On British Opinion on Nuremberg (1949)

John Q. Barrett[*]

In late October 1946, Justice Robert H. Jackson, just back to the United States from his year-plus away serving as U.S. Chief of Counsel prosecuting Nazi war criminals before the International Military Tribunal (IMT) at Nuremberg, happened to meet, briefly, lawyer Eugene C. Gerhart, age thirty-four. Gerhart was a former pre-World War II secretary to a judge of the Permanent Court of International Justice in Switzerland, a graduate of Harvard Law School, a veteran of U.S. Navy service during the war, a practicing lawyer in Jackson's upstate New York homeland, and a man with interests in history and writing. Not surprisingly, Jackson was impressed by Gerhart.

A year later, Eugene Gerhart wrote to Justice Jackson and proposed to write his biography. Jackson was skeptical but agreed to cooperate, within the limits that his time and his respect for U.S. Supreme Court confidentiality imposed.

As Gerhart pursued his research, he posed various questions to Jackson. In 1949, for instance, Gerhart asked Jackson about mid-1945 United Kingdom attitudes, before the London Conference concluded in August 1945 with the international agreement to create the IMT, about whether the Allies should prosecute their leading Nazi prisoners as criminals. Gerhart also asked about U.K. attitudes since Nuremberg regarding the legal theories on which the trial was conducted. He apparently had recently read British lawyer John Hartman Morgan's 1948 book *The Great Assize: An Examination of the Law of the Nuremberg Trials*, and he (Gerhart) asked Jackson if he also had read it.

In response, Justice Jackson dictated, edited, and sent the following letter to Eugene Gerhart on March 17, 1949. The letter was Jackson's

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I emailed an earlier version of this essay to The Jackson List on March 17, 2019.

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description, quite straightforward, candid, and on the record, of his thinking. It was at odds with U.K. policy at least initially in 1945. It was, in 1949, perhaps still at odds with some British views, about the legal underpinnings and the legitimacy of the Nuremberg trial.

Mr. Eugene C. Gerhart,
Security Mutual Building,
Binghamton, New York.

My dear Mr. Gerhart:

I have not read [R.H.] Morgan's The Great Assize. Viscount [Frederic Herbert] Maugham, the former Lord Chancellor and brother of Somerset Maugham, was at Nurnberg briefly as a guest.

Of course, the fundamental premises on which we prosecuted the Germans for offenses against international society are at war with the concept of sovereignty as an absolute right of a nation to do as it pleases. This argument was made by German [defense] counsel. However, as [Columbia University law] Professor [Philip] Jessup points out in his work, A Modern Law of Nations, page 2, no real international law can exist if this rule of unlimited sovereignty is to prevail. This is simply one of those basic breaks between the modern and what I consider the medieval conception of the place of law among nations. I am not disposed to deny that it [Nuremberg] was a substantial break with the past and may have been applied somewhat retroactively.

As to the crimes against humanity, there is truth on both sides. As I pointed out in the Opening Speech [I delivered to the IMT on November 21, 1945,], it is not every cruelty which a government inflicts upon its own people that becomes of international concern. But you will notice in the definition of "crimes against humanity" that it is limited to those "in execution of or in connection with any crime within the jurisdiction of the Tribunal." That is to say, when extermination, enslavement and deportation are a part of the program of aggressive warfare, they do become matters of international concern. I think our proof amply demonstrated

that the campaign against the Jews was intended to remove what they [the Nazis] regarded as an obstruction to instituting war and that the extermination was a part of the objective of the war.

It may be true that there is no generally accepted definition of "aggressive war" and that all victors tend to justify themselves. You will find in the minutes of the [summer 1945] London Conference that I made repeated efforts to get a definition and I never had any help from the British in doing it.

It does not seem to me that aggressive warfare is any more vague, even if not further defined, than many of the concepts with which we work in the law. And we must not forget that the Hitler war was aggressive by any test that anybody has ever suggested, and that he boasted of it as such. I have dealt with these matters in a speech, copy of which is enclosed.

This must be remembered about all British comment on the trial. The British Government under Lord Chancellor [John] Simon was opposed to trials and wanted the war criminals disposed of by executive determination. This fact appears in the London Conference records among the very early documents. A large segment of British opinion remains committed to that theory or is sufficiently biased on the subject to be critical of the trials. We rather forced trials upon them, as you will see from the London minutes, and there has been some disposition among the British not perhaps to resent that fact but at least to try to make up for it by criticism of what was done.

I trust this gives you, in general, what you want.

With best wishes, I am

Sincerely yours,

/s/ Robert Jackson

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
BERT H. JACKSON

March 17, 1949.

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