

**PROFESSOR WILLIAM MALEY, SATURDAY 19 NOVEMBER 2005,
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Your excellencies, distinguished guests, ladies and gentlemen.

I'd like to begin by going back to a different time and a different place and a different crime. On the 1st of December 1934, on a cold and gloomy day, a young man called Leonid Nikolayev entered the Smolny Institute in Leningrad in the Soviet Union and assassinated Sergei Mironovich Kirov, who was the head of the Leningrad Party Organisation in the Soviet Communist Party. This assassination was subsequently characterised by the Robert Conquest as the crime of the century, and it was striking for the people of the Soviet Union because in its aftermath—and particularly in the years 1937 and 1938—the People's Commissariat of Internal Affairs of the Soviet Union swung into action producing a purge of public and private figures in the Soviet Union that was known within the USSR by a Russian word *Yezhovchina* (named after Nicolai Yezhov, who was the head of the Secret Police), but which in Western countries came to be known as the Great Terror.

The culmination of the Great Terror was a series of show trials in Moscow which resulted in the elimination of a range of so-called 'Old Bolsheviks'—associates of the revolutionary leader Lenin—who had, up to that point, been amongst the most prominent members of the regime: Grigory Zinoviev, Lev Kamenev and ultimately Nikolai Bukharin. The prosecutor at those particular trials was a man called Andrei Vyshinsky, who was once described to me by somebody who had met him as being 'a rat in human form'. Vyshinsky turned up in Nuremberg, by which time he had come to the height of the Soviet political system. He proved rather an embarrassment when he met with the judges of the International Military Tribunal because he proposed a toast in Russian, to which all the other judges responded by raising their glasses simultaneously, which, when translated for them, nearly made them choke on their drinks. What he had actually said was 'To the defendants, may they travel quickly from heaven to hell', and some more sensitive judges on the bench felt it was not quite appropriate that they be seen making these kind of salutations when the evidence still had to be brought before them.

But this experience of the show trials of the 1930s is relevant to Nuremberg in another sense as well, because of course from June 1941—Operation Barbarossa, when the Soviet Union was invaded by Germany—Stalin's USSR became an ally of the other Western powers that were aligned against Nazi Germany. And so when the war in Europe ended in May 1945, this particular state (which did not have a history of an independent and credible judiciary or prosecutorial system) was a key player in the shaping of the justice mechanism by which the principal surviving members of the Nazi regime—who were by this time living in a hotel known colloquially as Ash Camp—were to be put on trial.

One challenge, therefore, for the Nuremberg Tribunal to be credible was to find ways of overcoming the burden that arose from the presence within the system of prosecution of a significant element which had nothing like a liberal judicial tradition at work within it. This was paralleled by another kind of problem, namely the problem of the battering which the German legal culture had experienced under the Nazi regime from 1933 to 1945. Now this is actually historically quite interesting because there was a certain amount of legalism in Nazi Germany reflected in the

preoccupation with detailed statutes on the part of people like Wilhelm Frick, who was one of the principal defendants at Nuremberg subsequently hanged, and Hans Frank, the main legal advisor to the Nazi Party who was also hanged at the end of the trial. But at the same time as this preoccupation with legal detail persisted, there was nothing remotely like the rule of law in any meaningful sense because any notion of law as being above the officials of the state was utterly compromised by the *Fuhrerprinzip*; the principle enunciated by people like Hans Frank which proposed that the will of the *Fuhrer* subordinated any other kind of legal principle and that as a result if Hitler willed something then it could legally be done. This then contributed to horrendous parodies of courts and legal processes such as one saw in the notorious hearings of the People's Court, the *Volksgerichtshof*, under Roland Freisler—who surely would have been a major defendant himself before the International Military Tribunal had he not been killed during an air raid which occurred when his Court was sitting, and virtually saved the life of a prominent member of German Resistance, Fabian von Schlabrendorff, who was actually before the Court when the bombers came over.

So on the one hand the atmospherics of Nuremberg were shaped by the peculiarity of the Soviet contribution to the exercise, and on the other hand by the very real difficulties that the German legal profession had encountered as a result of the predations of the Nazi regime. Overcoming these required remarkable achievements on the part of both the individual members on the bench, partly Soviet, and individual members of the bar, partly German. As things turned out these problems *were* overcome and the story of how they were overcome is integrally connected to the nature of the trial; the nature of the individuals who served in different roles on the trial; and the particular philosophy of the trial which underpinned the key members of the bench.

Choosing the judges of the Tribunal was a difficult task. Each of the principal states involved (France, the United Kingdom, the United States and the Soviet Union) contributed two judges: one a voting judge and one a non-voting judge. The position of British judge was initially offered to Sir Norman Birkett who was a judge of the High Court in London and who was regarded as one of the greatest advocates of his age. Someone in the Foreign Office came to the conclusion that Sir Norman Birkett wasn't senior enough, and without his having been informed and whilst he still believed that he was going to be the principal British judge, Lord Justice Laurence—who was a member of the Court of Appeal and therefore senior to Sir Norman Birkett in the British judicial hierarchy—was offered the position of voting judge. This was something which was an affront to Birkett because he regarded his legal skills as greatly exceeding those of Lord Justice Laurence, who indeed was not widely regarded as one of the great legal minds of his generation. But, in practice, it proved that the decision that had been made (albeit for the wrong reasons) was probably the right decision.

Birkett himself was a forceful, aggressive, restless personality, as his own diary kept during the hearings explained; it is absolutely chock-a-block with complaints bemoaning the slow pace of the trial; the lack of advocacy skills on the part of some of the defence counsel. It's a burning message of frustration on the part of a quick-witted and quick-minded jurist. Lord Justice Laurence was probably slightly slower, but he managed from the bench to create an impression of remorseless impartiality on the part of the court which quickly allayed the fears of the defence counsel that they were simply part of a farcical procedure in which there would be no opportunity

properly to test the evidence that would be brought against their clients. Lord Justice Laurence was imperturbable; unmovable once he came to the conclusion that justice required that the trial be handled in a particular way; not the least reluctant bit to rule against submissions put to him by members of the prosecution team; and by sheer virtue of the character of his personality, a huge contributor to one key atmosphere of the trial, namely an atmosphere of impartial justice.

Amongst the prosecutors, Justice Jackson stood out. He was in Nuremberg throughout the period of the trial. The principal British prosecutor, Sir Hartley Shawcross (who only died the year before last at the age of 101) was Attorney-General of England, and a consequence of this was that whilst he formally headed the British team, he spent a relatively small amount of time in Nuremberg—although he made the main opening and concluding statements on behalf of the British. The main British barrister was therefore Sir David Maxwell-Fyfe, who went on to become the Lord Chancellor in the Earl of Kilmuir in the later stages of his life. He was a very accomplished prosecutor on account of his consistently reliable mastery of the detail of the case, but was not a wordsmith with Justice Jackson's gift of capturing the moral significance of Nuremberg as an exercise and as an episode.

When one returns to the speeches which Justice Jackson gave—putting aside his cross-examination, which was ordinary to put it mildly—one finds a set of formulations which speak to the present just as powerfully as they spoke when he uttered them before the court in Nuremberg. Professor Coper has shared with you the opening passages of his opening statement, and indeed it's a measure of the mark they made that I had taken a note of the very same opening paragraph that Professor Coper did as one to share with you. I think the last sentence there is still worth repeating, even though you heard it earlier tonight:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

These words almost deserve to be engraved in stone and put in various cabinet rooms in the world. The concluding passage of his opening statement also deserves repetition because again it captures the universality of the trial, and here I quote:

The real complaining party at your bar is Civilization. In all our countries it is still a struggling and imperfect thing. It does not plead that the United States, or any other country, has been blameless of the conditions which made the German people easy victims to the blandishments and intimidations of the Nazi conspirators.

But it points to the dreadful sequence of aggressions and crimes I have recited, it points to the weariness of flesh, the exhaustion of resources and the destruction of all that was beautiful or useful in so much of the world, and to greater potentialities for destruction in the days to come. It is not necessary among the ruins of this ancient and beautiful city with untold members of its civilian habitants still buried in its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes. ...

Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you, the Tribunal, can make war impossible. It does expect that

your juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have 'leave to live by no man's leave, underneath the law'.

That remarkable passage, I think, sums up and captures why it was that Justice Jackson is still perhaps the outstanding figure of the Nuremberg trials. He was not in his design of the process without flaw, but he [inaudible] all the other participants in the trial in his sense of the fundamental ethical importance of what was being attempted, and in his vision of the way in which this could contribute to a consolidation of key principles of international law which would say the words 'never again' to the kind of conduct, which over a period of months, was drawn to the horrified attention of the world through the auspices of the Tribunal itself.

The Tribunal would not have been able to conduct a credible trial had it not also been for the contribution that was made by the defence counsel. Now of course, given the corruption of the legal profession during the Nazi period, finding defence counsel to defend defendants such as those who were on trial in this particular case was no easy task. There was little to be gained in appearing as defenders of kind of people who had been charged in the indictment, and indeed some of the defence counsel took on the responsibility only because their conception of the role of the advocate was to serve impartially no matter how obnoxious a particular client may appear. For their pains were harassed as well as being [inaudible] in the press as it was re-emerging in Germany at the time. But fortunately, Lord Justice Laurence and other members of the bench were assiduously seeking to defend the position of the defence counsel and to emphasise that they were actually officers of the court in performing the roles which they performed within the context of the Tribunal.

There were a number of defence counsel who were themselves lawyers of great accomplishment and attainment. One who only died the year before last, the lawyer for Grand Admiral Donitz, namely Otto Kranzbuhler, was regarded as perhaps the most brilliant of the lawyers to appear from the point of view of crafting a defence to criminal charges on the part of his client. And indeed he showed that [when?] he took the extremely imaginative step of presenting to the US Admiral Nimitz an interrogatory in which he extracted various items of information about American naval practice. [He used the interrogatory] not to argue that the Americans had committed war crimes, but rather to argue that what his client had done—which was paralleled by the actions of the American Admiral—was in accordance with the practice of war at sea at the time, and therefore was not criminal. This was an approach which some other lawyers might have taken to better effect had they had his legal dexterity.

For me the most remarkable of the German counsel was a professor of international law, Professor Herman Jahreiss, who appeared as the junior counsel for General Jodl. He was not a criminal lawyer by profession; he was an academic international lawyer, and he was tasked with making presentations on issues of law on behalf of all the defendants at the point in the trial when the defence opened. He was widely regarded as having provided a contribution to the discussions of the court which was both legally polished but also morally equal to the challenge of the circumstances which the court presented. He made one observation during his presentation which greatly upset a number of the defendants; whilst arguing that the Nazi regime had been a sovereign power in Germany from 1933, he went on to state how painful this was to

one who had lived in the outer cold as though an outcast among his own people. In doing so he captured the poignancy that surrounded the position in life, from 1933 to 1945, of those who did have a commitment to the majesty of the law, and who themselves regarded with horror what was being practiced under people like Frick, and under tribunals like the *Volksgerichtshof*.

Thus, through the contribution of figures such as Lord Justice Laurence, Justice Jackson and Professor Jahreiss, there was infused into the procedures of the trial this air of impartial justice, which, had it not been present, would have condemned the Nuremberg trial to be yet another example of the crude exercise of power by victors over vanquished. As it was, it was able to stand out as an example of the law at work.

Another factor which of course contributed to the trial's enjoying this reputation was that three of the defendants under the indictment were ultimately acquitted: Schacht, the former President of the Reichsbank; Fritzsche who had been a propagandist, but who in a sense had been included in the indictment in the place of Josef Goebbels; and Franz von Papen, who had been a prominent figure of the Nazi regime (and according to William Shirer, contributed more than anyone else to the emergence of Hitler as Chancellor in 1933), but who had been largely off the scene during the second world war as Ambassador to Turkey.

The fact that acquittals could actually occur, which some had believed to be unthinkable at the point when the trial began, genuinely signalled that the trial was actually an appraisal of matters of law and evidence brought before the court by the prosecution and then challenged by the defence. It was indeed a bitter disappointment for Justice Jackson that Schacht was acquitted; everyone knew that he had set his heart on securing conviction of that particular figure. But nonetheless, the Tribunal came to the conclusion that the evidence simply could not sustain conviction under those circumstances.

That's not to say that with hindsight every element of the judgment stands up to close scrutiny. Judges are human, after all, and with hindsight one can look at, for example, the fact that Albert Speer obtained only a fixed term of imprisonment of 20 years as rather generous compared to the fact that although Speer had been involved in the use of slave labour during the war, a figure such as Julius Streicher (who had been in a sense under house arrest for most of the war) was executed even though his main contribution was to publish a revolting anti-Semitic tract or publication called *Der Stuermer*, which was down to about 15,000 copies towards the end of the war.

One suspects that this was partly because Speer, in perhaps a quite contrived fashion, presented himself as young, good-looking and forward-looking before the judges, whereas Streicher, by universal consent, was disgusting beyond measure. Indeed the cross-examination of Streicher by a British barrister was described as resembling somebody contemplating a filthy mess on the pavement. That has troubled some lawyers in the intervening period, but broadly I think there is a sense amongst historians and amongst legal scholars who have examined the conclusions of the Tribunal that it got most of the cases pretty right.

Again, this link between evidence and the conclusions was an important thing. Now oddly enough, those who have looked at the notes that were kept by one of the judges during the private deliberations on guilt and sentencing have come to the conclusion that despite what one might have expected, the two Soviet judges, Nikitchenko and Volchkov, made a greater effort than their French counterparts actually to link their

conclusions to specific evidence and specific principles of law. It was said of the principal French judge that he had a romantic commitment to convict everyone but not to execute anyone, and that working around this was rather difficult for those who actually had to produce coherent penalties. Indeed some have gone so far as to say that the approach of the French Judge Henri de Vabres was quite different from that of the other judges; the French approach was essentially instinctive whereas the others' was evidence-based. Of course instinctive approaches to complex events are becoming more familiar in the times in which we are living and the faith-based approach is becoming more and more common.

Is any of this of contemporary relevance? I think it actually speaks to issues in our time beyond international humanitarian law. It was interesting that during his recent confirmation hearings before the US Senate Judiciary Committee, John Roberts, now the Chief Justice of the United States, expressed his esteem for Justice Jackson when he was called upon to discuss those figures in the judicial history of the United States who had influenced his own judicial thinking. And indeed Jackson, beyond what he did in Nuremberg, stands out as a judge whose relentless commitment to the principles of the law speaks to the times in which we are living.

Recently in the majority decision in the Supreme Court of the United States in the case of *Rasul v Bush*—one of some concern to an Australian detainee in Guantanamo Bay—the majority quoted comments made by Justice Jackson in a case in 1953 called *Shaughnessy v United States*, in which he talked about the exercise of power in a free country. Justice Jackson specifically said:

Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.

And that particular reaffirmation of essentially a doctrine of the separation of powers speaks powerfully to the Nuremberg experiment which took the management of the principal war criminals or principal accused out of the control of the Executives of the victorious states and put them before a tribunal in which their guilt would need to be individually established before convictions could be recorded and penalties meted out.

This emphasis on the separation of powers I think is very important, particularly in the times in which we are living. We are living through days in which we see torture being defended by key members of the Executive in key allies of Australia; we are living in circumstances in which in a number of different countries statutory measures are being contemplated severely to limit the exercise of *habeas corpus*; and perhaps in a deeper sense we are living in times in which, in defence of a self-defined and self-declared war on terror, some of the key principles of the rule of law are under challenge. And of course, we are also living in times in which some powerful states have been reluctant to endorse the move towards institutionalised international criminal justice of the sort that the Statute of the International Criminal Court embodies.

Therefore, in conclusion, it seems to me that we need to pose the question of whether we have come full circle from the principles which Justice Jackson enunciated in Nuremberg, and whether we need to rediscover his civilising message. With that question I'd like to conclude these remarks. Thank you very much.