is no continuing inter-

[13] *Ibid.*, at p. 358.
[14] *Op. cit.* (footnote 2 above), at p. 52.
[15] *Ibid.*
[16] *Ibid.*, at p. 51.

> national legislative authority. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common Law, through decisions reached from time to time in adapting settled principles to new situations. The fact is that when the law evolves by the case method, as did the Common Law and as International Law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error.[17]

If this be thought unjust, he often pointed out that:

> We must not forget that we did not invoke the outlawry of war as a sword to punish acts that were otherwise innocent and harmless. On the contrary, it was the accused who had to establish the lawfulness of their belligerency to excuse a course of murders, enslavements, arsons and violence which, except in war, is criminal by every civilized concept.[18]

In this whole endeavor he realized the "far-reaching, and in its application to the facts . . . most novel" feature of "individual accountability to international law and authority."[19] In his opening statement at Nürnberg he went to the heart of the matter:

> Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.[20]

In retrospect, if punishment by political decision[21] would have violated no international law, what useful purpose was served by the war crimes trials? And if all but one (Hess) of the defendants convicted of crimes against the peace were also convicted of more "orthodox" war crimes and crimes against humanity involving violations of the laws of warfare and of ordinary criminal law, why was it necessary or desirable to add and emphasize the notion of crimes against the peace? The decision to prosecute for crimes against the peace appears to have been taken, not for the purpose of obtaining convictions or punishments of persons who would otherwise have escaped, but rather for the purpose of firmly establishing as a principle of international law that a war of aggression is criminal.

The Justice himself always emphasized that the importance of the trial lay in the principles to which the four Powers became committed by the London Agreement, adhered to by 19 other nations, and by their participation in the trial. Not only did that agreement devise a workable procedure for the trial, but, more important, it

[17] Opening address for the United States at the Nürnberg Trial, Nov. 21, 1945. United States, Office of Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, Vol. I (1946), p. 114, at p. 165.

[18] Jackson, "Nuremberg in Retrospect," Am. Bar Assn. Journal, Vol. 35 (1949), p. 813, at p. 886.

[19] Jackson, "Some Problems in Developing an International Legal System," Temple Law Quarterly, Vol. 22 (1948), p. 147, at p. 152.

[20] *Op. cit.* (footnote 17 above), at p. 168.

[21] *Op. cit.* (footnote 18 above), at p. 884.

> for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.[22]

Pointing out the value of the trial also as "the world's first post mortem examination of a totalitarian regime," he reported to the President as one of the real accomplishments that:

> We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.[23]

Through the London Agreement and the incorporation of its principles in a judicial precedent, he concluded that "we have put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution." [24]

Justice Jackson evaluated the Nürnberg Trial as "an attempt to answer in terms of the law the most serious challenge that faces modern civilization —war and international lawlessness." [25] Referring to President Wilson's remark in 1919 about international law having been "a little too much thought out in the closet," he sought to "bring international law out of the closet where President Wilson found it and impress it upon the consciousness of our people." [26] Citing the many successful arbitrations between the United States and Great Britain, he stated that:

> The world's hope for peace depends in the last analysis upon establishing patterns of national behavior that will sustain international institutions strong enough to settle conflicts before they break into wars. We must forge and use stronger and more inclusive instrumentalities for the hearing and settlement of grievances which may be used as an alternative for war without compromise of national honor.[27]

In "this successful extension and adaptation to international uses of the philosophy and technique of our daily law practice," [28] he hoped that nations could

> devise instruments of adjustment, adjudication, and conciliation, so reasonable and acceptable to the masses of people that future governments will always have an honorable alternative to war. . . . We may

[22] Report to the President, Oct. 7, 1946, *loc. cit.* (footnote 6 above), at p. 437.
[23] *Ibid.*, at p. 438.
[24] *Ibid.*, at p. 439.
[25] *Loc. cit.* (footnote 18 above), at p. 813.
[26] Address of April 13, 1945, *loc. cit.* (footnote 4 above), at p. 13.
[27] Address before New York State Bar Association, Jan. 24, 1942. N. Y. State Bar Assn. Repts., Vol. 65 (1942), p. 434, at p. 442.
[28] *Ibid.*, at p. 443.

> as well face the fact that it will not be enough to have a mechanism for keeping the peace which a few scholars and statesmen think well of. If it is really to work, it must have such widespread acceptance and confidence that peoples as well as philosophers support it as a thoroughly honorable and reasonably hopeful alternative to war.[29]

Doubtful of the utility of codification of international law until the world had many more shared experiences and values in dealing with international disputes by legal means,[30] he felt that:

> we should take advantage of every opportunity to deal with international controversies by the adjudicative or arbitral techniques. In this way we will enlarge and expand the world's experience in using these orderly and reasonable processes, fashion an increasing body of decisional and customary international law, and encourage the law-abiding habit among nations.[31]

There may be room for much difference of opinion as to the validity of some of the views expressed by Mr. Justice Jackson, but in the main they are sound and necessary for making real progress in international law. He was only too aware that the lasting value of the Nürnberg principles will depend far less on the ready acceptance given them by the United Nations General Assembly than on the use made of them in the future. Most of us will agree with his belief that:

> Those who best know the deficiencies of international law are those who also know the diversity and permanence of its accomplishments and its indispensability to a world that plans to live in peace.[32]

WM. W. BISHOP, JR.

### CHARLES WARREN

Charles Warren was born March 9, 1868, and died August 16, 1954, at his home in Washington at the age of 86. A native Bostonian of pure Colonial ancestry, a graduate of Harvard, a student at the Harvard Law School for two years (obtaining a degree of A.M.), Mr. Warren came to be early marked as an author and historian. His career may be divided roughly into several more or less distinct phases. During the first phase up to 1914, while he was engaged in the practice of law in Boston, he tried his hand at a novel, *The Girl and the Governor* (1900), and a poem delivered at the dedication of the Harvard Union in 1901. But his penchant for historical writing was by that time distinctly budding. Besides various legal papers and historical notes in current law reviews, he published a two-volume work on *The Harvard Law School and Early Legal Conditions in America* (1909), and *A History of the American Bar, Colonial and Federal, to the Year 1860* (1911).[1]

[29] Address of April 13, 1945, *loc. cit.* (footnote 4 above), at p. 12.

[30] Address before American Society of International Law, April 26, 1952. Proceedings, 1952, p. 196, at p. 201. See also footnote 27 above.

[31] *Loc. cit.* (footnote 19 above), at p. 158.

[32] Address of April 13, 1945, *loc. cit.* (footnote 4 above), at p. 11.

[1] The writer is indebted to the kindness of Mrs. Cleada N. Horne, Mr. Warren's secretary for over 35 years, for making available certain data for this paper.