Robert H. Jackson and the Nuremberg Trials: Justice and Diplomacy

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ABSTRACT

After the bloodbath of the Second World War, the Allied Powers used trials instead of the usual treaty to set a new precedent for world peace and international law; these are widely known as the Nuremberg Trials. The trials not only broke ground in international law, but also served the diplomatic purpose of creating a post-war order between the victors and defeated, while acting as a possible deterrent to future aggressive war. The Chief prosecutor for the Americans, Justice Robert H. Jackson, is regarded as the key individual to consider when analyzing Nuremberg. He is often viewed in his role as a man of law; I argue that he was not only serving justice, but also acting as an agent of diplomacy. He represented the American legal and political philosophies abroad and took great efforts to assure the success of Nuremberg. By analyzing primary sources—documents from the trials, newspaper articles reporting on him, and articles published by Jackson after the trials—and secondary sources, I paint a picture of the man who both furthered the field of international law and represented the American program at Nuremberg.

In November 1945, twenty-two defendants, minus Martin Bormann, “who was prosecuted in absentia,” had to face the beginning of the trials that would determine their fates, which, for many of the former Nazis, meant execution.¹ These were known as the Nuremberg Trials. Although the American people initially favored the execution of the Nazis without a trial, the verdicts of the trials were generally received as positive progress and, perhaps, even too lenient.² The trials were an attempt by the Allies to create a post-war order, while preventing the issues that arose from the Treaty of Versailles and the Leipzig Trials after the First World War.³

The Nuremberg trials challenged the established boundaries between morality and legality, justice and victory, and dominance and punishment like never before. The trials at Nuremberg were key in shaping the increasingly globalized world following the horrors of the two World Wars. The trials were an important part for the Allied, especially American, program in making sure the path Germany had taken would never be taken again.⁴ The trials are often viewed in the context of morality: the victors of the war doing the world good by punishing the evil

³ Ibid., 5-6.
Nazis. They can be regarded as a championing of civilized western ideals: democracy winning over totalitarianism. They can also be viewed in terms of diplomacy: the victors punish the vanquished foes (this aspect was seen by the prosecution as an unfortunate necessity).\(^5\)

The trials broke ground in the history of international law by declaring that leaders of nations would face individual responsibility for waging an aggressive war.\(^6\)

This charge was met with greater legal optimism than the pseudo-legal charge of crimes against humanity.\(^7\) They also forced western powers to address their stances on a pragmatic versus positivist philosophy of law and assimilate a more unified goal and stance within international law.\(^8\)

Although the four Allied nations, England, Russia, France, and the United States, led the trials, the trials were inherently an American affair. Interpreting the trials as an American show was done by both the Americans and the Europeans, as well as the supporters and the opponents of the trials.\(^9\) President Franklin Delano Roosevelt influenced the American policy on post-war trials by stating, as early as 1942, “that just and sure punishment shall be meted out to the ring leaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith.”\(^10\) Later, Truman viewed the trials as the best possible thing to come from such a horrendous war, and Hoover voiced his approval.\(^11\)

Leading the Allies in their pursuit of justice was Robert H. Jackson as Chief American prosecutor.\(^12\) Robert H. Jackson took a leave of absence from his prestigious Supreme Court seat in order to engage in this great legal and diplomatic endeavor, possibly adding more to his legacy than his time on the Supreme Court.\(^13\) Because the United States exerted the most control of all the Allies over the proceedings, and the legal and diplomatic implications of the Nuremberg Trials, Jackson is a key figure to analyze if one is to fully understand the role of the trials in creating a post-war order. The role of Robert H. Jackson as chief American prosecutor in the Nuremberg trials should not be viewed simply as a lawyer fighting for justice, but also as a diplomat representing the values and interests of the American government after World War II.

Jackson is viewed in the fields of law and history as the key individual in the formation and execution of the Nuremberg Trials. He is met with both critique and praise, but, according to law professor John Q. Barrett, many would be “hard pressed to think who among his contemporaries in the United States government or private bar had his combination of stature and skill,” to carry out the job of chief American prosecutor.\(^14\) Barrett acknowledges Jackson’s historical significance and ability to have played many roles, both judicial and diplomatic, at Nuremberg.\(^15\) Another professor of law, Dennis J. Hutchinson, also acknowledges the tendency of Jackson, and the trials themselves, to “[oscillate] from moment to moment between law and politics.”\(^16\)

In contrast, Professor G. Edward White, a scholar in legal history, suggests that, “[Jackson] was a lawyer, not a hired man, and in suggesting the difference between the two he helped distinguish law from power or partisanship.”\(^17\) Although Jackson was a lawyer by trade and traditionally outfitted with the connotations of this title, the extent of his diplomacy is debated by scholars; most agree, however, that Jackson’s significance in Nuremberg cannot be ignored. As Dr.\(^18\)

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8 Bosch, 41–47.

9 Ibid., 112.


11 Bosch, 28.


13 Hockett, 257.


15 Barrett, 511.


William Maley of the Asia-Pacific College of Diplomacy, illustrates, “[Jackson] was not, in his design of the process, without flaw, but he outshone all other participants in the Trial in his sense of fundamental ethical importance of what was being attempted.”

Justice Robert H. Jackson was a man of the constitution. An associate justice of the Supreme Court, he viewed the trials as an event, “rather unique in the annals of law.” In its uniqueness, Nuremburg would be a challenge to Jackson’s own legal philosophies. The Nuremberg court itself would be prosecuting on grounds of ex post facto, or retroactive, law, a legal action that many Americans felt protected against by the United States Constitution, which Jackson, as a Supreme Court justice, was sworn to defend. Although international law was moving in the direction of illegalizing aggressive war—evident by the Kellogg Briand Pact of 1928 and the 1937 book by Soviet Russia’s Aron Trainin, The Defense of Peace and Criminal Law, which criticized the League of Nations for not criminalizing aggressive war and not creating an international court to convict this crime—the crimes the Nazis committed during World War II were not breaking any established international law.

Even with regards to the growing evolution of international law, it has been established and generally accepted since the nineteenth century that bias is inevitable when a court of one nation is judging individuals of another nation.

Jackson himself once said that, “The world yields no respect for courts that are merely organized to convict.” It could be argued that the Nuremberg trials were, indeed, designed to convict the Nazis on the basis of diplomatic and moral motivation by the victors of a war; but Jackson went against his own initial doubts of the implication of ex post facto and the basis of the Nuremberg court in order to undertake the task of the main prosecutor. He defended the creation of the trials once he was sure to be an active participant. He believed that the trials, “fulfilled an immediate function which is both the most ancient and the most compelling purpose of all criminal justice, namely, substituting a reliable process of determining guilt for what was the most likely alternative-private, uncontrolled vengeance by those directly injured.” This “immediate function” was, in effect, the creation of a type of postwar power dynamic, necessary to fill the power vacuum in the fallen German nation.

In order to make the journey to Nuremberg, Jackson had to take a leave of absence from his position as associate Supreme Court justice, an action seen as an inconvenience by the other Supreme Court justices. The increased workload was not the only factor about Jackson’s absence that embittered the other justices, but also the legality of the Nuremberg trials themselves. Chief Justice Harlan Stone denounced the trials as a mere “high-grade lynching party.” Instead of consulting his legal brethren on accepting the position in the groundbreaking trials, Jackson consulted the man who deemed him the only man worthy of the job, President Truman. It is surmised that Jackson was special in his “matchless drive and leadership,” which led to him being the chosen representative.

Jackson’s excuse for not consulting his colleagues was met with the defense that “[he] knew that [Stone] would disapprove of [his] doing it. [He] didn’t have to ask [Stone] to know that.” Stone countered, believing that Jackson was involved in an act of catharsis, meaning that the trials were an act of therapy for the Allies, giving them a way to cope with
the horrors of the Nazi crimes.\textsuperscript{30} Another theory for Jackson’s lack of consultation with his brethren, was his fear that his participation in the Nuremberg court would be seen as politically motivated.\textsuperscript{31} There is speculation that Jackson took the Nuremberg post, hoping that a closer relationship with Truman would lead to him being appointed Chief Justice, should Stone step down from his position (this was a likely possibility around this time).\textsuperscript{32} Jackson’s refusal to discuss his involvement with his fellow men of law can be seen as both a way for Jackson to deal with his going against established western legal principles and as a way to work closer with Truman. It should be noted that Jackson was a friend of both Roosevelt and Truman prior to the end of World War II; his selection could not have been purely because of legal merit, but also due to past ties.\textsuperscript{33}

When Jackson arrived in Nuremberg, he faced the challenge of assuming the role as a representative, or diplomat, of the United States’ program. Jackson, after the conclusion of the trials, illustrated that, in the Western world, men “of [his] profession,” that is, the men of law, were the most frequently chosen men to serve in executive and diplomatic roles.\textsuperscript{34} For a realist thinker, international laws themselves do not exist; the “lawyer” interpreting these laws is actually a diplomat seeking peace through the façade of justice, while the idealist believes ideas have inherent weight and consequence.\textsuperscript{35} Jackson’s actions at Nuremberg helped break ground in the field of international law, formulating ideas of consequence (such as making crimes against humanity illegal), but he had the mentality and assertiveness of a diplomat. In fact, Jackson was widely considered be the preferred candidate to succeed FDR in 1941, so his political and diplomatic potential was acknowledged.\textsuperscript{36} Jackson’s own agenda was not ignored when going to Nuremberg. Jackson had the intentions to “redefine the proper relations between individual citizens and the state in post-war America.”\textsuperscript{37} He would later accomplish this by promoting the Nuremberg conviction that held individuals accountable in wartime (the importance of which he clearly outlines in his statement made on August 12, 1945, shortly before the beginning of the trials).\textsuperscript{38}

Professor C. Arnold Anderson generalized that, “after war people want only to be done with hatred and carnage and have sympathy for their fallen foe,” but that, “diplomats... renew wartime bitterness.\textsuperscript{39} For Jackson, quoted in a New York Times article before the start of the trials, it was vital that, “[t]here [would] be no censorship on what transpires in the courtroom and no part of the court proceedings [would] be secret. The trial of major European war criminals [was to] be a public trial.”\textsuperscript{40} Jackson calling the war criminals “European,” as opposed to “German” or “Nazi,” perpetuates the American view that the World Wars were waged by the Europeans; the Americans were being the saviors of the Allies and the deliverers of justice to the Nazis.

According to Gordon Dean, of Counsel for the United States, “The first challenge which Jackson faced was that of formulating a program, an American program, which he could take with him into negotiation with representation of the other Powers and urge its adoption.”\textsuperscript{41} As opposed to his usual role of defending the constitution and collaborating with his fellow men of law, Jackson was forced to create this American program, not without the input and support of the President and other American diplomats. He accomplished this and gave the proposal to the other Allied powers, who gave their critique.\textsuperscript{42} Jackson illustrated in his report on the

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\textsuperscript{30} Hockett, 280.  
\textsuperscript{31} Hockett, 284-285.  
\textsuperscript{32} Ibld., 282.  
\textsuperscript{33} Barrett, 515.  
\textsuperscript{35} Bosch, 149.  
\textsuperscript{36} Barrett, 515  
\textsuperscript{37} White, 184.  
\textsuperscript{38} Avalon Project at Yale Law School, “Statement by Justice Jackson on War Trials Agreement, August 12, 1945,” http://avalon.law.yale.edu/imt/imt_jack02.asp.  
\textsuperscript{40} Robert H. Jackson, quoted in “Jackson Pledges Open War Trials,” The New York Times, August 18, 1945.  
International Conference on Military trials that, “What is [hard] for Americans to recognize is that trials which we regard as fair and just may be regarded in Continental countries as not only inadequate to protect society but also as inadequate to protect the accused individual. However, features of both systems were amalgamated to safeguard both the rights of the defendants and the interests of society.” This shows an effort in Jackson to both defend the ideals of his country, but also make negotiations with the other representatives in order to ensure the success of the trials.

In a passionately written report to President Truman released by the White House on June 7, 1945, before the start of the trials, Jackson stated, “The American case is being prepared on the assumption that an inescapable responsibility rests upon this country to conduct an inquiry, preferably in association with others, but alone if necessary, into the culpability of those whom there is probable cause to accuse of atrocities and other crimes. We have many such men in our possession.” In the same report, Jackson illustrates the various tasks he has done in order to prepare the trials, including collaborating with those collecting and processing the evidence, visiting Nuremberg and witnessing the interrogation of the defendants, preparing the cases the United States would prosecute, and working with the United Nations War Crimes Commission to appoint the United Kingdom representative in the joint prosecution.

Jackson too announced his views on the legality of the trial and his view of the universality of the Nazi crimes:

We can save ourselves from those pitfalls if our test of what legally is crime gives recognition to those things which fundamentally outraged the conscience of the American people and brought them finally to the conviction that their own liberty and civilization could not persist in the same world with the Nazi power. Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted. I think also that through these trials we should be able to establish that a process of retribution by law awaits those who in the future similarly attack civilization. Before stating these offenses in legal terms and concepts, let me recall what it was that afforded the sense of justice of our peoples.

In his report addressed to the President (but published by the government for the public), Jackson stated that, “The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.” Jackson interpreted federal constitutional law; since his argument that common sense, not historically established ideologies, should be emphasized in the American program, he effectively stood against his own patterns of legal philosophies in order to defend and rationalize the United States partaking in retroactive law. In order to encourage the trials, as representing the American ideal that the trials, not a mass execution, were required to handle the Nazis, Jackson could not stick strictly to his traditional legal philosophies.

Other developments before the start of the trials showed Jackson asserting his dominance over the other Allies in order to push the American program. On August 3, 1945,
it was reported that “the Big Three want[ed] ‘speedy agreement’ on the creation of an international crimes tribunal . . . Justice Jackson let it be known that he had served a polite ultimatum on his colleagues to expedite their deliberations lest the United States withdraw.”

Another New York Times article, published two days later, stated, “Apparently, the last obstacles to competition of the agreement were cleared up when Supreme Justice Robert H. Jackson, chief of the United States counsel on the Allied War Crimes Commission, went to Potsdam last week to press for decision from the Big Three. Precisely what Justice Jackson accomplished at Potsdam is not yet known.” An article published just four days afterwards stated, “The [agreement of the four powers to criminalize aggressive war] sets precedents in international law and, in the words of United States Supreme Court Justice Robert H. Jackson, the American representative, ‘ought to make clear to the world that those who lead their nations into aggressive war face individual accountability for such acts.’

This shows Jackson’s heavy hand in, first, influencing the outcome of holding the trials, and, second, making the waging of an aggressive war a criminal act. Jackson’s assertiveness in dominating the Big Three is rather diplomatic in nature.

Jackson also asserted, “If we can cultivate in the world the idea that aggressive war making is the way to a prisoners’ dock rather than the way to honors . . . we will have accomplished something toward making peace more secure.” This clearly shows Jackson’s motives in establishing a new precedent in international law and his hope that illegalizing aggressive war would lead to a new world order—fostered by American ideologies—that would be more peaceful than the blood bath of the early twentieth century.

Once the trials began, Jackson, in his now widely cited opening statement for the prosecution, fanned the flames of anger towards the Nazi defendants. This, naturally, is necessary for a prosecutor to do, but the guilt of the Nazis was already considered by Jackson to be a certainty and he knew of the publicity of the opening statement.

In his opening statement for the United States, Jackson seems to not only address the members of the Nuremberg court, but also citizens of the modern world, “You will have difficulty, as I have, to look into the faces of these defendants and believe that in this Twentieth Century human beings could inflict such sufferings as will be proved here on their own countrymen as well as upon their so-called ‘inferior’ enemies.”

Further along in the famed opening, Jackson, like a proper diplomat, gives the United States much of the credit in establishing the Charter of the International Military Tribunal (another name for the Nuremberg trials):

The Charter of this Tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James, “under God and the law.” The United States believed that the law long has afforded standards by which a judicial hearing could be conducted to make sure that we punish only the right men and for the right reasons. Following the instruction of the late President Roosevelt and the decision of the Yalta Conference, President Truman directed representatives of the United States to formulate a proposed International Agreement, which was submitted during the San Francisco Conference to Foreign Ministers of the United Kingdom, the Soviet Union, and the Provisional Government of France. With many modifications, that proposal has become the Charter of this Tribunal.
Jackson’s agenda in criminalizing aggressive war is seen in the Charter Provision during the Judgment of the trials, as it is stated in the Judgment, although not read directly by Mr. Jackson, “War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.” The criminalizing of aggressive war was met with uproar in the American military community. Although the Secretary of War determined that the Nuremberg trials were good, most military leaders were worried about the implications of criminalizing war and the effect that the prosecution of military professionals would have on the future of their profession. In a press conference to address these concerns, Jackson “angrily repeated his argument that the German military leaders were not being indicted or tried because of their mere membership in a ‘profession’ but for inhumane and monstrous outrages for conspiring to bring on an unjust war which had consumed many innocent lives.” The diplomacy of the Nuremberg trials was indirectly addressed in this back and forth, as the military men essentially had to learn the lesson that “the best way to avoid prosecution and the horrors of defeat was to win wars.” Caught in the middle was Army Chief of Staff Dwight David Eisenhower, who was an encourager of the trials as well as a military man. He said, “First, we don’t have a dictator, thank God, and second; I was in the field,” but his reasoning for the military man not to fear was weak and there was evidence that he himself contributed to part of the decision making in Nuremberg. On December 6, 1946, less than two months after the conclusion of the trials, Jackson gave a speech before a special group at the National War College in Washington, D.C. where he attempted to address the concerns raised by military personnel. In this speech, Jackson attempted to comfort the concerned men by showing that Secretary of War Stimson pushed the idea of outlawing aggressive war, “It is unfortunate that the judgment has not yet been published in the United States because the recital of the judgment against these individuals really shows what they were up to.” Jackson is shown to be an avid defendant of the charge against aggressive war, representing not only his own personal agenda, but also that of the American government and Secretary of War. Here, again, Jackson transcended his legal boundaries and acted as a cathartic representative.

Using law in the place of pure diplomacies proved to be a controversial and unique way to create post-war order; the Americans were viewed, even by their own people, as coddling the Nazis. It was “without question [that] the accused got an infinitely better deal than anyone ever did before a Nazi tribunal, or indeed amidst the infernal conditions of Auschwitz and Treblinka where even the preference of legal forms was abandoned.” As to the goal of the Nuremberg trials to act as a deterrent against aggressive war, it is speculated that, “[the modern world has], so far, managed to avoid a Third World War. But the reasons for that have everything to do with the balance of terror, and nothing at all to do with the legal aspirations projected from Nuremberg.”

The trials have been traditionally ignored by many historians because they do not fit in the normal schema of postwar German affairs, representing a “peaceful” cooperation which contrasted the disunity and hostility brought about by the bipolarized Cold War. To ignore the trials would be to ignore their significance in changing the global outlook.

56 Bosch, 166-183.
57 Bosch, 169.
58 Ibid., 170.
61 Ibid., 6.
62 Bosch, 89.
63 Biddiss, 613.
64 Ibid., 612.
on war and the assertion of America being the world power following World War II. The trials were referenced heavily during the Korean and Vietnam Wars, calling the United States a hypocrite for waging the very same aggressive war against Asia that they had, just decades ago, passionately outlawed.\textsuperscript{66} The North Vietnamese even announced that American pilots would be tried as war criminals, justifying this by saying the pilots were criminals under the Nuremberg Charter.\textsuperscript{67}

Nuremberg effectively changed the view of war and international law by the newly globalized world civilization. Robert H. Jackson was simultaneously an effective prosecutor, changing the history of international law, and a passionate representative of the ideals and motives of his country. He went against his legal philosophies, received much criticism, and devotedly defended the American program of postwar trials. Working closely with two presidents and the American government, Jackson completed his task of prosecuting the Nazi criminals in a manner deemed fair by the Allies. He represents the battle between the ideology of justice and the power of diplomacy. Jackson was a man who enthusiastically questioned the application of international law and empowered the status of his country in these groundbreaking trials at Nuremberg.

\textsuperscript{65} Bosch, 164.
\textsuperscript{66} Ibid., 182-197.
\textsuperscript{67} Ibid., 185.
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