

## The Holocaust at Nuremberg

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The Trial of the Major War Criminals at Nuremberg in 1945-46, a spectacular media event of the day, presented the first comprehensive definition and documentation to a non-Jewish audience of the persecution and massacre of European Jewry during World War II-what we have come to term, in English at least, as the Holocaust. Virtually every important aspect of the catastrophe, one hastens to say, had seeped into the news channels of the Western Allies during the course of the war itself. Soviet propaganda had similarly disseminated the horrors of the German assault on European Jewry, although Moscow's line had certainly diminished the extent to which the policies of the Reich had singled out the Jews. Jews themselves had mounted protests against the killings from their first occurrence, and, particularly during the second half of 1942, their spokesmen broadcast information about the "Final Solution" from London, Washington, and elsewhere, using every platform available to them. Yet-as historians have long since made clear-information was not knowledge.

It took time for the news to sink in, and imagination to put the pieces together, grasp the whole, and make distinctions. Even at the end of the war, as we know from accounts of the liberation of camps in the West, there was a shock of "discovery." Throughout the conflict men and women of good will-non-Jews and also Jews themselves-did not fully comprehend the scope or character of the catastrophe. Particularly in regard to the Nazis' motivation, their determination to eliminate an entire people, and their organization of a European-wide massacre, understanding frequently fell short.

Nuremberg did not change this situation overnight. To the contrary, because the trial was such a prodigious affair, lasting an entire year, and involving scores of witnesses, thousands upon thousands of pages of documents and testimony, and complex legal argumentation-the Holocaust was by no means at the center of attention. Information about it easily could be drowned in the greater flood of crimes and accusations. Moreover, during the immediate postwar period, Jews and non-Jews, for a variety of reasons, consciously

preferred, at times, not to discuss the matter. Nuremberg's references to Jews were sometimes ignored, just as stories in *The New York Times* in 1942 were ignored, and connections made in 1946 were sometimes no more solidly implanted in the public consciousness than those in 1943 or 1944. Bound by the framework of a legal process, and operating in the immediate aftermath of the war, Nuremberg also added a few distortions of its own.

It was, however, a turning point. For the first time in a non-Jewish forum, spokesmen for the Allied powers outlined the Nazis' anti-Jewish policy at length, and with ample documentation and evidence, sometimes from eyewitnesses. In detail and conception unknown to all except a handful of Jewish experts, Nuremberg set forth, for the first time, a full account of the massacre of European Jewry. And unlike wartime political leaders, the Nuremberg prosecutors acknowledged the uniqueness of the assault upon the Jews of Europe. To be sure, much remained to be explained, and the major books on the subject were still years away, but Nuremberg made available in a fully authoritative way, for the first time, the elements of the story. Ever since, the Nuremberg documentation has constituted the principal reference point for a study of the Nazi Holocaust.

The four powers that organized the Nuremberg Trial—the Americans, British, Soviets and French—defined the rules and focus of the proceedings at a conference of experts that met in London during the summer of 1945. This was in response to a strong initiative from Washington in the preceding months. After much deliberation, the London Conference produced a charter outlining the authority and competence of the International Military Tribunal and prepared an indictment charging twenty-four defendants (reduced to twenty-two after industrialist Baron Gustav Krupp von Bohlen und Halbach was shown to be incompetent and Labor Front leader Robert Ley committed suicide) with “crimes against peace, war crimes, crimes against humanity,” and with participating in “a common plan or conspiracy” to commit those crimes. The indictment also charged seven “groups or organizations” of the German state and Nazi party with being criminal participants in the other crimes.

According to the American plan for the trial, largely accepted by the other powers, the very heart of the charges against the accused was the conspiracy to wage aggressive war, with war crimes and crimes against humanity seen as accessory, as having been committed in pursuit of aggression on a global scale.<sup>1</sup> Seeking to attune the prosecution to the American leadership's desire to justify the war to the United States public, officials in Washington accented the first count against the accused, the "Common Plan or Conspiracy," thereby putting a particular stamp on the entire process, especially its presentation of how Nazi criminality originated. "Our case against the major defendants," the American chief prosecutor, Supreme Court Associate Justice Robert H. Jackson wrote to President Harry S. Truman, "is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan."<sup>2</sup> "(O)ur view," Jackson declared during the London Conference, "is that this isn't merely a case of showing that these Nazi Hitlerite people failed to be gentlemen in war; it is a matter of their having designed an illegal attack on the international peace . . . and the other atrocities were all preparatory to it or done in execution of it."<sup>3</sup>

Contrary to a widespread belief-at the time, and subsequently-in the Nuremberg prosecution the Nazis' persecution and murder of European Jews was not limited to "crimes against humanity." Although there is some reason now to think of the former in such terms, this was not the original conception, nor the way in which the case against the accused was first presented. Indeed, the assault on the Jewish people was referred to in every one of the counts against the defendants. The indictment understood the "program of relentless persecution of the Jews, designed to exterminate them" as a means of mobilizing support for Nazism among Germans and for acquiring totalitarian control over Germany. Eventually, anti-Jewish policy resulted in European-wide massacre:

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<sup>1</sup>See Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books, 1981) and *idem*, *The American Road to Nuremberg: The Documentary Record 1944-1945* (Stanford, California: Hoover Institution Press, 1982).

<sup>2</sup> *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials. London 1945* (Washington: Department of State, 1949) (hereafter, *Report of Robert H. Jackson*), p. 48.

<sup>3</sup> *Ibid.*, p. 299.

Of the 9,600,000 Jews who lived in the part of Europe under Nazi domination, it is conservatively estimated that 5,700,000 have disappeared, most of them deliberately put to death by the Nazi conspirators. Only remnants of the Jewish population remain.<sup>4</sup>

“War Crimes” was the most straightforward of the four counts against the accused, in the sense that international law provided a well-worn path of custom, precedent, and legislation for their adjudication. As defined in the Nuremberg Charter, “war crimes” were understood as illegal acts committed against civilian populations as well as military personnel. In the words of Article 6(b), war crimes were “violations of the laws and customs of war,” including murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>5</sup>

“Crimes against humanity” was a distinct innovation of the Nuremberg Trial, and in the popular imagination it remains one of the noted achievements of the entire process, as well as the category of crimes used to designate the persecution and murder of European Jews. Originally introduced into the indictment for technical reasons, “crimes against humanity” came to stand for crimes of unprecedented magnitude-akin to what the French prosecutor, François de Menthon, referred to at one point as a “crime against the human status.”<sup>6</sup> The reason for this usage has something to do with the origins of “crimes against humanity” at Nuremberg but also with their association with

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<sup>4</sup> *Ibid.*, p. 34.

<sup>5</sup> *Ibid.*, p. 11.

<sup>6</sup> International Military Tribunal. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, 42 vols., (Nuremberg: International Military Tribunal, 1947; hereafter, IMT), V, pp. 406-409. On crimes against humanity, see Egon Schwelb, “Crimes Against Humanity,” *British Year Book of International Law*, XXIII (1946), pp. 178-226; M. Sherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff Publishers, 1992); Sydney L. Goldenberg, “Crimes Against Humanity - 1945-1970,” *Western Ontario Law Review*, 10 (1971), pp. 1-55; and Roger S. Clark, “Crimes Against Humanity,” in George Ginsburgs and V.N. Kudriavtsev, *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990), pp. 177-212.

the murder of European Jews—widely accepted, as Sir Hartley Shawcross put it in his case against the Jew-baiter Julius Streicher, as “the most frightful crime the world has ever known.”<sup>7</sup>

“Crimes against humanity” had an extensive pedigree, relating to broad humanitarian principles that were not codified in positive law. The “laws of humanity” were woven into the famous Martens Clause of the Fourth Hague Convention of 1907 on land warfare, which sought to extend to entire populations the protection of “the principles of the law of nations, as established by and prevailing among civilized nations, by the laws of humanity, and the demands of public conscience.” Denouncing the massacre of Armenians in 1915, the governments of France, Britain, and Russia held the Turkish government responsible for “crimes against humanity and civilization.” And the 1919 Commission of Responsibility of the Authors of the War looked to the prosecution of those “guilty of offenses against the laws and customs of war or the laws of humanity.”<sup>8</sup>

With reference to the Nazis, “crimes against humanity” came to designate grave maltreatment or atrocities for which there appeared to be so explicit legal prohibition, for reasons having most often to do with the nationality of the victims. In exile during the war, German anti-Nazi and other antifascist refugees from the expanded Reich feared that “war crimes” as conventionally defined might well exclude the persecutions they had suffered on Axis territory. German, Austrian and Czechoslovak Jews, churchmen, Social Democrats, Communists and liberals, shared this concern, and their spokesmen pleaded with Allied authorities to have their sufferings acknowledged in the quest for justice.

Taking up their case in 1944, the American delegate to the United Nations War Crimes Commission, Herbert Pell, sought retribution for wartime atrocities committed against people on religious or racial grounds. According to the commission’s official history, Pell “said that such crimes demanded the application of the ‘laws of humanity,’ and moved that ‘crimes committed

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<sup>7</sup> IMT, XIX, p. 518.

<sup>8</sup> Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, *Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919* (Oxford: Clarendon Press, 1919).

against stateless persons or against any persons because of their race or religion' represented 'crimes against humanity' ...." Not long after, the commission defined such crimes as "crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed"-a definition not far in substance from that adopted in London and incorporated into Article 6(c) of the charter, entitled "Crimes against Humanity."<sup>9</sup>

As part of their preparation for the London meeting, the American prosecution team produced several drafts of the offenses with which the Nuremberg defendants were to be charged. The challenge here was to engage the full range of Nazi criminality, including not only aggressive wars and breaches of the "laws and customs of war," but also "atrocities and persecutions," as they were frequently termed. These barbarities were understood to be integral to Nazism and thus might have been sanctioned by German law at the time. Repeatedly, the American drafts referred to "persecutions on racial or religious grounds"-language, once again, that found its way into Article 6(c). As Jackson explained, he had been specifically urged by émigré groups to prosecute crimes "Committed inside Germany, under German law, or even in violation of German law, by authorities of the German state."

As the London meetings continued, it was evident that these American preoccupations were matched by those of the British, French, and Russian Allies. Sir David Maxwell Fyfe reported pressure from Jewish groups to include some reference to persecutions on grounds covered by the term "crimes against humanity."<sup>10</sup> The French and the Russians, particularly as the result of the suffering of their populations during the war, and for whom such a category of crimes might designate as criminal some acts otherwise ineligible for prosecution, posed no objection to incorporating such language into the charter. So far as the specific term "crimes against humanity," the suggestion seems to have come to Jackson from Hersch Lauterpacht, a distinguished professor of international law at Cambridge who had strongly pressed for a

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<sup>9</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: United Nations War Crimes Commission, 1948), pp. 175-176; *New York Times*, February 21, 1945.

<sup>10</sup> *Report of Robert H. Jackson*, pp. 329, 333.



war-crimes trial in 1943 and who had been keen to have the court consider atrocities committed against European Jewry.<sup>11</sup> The dominant force in London, it was Jackson who introduced the heading “Crimes Against Humanity” into one of the final drafts of the London agreement. Thereby, it found a place in Article 6 of the Nuremberg Charter and the indictment.

Would these crimes include persecutions reaching back to the Nazis’ seizure of power in 1933? Jewish groups had argued strenuously that this be done, and up to the beginning of the London Conference the American drafts suggested that “crimes against humanity” would extend to the very beginning of the Nazi era. However, in keeping with his primary focus on Nazi aggression in the drafting of the charter, and uneasy about claiming jurisdiction over the internal affairs of another country, Jackson demanded that “crimes against humanity” be understood as part of the “common plan or enterprise of making an unjust or illegal war in which we became involved.” As we have seen, the Americans wanted such crimes to be subsidiary, deriving from the other charges against the accused. Fashioned into the language of the charter, and with the punctuation corrected by a special Protocol on October 6 to underscore the point, Article 6(c) read as follows:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>12</sup>

In preparation for the trial, the American prosecution seriously considered singling out the Nazis’ policies toward Jews through direct Jewish participation in the proceedings. Before the London Conference, some Jewish groups requested such involvement in the trial as part of their briefing of the chief

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<sup>11</sup> Jacob Robinson, “The International Military Tribunal and the Holocaust: Some Legal Reflections,” *Israel Law Review*, 7 (1972) (hereafter, Robinson), p. 3; H. Lauterpacht, “The Law of Nations and the Punishment of War Crimes,” *British Year Book of International Law*, XXI (1944), pp. 58-95.

<sup>12</sup> By introducing a comma instead of a semicolon after “war,” the Berlin Protocol of October 6, 1945, insured the limited scope of *all* crimes against humanity-limited, that is, to acts committed “in connection with any crime within the jurisdiction of the Tribunal . . .” See Schwelb, “Crimes against Humanity,” pp. 194-195.

American prosecutor. Jackson originally advised against the idea, but seems to have changed his mind during the summer of 1945, probably as a result of conversations with Professor Lauterpacht.

In August, Jackson apparently agreed to call Chaim Weizmann, the venerable president of the World Zionist Organization, to testify at Nuremberg. Weizmann, it was hoped, would prepare a 15,000-word statement and would address the tribunal for about three hours. Ultimately, the idea was dropped. The British, apparently, objected to Weizmann's testifying, fearing that the Zionist leader would embarrass them with reference to the White Paper on Palestine. Weizmann, too, was uncertain about the wisdom of an appearance, as emerged at a meeting with Zionist leaders in London on September 13. Aged and frail, the Jewish statesman was unhappy with the material that had been prepared for him ("entirely insufficient... an essay which would have been written by almost anyone ... completely useless...") and was unwilling to subject himself to cross-examination "without being adequately prepared." In contrast to David Ben-Gurion who was enthusiastic about the idea, Weizmann hesitated. He wanted to bring to bear additional research and sought to put off an appearance before the tribunal. In general, the Zionist leader seems to have been unconvinced about the value of such testimony and lacked confidence in his ability to speak to the issue.<sup>13</sup>

On the second day of the trial, November 22, 1945, Robert Jackson set the tone for future discussion of Nazi anti-Jewish policy by the prosecution, devoting an important section of his opening speech to the tribunal to "crimes against the Jews." "The most savage and numerous crimes planned and committed by the Nazis were those against the Jews," the American prosecutor declared.

It is my purpose to show a plan and design to which all Nazis were fanatically committed, to annihilate all Jewish people. These crimes were organized and promoted by the Party leadership, executed and

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<sup>13</sup> Lauterpacht to Weizmann, July 29, 1945. Weizmann Archives: File 2596; Lauterpacht to Weizmann, August 12, 1945, *ibid.*, File 2599; Leonard Stein to Weizmann, August 28, 1945, *ibid.*, File 2600; minutes of a meeting, September 13, 1945, *ibid.*, File 2603; Robinson, pp. 1-13.



protected by the Nazi officials, as we shall convince you by written orders of the Secret State Police itself.<sup>14</sup>

To be sure, Jackson's understanding was framed by the indictment and cast as a legal argument. "The persecution of the Jews," he claimed without elaboration, "was a policy directed against other nations as well as against the Jews themselves. Antisemitism was promoted to divide and embitter the democratic peoples and to soften their resistance to the Nazi aggression." "The avowed purpose was the destruction of the Jewish people as a whole," he said, but also "as an end in itself, as a measure of preparation for war, and as a discipline of conquered peoples."

On balance, as one legal scholar has noted, this reading of the evidence understood the murder of European Jews "in terms of the perverted logic of political control and military conquest," rather than as part of a genocidal project inspired by anti-Jewish ideology.<sup>15</sup> These interpretative themes were less prominent in his speech, however, than the crushing weight of evidence: the number of victims—some 5,700,000 Jews, by his estimate, a figure accepted by Sir Hartley Shawcross, the British chief prosecutor; the widespread involvement of the defendants and other Germans—part of the Nazi plan "to which every defendant was a party"; the Nazis' unbounded goals—their plan for extermination that contemplated "extinguishing the Jews in Europe and often in the world"; the particular savagery in Eastern Europe—"the eastern Jew has suffered as no people ever suffered"; and the details of mass murder—the ghettos, the Einsatzgruppen, the gas vans, the Warsaw ghetto. It was all there, and Jackson finished his introduction by accenting the place of anti-Jewish persecutions in the American case:

Determination to destroy the Jews was a binding force which at all times cemented the elements of this conspiracy. On many internal policies there were differences among the defendants. But there is not one of them who has not echoed the rallying cry of Nazism: "Deutschland erwache, Juda verrecke!" (Germany awake, Jewry perish!).<sup>16</sup>

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<sup>14</sup> IMT, II, p. 118.

<sup>15</sup> Lawrence Douglas, "Film as Witness: Screening *Nazi Concentration Camps* Before the Nuremberg Tribunal," *Yale Law Journal* 105 (1995) (hereafter, Douglas), p. 477.

<sup>16</sup> IMT, II, pp.118-127.

Jewish issues were presented at various points in the prosecution's case and were woven into the evidence presented on all counts, especially war crimes and crimes against humanity. Although closely associated with the latter count in the indictment, the murder of European Jews was not separated from other crimes. In speeches before the tribunal and in frequent testimony, references to Jews intermingled with accounts of other victimization at the hands of the Nazis. In practice as in theory, crimes against humanity were constantly tangled in war crimes, and both in the indictment and throughout the trial there was little effort to distinguish between them. To be sure, attorneys often alluded to crimes against humanity as a way of underscoring the particularly heinous character of Nazi criminality. "The war crimes," said Shawcross, departing from the legal definition and slipping into the widespread popular understanding of the matter, "were in their very enormity crimes against humanity. The crimes against humanity were not seldom war crimes, larger still." At Nuremberg, he reminded the tribunal, following the wording of the charter, crimes against humanity had to be connected with the other crimes of the indictment. "So the crime against the Jews," he noted in a legal flourish, "insofar as it is a crime against humanity and not a war crime as well, is one which we indict because of its close association with the crime against the peace."<sup>17</sup> There is no better illustration of how the charter promoted the integration of the crimes against Jews with other crimes before the tribunal.

There was one exception to the respectful inclusion of the fate of European Jewry. Remarkably, in an introductory speech that lasted for several hours and treated Nazi criminality in the most wide-ranging fashion-and which was meant to deal with both war crimes and crimes against humanity- François de Menthon devoted only a single sentence to Jews, a somewhat off-target reference to Nazi persecutions: "It is also known that racial discriminations were provoked against citizens of the occupied countries who were catalogued as Jews, measures particularly hateful, damaging to their personal

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<sup>17</sup> IMT, XIX, pp. 470-471.

rights and human dignity.”<sup>18</sup> The lapse is curious, though not untypical, probably relating to the unease in postwar France and elsewhere on Jewish issues, and to distortions of the popular memory having to do with wartime collaboration and popular antisemitism.<sup>19</sup> By contrast, most prosecutors at Nuremberg spoke freely about Jews. Scattered references to Gypsies also appeared, one should add, but these were very few and reflected little understanding, at the time, of Nazi policies toward the Sinti and Roma people.<sup>20</sup>

Certainly, some of the articulation of the murder of European Jewry seems odd when seen from our vantage point, after a half century’s research and discussion of the matter. There may have been more than a translation problem when one Soviet prosecutor was reported as denouncing, “the excessive antisemitism of the Hitlerite criminals.”<sup>21</sup>

Some basic elements were missed: notably, the prosecutors failed to distinguish between concentration camps, where there was great cruelty and loss of life but not systematic mass murder, and the death camps of Poland, where close to four million had been killed as if on an assembly line. At times, interpretations seemed to be shaped by the contours of the legal argument rather than the reverse. An example is the indictment’s description of crimes against humanity in which the victims were declared to have been singled out because they “were suspected of being hostile to the Nazi Party . . . or were suspected of being opposed to the common plan alleged in Count One.”<sup>22</sup>

Neither the British nor the Americans had given much thought before the trial to the processes by which European Jews had been persecuted and destroyed. Telford Taylor, a U.S. army colonel in 1945, and part of the prosecution team who took over subsequent Nuremberg trials, someone of unquestioned sympathy toward Jews, remembers that as the trial was being prepared he knew little about what we call “the Holocaust”: “like so many

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<sup>18</sup> IMT, V, p. 412.

<sup>19</sup> On this issue see especially Annette Wieviorka, *Déportation et génocide: entre la mémoire et l’oubli* (Paris: Plon, 1992). See also idem, “Le proces de Nuremberg,” *L’Histoire*, No. 136 (September 1990), pp. 50-64.

<sup>20</sup> The only reference to Gypsies in the indictment was in a passage referring to “deliberate and systematic genocide, viz., the extermination of racial and national groups . . . particularly Jews, Poles, and Gypsies and others.” IMT, I, pp. 43-44.

<sup>21</sup> IMT, VIII, p. 294.

<sup>22</sup> IMT, I, p. 65.

others, I remained ignorant of the mass extermination camps in Poland, and the full scope of the Holocaust did not dawn on me until several months later, at Nuremberg.”<sup>23</sup> Inevitably, because the learning curve was so steep, there were odd misstatements—as if the concentration was broken, or as if there was a momentary assumption that the Nazis had used common sense, or as if the prosecutors were reluctant to look at their own evidence in the face. Only the latter could explain British prosecutor Sir David Maxwell Fyfe’s suddenly blurting out to the court, as if a shattering conclusion, that the death camp of Majdanek “could only have been run with the approval of the German government.”<sup>24</sup> Or, similarly, the prosecution’s belief that defendant Julius Streicher, a repellent but clearly second-rate Jew-baiter — “the filthy Streicher,” as Jackson called him in his summation—was a key figure in orchestrating crimes against humanity by inciting and “directing” others in the persecution of the Jews.

Both the Americans and the British set the murder of European Jews in what is to us familiar historical perspective—referring to six million killed (seemingly rounded off from 5.7 million), thereby establishing that figure for the first time with the authority of a non-Jewish international agency. There was a forthright acknowledgment of the historic importance of the catastrophe. Jackson, in his summary, had this to say: “The Nazi movement will be of evil memory in history because of its persecution of the Jews, the most far-flung and terrible racial persecution of all time.”<sup>25</sup> Shawcross, in the same vein, declared a day later:

There is one group to which the method of annihilation was applied on a scale so immense that it is my duty to refer separately to the evidence. I mean the extermination of the Jews. If there were no other crime against these men, this one alone, in which all of them were implicated, would suffice. History holds no parallel to these horrors.<sup>26</sup>

In their cases against various defendants all four prosecution teams outlined at length essential elements of what we now understand as “the Holocaust.”

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<sup>23</sup>Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (Boston: Little, Brown, 1992), xi.

<sup>24</sup>Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), p. 48.

<sup>25</sup>IMT, XIX, p. 404.

<sup>26</sup>IMT, XIX, p. 501.

Following a strategy urged upon the American lawyers by Jackson himself, the United States relied heavily upon documentary evidence in making their case, preferring paper to witnesses on Jewish issues as everything else. This strategy on the whole robbed the American presentation of drama and intensity, although there were exceptions in particularly horrifying instances, some of which focused attention on Jews. A good example was the presentation of a bizarre and ghoulish document that has since become famous—the album-report on the suppression of the Warsaw ghetto uprising of 1943, by the SS commander Jürgen Stroop, marked Exhibit USA-275. Presented by American prosecutor Major William Walsh, and followed by photographs projected on a screen for a darkened courtroom, this was almost certainly the most extensive publicity the world had yet received for the 1943 Jewish revolt.<sup>27</sup>

To the documents and first-hand testimony, the prosecution added a film with horrific scenes from liberation of German concentration camps, and films of massacres and other barbarities, some of them taken by the Germans themselves.<sup>28</sup> The court psychologist Gustav Gilbert and his colleague Douglas Kelley stationed themselves at one showing to assess the reaction of the defendants. They reported a range of reactions, from contrition (Walter Funk: “covers his eyes, looks as if he is in agony, shakes his head”), to boredom (Rosenberg: “fidgets, peeks at screen, bows head, looks to see how others are reacting”), to indeterminate (Streicher: “keeps watching, immobile except for an occasional squint”). In the evening, the psychologists did the rounds of the prisoners’ cells to collect more impressions. Field Marshal Wilhelm Keitel, Gilbert reported,

Was eating, having just returned from a conference with his defense attorney. He appeared to have forgotten the film until we mentioned it.

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<sup>27</sup> *Ibid.*, III, pp. 553-559.

<sup>28</sup> See Douglas, pp. 449-481, which describes the screening for the court of a seventy-minute film on the liberation of camps in Central Europe. The narration of this film was rather sparse, and although it dealt with concentration camps rather than the death camps of Poland, it was remarkably reticent on issues related to the murder of European Jews. “The word ‘Jew,’ for example, is mentioned only once in the entire film, and in such a manner as to obscure any suggestion that Nazi terror was directed against Jews as a group: ‘The 4,000 Ohrdruf victims are said to include Poles, Czechs, Russians, Belgians, German Jews and German political prisoners.’” *Ibid.*, p. 474.

He stopped eating and said with his mouth half full, "It is terrible. When I see such things, I'm ashamed of being a German!—It was those dirty SS swine!—If I had known I would have told my son, "I'd rather shoot you than let you join the SS." But I didn't know. I'll never be able to look people in the face again."<sup>29</sup>

Judge Norman Birkett often saw no value in the accumulation of detail. "This evidence is building up a most terrible and convincing case of complete horror and inhumanity in the concentration camps," he wrote in his diary one evening, following the horrific testimony on the camp of Auschwitz by a French witness, Marie Claude Vaillaint-Couturier. "But from the point of view of this trial it is a complete waste of valuable time. The case has been proved over and over again. Neither does the world need it any more, for all over the world the evidence has been published . . . But it seems impossible to stop it, or to check the volume of it."<sup>30</sup>

It was the Americans, not the Russians, who first familiarized the Nuremberg court with the Einsatzgruppen, the motorized SS units that followed in the wake of the Wehrmacht in the Soviet Union, shooting Jews by the tens and, eventually, hundreds of thousands. Here the United States prosecutors called a very important witness (later convicted in a subsequent Nuremberg trial and executed in 1951). SS general Otto Ohlendorf was thirty-eight years old in 1946, and a commander during the Barbarossa campaign of one of the most important murder units-Einsatzgruppe D, operating in the southern Ukraine during the summer and autumn of 1941. "The instructions were that in the Russian operational areas of the Einsatzgruppen the Jews, as well as the Soviet political commissars, were to be liquidated," Ohlendorf told the court. "And when you say 'liquidated' do you mean 'killed'?" Ohlendorf was asked by Colonel John Harlan Amen, the United States Associate Trial Counsel.

"Yes, I mean 'killed,'" was his reply.

Ohlendorf went on to explain how the victims were selected, the strain experienced by their murderers, the problems of daily life in a murder unit, the

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<sup>29</sup> G.M. Gilbert, *Nuremberg Diary* (New York: Signet, 1947), pp. 48-49.

<sup>30</sup> H. Montgomery Hyde, *Norman Birkett: The Life of Lord Birkett of Ulverston* (London: Hamish Hamilton, 1964) (hereafter, Hyde), p. 505.



lines of command, and so forth. How many men were in the unit, Amen asked. About 500, Ohlendorf indicated.<sup>31</sup>

Similar testimony came from SS *Obergruppenführer* and General of the Waffen SS Erich von dem Bach-Zelewski, a top SS official in occupied Soviet territory and the leader, for a time, of one of the Einsatzgruppen. He was examined by American prosecutor Colonel Telford Taylor.

In what was perhaps the single most important testimony for understanding the European-wide evolution of the “Final Solution,” the Americans called the thirty-four-year-old Dieter Wisliceny, a SS *Hauptsturmführer* who was a close associate of the SS Jewish expert Adolf Eichmann. He had served with the latter in the Jewish branch of the Reichssicherheitshauptamt, the huge SS police apparatus. Questioned by Lieutenant Colonel Smith Brookhart, Jr., an American assistant trial counsel, Wisliceny outlined the stages of Nazi Jewish policy with remarkable lucidity. “Until 1940 the general policy within the section was to settle the Jewish question in Germany and in areas occupied by Germany by means of a planned emigration,” he said.

The second phase, after that date, was the concentration of all the Jews, in Poland and in other territories occupied by Germany in the East, in ghettos. This period lasted approximately until the beginning of 1942. The third period was the so-called “Final Solution” of the Jewish question, that is, the planned extermination and destruction of the Jewish race; this period lasted until October 1944, when Himmler gave the order to stop the destruction.<sup>32</sup>

Wisliceny detailed his association with Eichmann and the latter’s role in deporting the Jews to their deaths. When did he learn of an order for the “so-called “Final Solution?” Wisliceny claimed he heard of it from Eichmann, in the summer of 1942.

WISLICENY: Eichmann told me he could show me this order in writing if it would soothe my conscience. He took a small volume of orders from his safe, turned over the pages, and showed me a letter from Himmler to the Chief of the Security Police and the SD. The gist of the letter was roughly as follows:

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<sup>31</sup> IMT, IV, pp. 316-317, 326.

<sup>32</sup> IMT, IV, pp. 356-357.

The Führer has ordered the Final Solution of the Jewish question; the Chief of the Security Police and the SD and the Inspector of Concentration Camps were entrusted with carrying out this so-called Final Solution. All Jewish men and women who were able to work were to be temporarily exempted from the so-called Final Solution and used for work in the concentration camps.” This letter was signed by Himmler himself. I could not possibly be mistaken since Himmler’s signature was well known to me. I . . .”

LT. COLONEL BROOKHART: To whom was the order addressed?

WISLICENY: To the Chief of the Security Police and the SD, that is, to the office of the Chief of the Security Police and SD.

LT. COLONEL BROOKHART: Was there any other addressee on this order?

WISLICENY: Yes, the Inspector of Concentration Camps. The order was addressed to both of these offices . . .

“It was perfectly clear to me that this order spelled death to millions of people,” Wisliceny later told the court. “I said to Eichmann, ‘God grant that our enemies never have the opportunity of doing the same to the German people,’ in reply to which Eichmann told me not to be sentimental; it was an order of the Führer’s and would have to be carried out.”<sup>33</sup>

Soviet prosecutors were reluctant to distinguish the suffering of Jews from that of other Soviet citizens, but they also presented a full, grisly, account of the Nazis’ campaign against the Jewish people, almost as if unconcerned about the Jewish claim of unique and singular victimization. Introducing the Russian case, Soviet Chief Prosecutor Roman Rudenko, who had just completed a brutal prosecution of anti-Communist Poles in the previous year at the behest of Stalin, accented the Barbarossa campaign and the plans for “the merciless annihilation of Soviet people for political and racial reasons.”<sup>34</sup> Rudenko claimed that *all* inhabitants of Eastern Europe “were subjected to merciless persecution and mass extermination”: entire populations of occupied Europe, “and of the Slavic countries above all others-especially Russians, Ukrainians, Belorussians, Poles, Czechs, Serbians, Slovenes, Jews.” Particularly with reference to the Soviet Union, the Soviet prosecutor underscored that the Nazis’ murderous goals-“the merciless annihilation of the Soviet people for

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<sup>33</sup> IMT, IV, pp. 358-359.

<sup>34</sup> I have learned a great deal on the Soviet prosecution from Natalia S. Lebedeva, “The USSR and the Nuremberg Trial,” lecture given at the University of Toronto, March 8, 1996.

political and racial reasons”- involved more than a quarrel with the Jews.<sup>35</sup>

Yet while some passages of his speech simply listed Jewish victims together with those of other Soviet nationalities, others might have been understood as giving them a special standing-as in: “the bloody butchery of the Slavic and Jewish peoples.” Still other formulations suggested a singular Jewish fate: “The fascist conspirators,” Rudenko told the tribunal, “planned the extermination to the last man of the Jewish population of the world and carried out this extermination throughout the whole of their conspiratorial activity from 1933 onwards.”<sup>36</sup>

Among the relatively few witnesses the Soviet prosecutors presented were several Jews who told of horrifying events. Chief Counsellor L.N. Smirnov called Abram Suzkever, a Jewish writer from Vilna. Prompted by Smirnov, Suzkever recounted the terrorization and massacre of one of the leading Jewish communities of Eastern Europe:

MR. COUNSELLOR SMIRNOV: You witnessed the persecution of Jews in that city?

SUZKEVER: Yes.

MR. COUNSELLOR SMIRNOV: I would like you to tell the Court about this.

SUZKEVER: When the Germans seized my city, Vilna, about 80,000

Jews lived in the town. Immediately the so-called Sonderkommando Was set up at 12 Vilenskaia Street, under the command of Schweichenberg and Martin Weiss. The man-hunters of the Sonderkommandos, or as the Jews called them, the “Khapun,” broke

into the Jewish houses at any time of day or night, dragged away the

men, instructing them to take a piece of soap and a towel, and herded

them into certain buildings near the village of Ponari, about 8 kilometers from Vilna. From there hardly one returned. When the Jews found out their kin were not coming back, a large part of the population went into hiding. However, the Germans tracked them with

police dogs. Many were found, and any who were averse to going with

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<sup>35</sup> IMT, VII, pp.153, 192.

<sup>36</sup> IMT, VII, pp.191-192.

them were shot on the spot.

I have to say that the Germans declared that they were exterminating

the Jewish race as though legally.

On 8 July an order was issued which stated that all Jews should wear a

patch on their back; afterwards they were ordered to wear it on their chest...But two days later some other commandant named Neumann issued a new order that they should not wear these patches but must wear the yellow Star of David.

MR. COUNSELLOR SMIRNOV: And what does this yellow Star of David mean?

SUZKEVER: It was a six-pointed patch worn on the chest and on the back, in order to distinguish the Jews from the other inhabitants of the

town. On another day they were ordered to wear a blue band with a white star. The Jews did not know which insignia to wear as very few lived in the town. Those who did not wear this sign were immediately arrested and were never seen again.

After a long, harrowing account, Smirnov asked for statistics:

MR. COUNSELLOR SMIRNOV: Please, Witness, I am interested in the following question: You said that at the beginning of the German occupation 80,000 Jews lived in Vilna. How many remained after the German occupation?

SUZKEVER: After the German occupation about 600 Jews remained in Vilna.

MR. COUNSELLOR SMIRNOV: Thus, 79,400 persons were exterminated?

SUZKEVER: Yes.

MR. COUNSELLOR SMIRNOV: Your Honors, I have no further questions to ask of the witness.<sup>37</sup>

The Soviet prosecutors left no doubt whatsoever on the question of the premeditation and planning of genocide. What they did ignore, almost

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<sup>37</sup> IMT, VIII, pp. 302-308.

completely, was ideology. Particularly, they did not explain why Jews had been singled out by the Nazis. Indeed, while prominent on the Nazis' list of victims, by the Soviet account, the Jews were not the object of a distinctive, obsessive, high-priority Nazi war aim. Mass murder, in their conception, was in the service of conquest. The "wholesale extermination of absolutely innocent people," Jews and others, was part of the broad litany of Nazi crimes. All these, Rudenko insisted, were "steps on the road to establishing Hitlerite domination in Europe and in the whole world."<sup>38</sup>

Reference to crimes against humanity and, specifically, the persecution of the Jews came up regularly in the examination of the defendants, but with varying degrees of emphasis. It dominated the case of Julius Streicher, editor of the pornographic *Der Stürmer* and *Gauleiter* of Nuremberg. He alone among the defendants was charged only with this count and the conspiracy charge. Streicher's testimony and cross-examination were noteworthy mainly for what they revealed about the accused—a coarse, garrulous, repulsive fanatic, whom even Nazi loyalists found embarrassing, and who visibly discomfited his German attorney, Dr. Hanns Marx. ("Finished?" Marx asked abruptly, in the middle of one of Streicher's meandering, speech-like answers to his attorney's questions.) Indeed, so unsavory did Streicher turn out to be (notwithstanding valiant testimony on his behalf by his wife), that it seemed difficult for some to associate him with the planning for the elimination of the Jews that yoked statesmen and technocrats, military and civilians, Germans and other nationalities in a huge, European-wide program of great scope and complexity. Streicher did not deny his antisemitism, of course. All he did was to insist that he was not a murderer, which seemed plausible enough, and, more dubiously, that he had not incited others to murder.

Quite another story was the former *Reichsmarschall* Hermann Göring, number-two man in the Reich for nearly a decade of its twelve-year history. He was the dominant personality among the defendants; some would say of the entire trial. Swaggering and condescending among his fellow prisoners, posing as the jovial and chivalrous embodiment of Nazism, Göring instantly

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<sup>38</sup> IMT, VII, pp. 166-168.

attracted attention. "Göring's appearance made a strong but obscure allusion to sex," wrote Rebecca West, perhaps the most brilliant reporter at the trial.

Sometimes, particularly when his humor was good, he recalled the madam of a brothel... He was the only one of all these defendants who, if he had the chance, would have walked out of the Palace of Justice and taken over Germany again, and turned it into the stage for the enactment of the private fantasy which had brought him to the dock.<sup>39</sup>

Weaned from drugs and a sybaritic life style, he cut a not unimpressive figure. In his testimony he was cool, intelligent, and knowledgeable. In a much-attended encounter with Robert Jackson, he clearly got the better of the American prosecutor, who turned out to be amateurish in the art of cross-examination.

Regarding the Jews, Göring was characteristically unrepentant. Allowed to give full, even leisurely, responses to his attorney, Otto Stahmer, the *Reichsmarschall* explained his own approach to the Jewish question. It was a simple case of self-defense, Göring said, without even a mention of the theme of race. In court, he presented his antisemitism as humdrum, restrained, indistinguishable from that of millions of Germans, and others:

After Germany's collapse in 1918 Jewry became very powerful in Germany in all spheres of life, especially in the political, general intellectual and cultural, and, most particularly, the economic spheres. The men came back from the front, had nothing to look forward to, and found a large number of Jews who had come in during the war from Poland and the East, holding positions, particularly economic positions. It is known that, under the influence of the war and business concerned with it-demobilization, which offered great possibilities for doing business, inflation, deflation - enormous shifts took place in the propertied classes. There were many Jews who did not show the necessary restraint and who stood out more and more in public life, so that they actually invited certain comparisons because of their numbers and the position they controlled in contrast to the German people.<sup>40</sup>

When it came to the killing, Göring disclaimed responsibility, involvement, or even knowledge of the systematic, mass murders. When pressed in cross-

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<sup>39</sup> Rebecca West, *A Train of Powder* (New York: Viking Press, 1965), p. 6.

<sup>40</sup> IMT, IX, p. 272.



examination - which was less often than one might think - he contended that others had been more “radical,” and hence responsible for “excesses”; he mentioned Himmler and Bormann, without being specific about their “radicalism,” and without being asked. Like many other defendants Göring said he favored Jewish emigration somewhere (he offered no details); he indicated that this was his understanding in his famous communication to Reinhard Heydrich on July 31, 1941, calling for “a total solution to the Jewish question within the area of German influence in Europe.” Göring accepted responsibility for the so-called “Aryanization” of Jewish property, stonewalled on the question of helping himself to Jewish-owned works of art, and zealously corrected his questioners on matters of insignificant detail. So far as concentration camps were concerned, he alluded to the early period of the regime when he was in charge of the police in Prussia and, together with Himmler, was one of the founders of the Gestapo. Here too, his theme was self-defense. “Excesses” might have occurred, he allowed, “but compared to all that has happened in the past and to the greatness of events, this German revolution of freedom is the least bloody and the most disciplined of all revolutions known to history.”<sup>41</sup>

“You . . . knew there was a policy aimed at the extermination of the Jews,” said Sir David Maxwell Fyfe, at the end of a grueling week of testimony.

“No, a policy of emigration, not liquidation of the Jews,” Göring replied. “I knew only that there had been isolated cases of such perpetrations.”<sup>42</sup>

To varying degrees, the other defendants acknowledged the murderous character of Nazi policy toward Jews, denying their own responsibility or, in a few instances, showing signs of contrition. Deeply implicated in documents from the Wilhelmstrasse, former Foreign Minister Joachim von Ribbentrop was one of the leading deniers. Ribbentrop knew nothing of the diplomatic correspondence organizing the deportation of Jews from every corner of Europe; he knew nothing of the work of his subordinates in this sense; he denied taking any initiative whatever in the persecution or deportation of the Jews. When cornered, as was not difficult given some of the documentation, he blamed Hitler. Faced with the record of a conference in April 1943, in which

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<sup>41</sup> IMT, IX, p. 258.

<sup>42</sup> IMT, IX, p. 619.

he and Hitler had bullied Admiral Horthy on Hungarian Jews, Ribbentrop claimed to have been shocked and grieved by the bloodthirsty words of his *Führer*. He did not quite understand Hitler's language, he said:

But perhaps this attitude [of Hitler] can be understood only if we remember that the *Führer* believed that the Jews had caused this war, and that he had gradually developed a very fanatical hatred toward them. . . . As his faithful follower, I adhered to the *Führer*'s orders in this field, but I always did my utmost to alleviate the situation as far as possible.

In 1943, Ribbentrop added, without providing any evidence for the claim, "I submitted a comprehensive memorandum to the *Führer* in which I urged him to alter the Jewish policy completely." "I have never been antisemitic," Ribbentrop told his French interrogator Edgar Faure. "But I was a faithful follower of Adolf Hitler."<sup>43</sup>

Although he was in Allied custody at the time, no one on the prosecution side moved to call as a witness Rudolf Höss, the former commandant of Auschwitz. Höss did appear, giving some of the most chilling and historically important testimony of the entire trial, but as a *defense* witness. He was called by Kaltenbrunner's lawyer Kurt Kauffmann in order to demonstrate his client's distance from the killing process. Very matter-of-factly Höss provided Kauffmann and the court with details: he agreed with an estimate of "more than 2 million Jews" destroyed at Auschwitz - about a million more than the actual number murdered there, we now know; he told of the medical experiments, the transports, the exterminations at Birkenau, the gas chambers, the ruse of delousing with showers, and the strict secrecy in which all of this happened. Kauffmann asked the question that must have been on everyone's mind, but the answer was anti-climactic:

DR. KAUFFMANN: Did you yourself ever feel pity with the victims, thinking of your own family and children?

HÖSS: Yes.

DR. KAUFFMANN: How was it possible for you to carry out these actions in spite of this?

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<sup>43</sup> IMT, X, pp. 411-412.

HÖSS: In view of all these doubts which I had, the only one and decisive argument was the strict order and the reason given for it by the *Reichsführer* Himmler.

Höss claimed he had been summoned to Berlin in the summer of 1941, and was told then of the order for the “Final Solution” to be carried out at Auschwitz, of which he was then the commandant. The testimony was shattering, as the defense well knew. It shifted attention oddly to the witness himself - a dull, unimpressive, but methodical officer, of the sort that had staffed the numerous offices and positions involved in the murder of European Jews.<sup>44</sup> Höss’s account offered evidence for the timing and the chain of decision-making of the “Final Solution”; however, these were not questions that were picked up at the time and have only since become matters of intense interest and debate.

How much did the defendants know about the murders in the East, the “Final Solution,” the concentration camps, or Auschwitz? Göring insisted that he himself did not know; and probably neither did Hitler. He would not even allow that atrocities had occurred systematically; the most that he would concede was that there might have been “isolated cases” of liquidations.<sup>45</sup> Kaltenbrunner, who some time after Reinhard Heydrich’s assassination had taken over the Reichssicherheitshauptamt, maintained that he had not known of the “Final Solution” before 1943. “Immediately after receiving knowledge of this fact,” he reported, “I fought, just as I had done previously, not only against the Final Solution, but also against this type of treatment of the Jewish problem.” What did Kaltenbrunner do? He “protested to Hitler and the next day to Himmler,” he maintained.

I did not only draw their attention to my personal attitude and my completely different conception which I had brought over from Austria and to my humanitarian qualms, but immediately from the first day, I concluded practically every one of my situation reports right to the very end by saying that there was no hostile power that would negotiate with a Reich which had burdened itself with this guilt.

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<sup>44</sup> IMT, XI, pp. 396-404.

<sup>45</sup> IMT, IX, pp. 618-619.

Chiefly thanks to his intervention, Kaltenbrunner ventured, the persecution of Jews ended in October 1944.<sup>46</sup>

At various points in the trial, one would have to conclude that other defendants indicated that they had helped Jews at times-among them Schacht, Ribbentrop, Papen, Schirach, Funk, Seyss-Inquart, and Speer. The Jews, according to this testimony, had plenty of friends in high places, particularly toward the end of the war.

There was some contrition at Nuremberg, although few noteworthy instances. Wartime master of the *Generalgouvernement*-the part of Poland captured in 1939 and not incorporated into the Reich-Hans Frank handed over to the Americans his voluminous diary of the days when he ruled in splendor from Krakow, and claimed in prison to have committed himself anew to Catholicism. Did he ever participate in the annihilation of the Jews? he was asked by his lawyer Hans Seidl "I say 'yes,'" Frank replied,

and the reason why I say "yes" is because, having lived through the 5 months of this trial, and particularly after having heard the testimony of the witness Höss, my conscience does not allow me to throw the responsibility solely on these minor people. I myself never installed an extermination camp for Jews, or promoted the existence of such camps, but if Adolf Hitler personally has laid that dreadful responsibility on his people, then it is mine too, for we have fought against Jewry for years, and we have indulged in the most terrible utterances - my own diary bears witness against me. Therefore, it is no more than my duty to answer your question with "yes." A thousand years will pass and still Germany's guilt will not have been erased.<sup>47</sup>

Similarly contrite was president of the Reichsbank, Walter Funk, accused of having received deposits of gold taken from the teeth of gassed Jewish victims- "probably the most ghoulish collateral in banking history," as Jackson said.<sup>48</sup> Funk was singularly unimpressive-"a broken heap of flesh," wrote Norman Birkett in his diary, "half-asleep during most of the days, apathetic and listless, and raising blinking eyes to the bright lights installed in the Court for the benefit of the cinematograph operators."<sup>49</sup> Testifying about his pretrial

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<sup>46</sup> IMT, XI, pp. 275-276.

<sup>47</sup> IMT, XII, pp. 7-8.

<sup>48</sup> IMT, XIX, p.416.

<sup>49</sup> Hyde, p. 505.

interrogation during which he had broken into tears, Funk told his attorney that he had just been released from the hospital at the time. Self-pitying, he claimed remorse, without admitting guilt.

And when I was reproached with these measures of terror and violence against the Jews I suffered a spiritual breakdown, because at that moment it came to my mind with all clearness that the catastrophe took its course from here on down to the horrible and dreadful things of which we have heard here and of which I knew, in part at least, from the time of my captivity. I felt a deep sense of shame and of personal guilt at that moment, and I feel it also today .... It is terribly tragic indeed that I in particular am charged with these things. I have said already that I took no part in these excesses against the Jews. From the first moment I disapproved of them and condemned them very strongly, and they affected me personally very profoundly. I did everything, as much as was within my power, to continue helping the Jews. I never thought of an extermination of the Jews, and I did not participate in these things in any way.<sup>50</sup>

Most of the accused gave more articulate reasons why they should not be convicted on the count of crimes against humanity, or why history should look kindly upon them. Göring made the intelligent case that such crimes should in no manner be understood as part of a pre-1939 plot to launch an aggressive war—a powerful historical point, and also a significant legal argument given the way crimes against humanity were cast in the charter. (The judges went some way to heeding his argument, as we shall see.) Some placed the blame on Hitler, as we have noted; speaking for the Wehrmacht, Wilhelm Keitel and Alfred Jodl blamed the SS. Still others claimed they did not know, or that they had been powerless. Reich youth leader and wartime governor of Vienna, Baldur von Schirach, maintained that he learned of the exterminations only in 1944. Had he known before then, he claimed, he would have done something, but in 1944 it was too late; by that time he was completely estranged from Hitler—“politically dead.”<sup>51</sup> Previously, he actually believed it was in the Jews’ best interests to leave the Reich. “I thought that the Jews would be better off in a closed settlement in Poland than in Germany or Austria where they would remain exposed to the whims of the Propaganda Minister who was the

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<sup>50</sup> IMT, XIII, p. 120.

<sup>51</sup> IMT, XIV, pp.431-2.

mainstay of antisemitism in Germany.”<sup>52</sup> Arthur Seyss-Inquart, wartime ruler of the Netherlands, claimed that he believed that the Jews deported from Holland to Auschwitz must have found the camp agreeable. (“I had people sent from the Netherlands to Auschwitz. They came back with the report that that was a camp for 80,000 people with sufficient space. The people were comparatively well off there. For example, they had an orchestra of 100 men.”<sup>53</sup> This stretched credulity, not only because of the widespread knowledge of Jewish deportations as a terrible voyage without return, or of the skepticism everywhere about the “comforts” of Auschwitz and other camps in the East, but that of the 107,000 Jews deported from the Netherlands, some 34,000 were sent to be murdered in Sobibor—from which, at the end, emerged a mere nineteen survivors.

Alfred Thoma, Alfred Rosenberg’s counsel, argued that the National-Socialist ideology, which his client had done so much to propagate, had nothing to do with the policy of mass murder. Antisemitism, he argued in effect, should not suffer from what some Nazis had done in its name. “Anti-Judaism is not an invention of National Socialism,” Thoma reminded the court.

For thousands of years the Jewish question has been the minority problem of the world. It has an irrational character which can be understood to some extent only in connection with the Bible. Rosenberg was a convinced antisemite, who in writing and speech gave expression to his convictions and their foundations. I have already emphasized that even such different personalities as Von Papen, Von Neurath, and Raeder are still of the opinion that the predominance of the Jewish element in the entire public life had reached such proportions that a change had to come about in this respect. The concrete result of that predominance, the fact that the Jews in Germany when attacked knew how to repay in kind, sharpened the antisemitic fight before the accession to power.<sup>54</sup>

Rosenberg, Thoma maintained, “despite his strong opposition to Jews . . . did not want the ‘extermination’ of Jewry,” but instead favored their “expatriation”—“that is, through classifying them by law as aliens and giving them protection as such.” Unfortunately, Hitler took things in a different direction. But no one

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<sup>52</sup> IMT, XIV, p. 424.

<sup>53</sup> IMT, XV, p. 668.

<sup>54</sup> IMT, XVIII, p. 116.



regretted this more than Rosenberg, who only wished that he had protested to Hitler, Himmler and Goebbels-in the way that he had, indeed, protested against the excesses of *Gauleiter* Koch in the Ukraine.<sup>55</sup>

Why had they not spoken out? The military men, as we have seen, referred to their soldierly obligations: the soldiers had sworn an oath to Adolf Hitler. Civilians often protested their inability to have any impact upon affairs of state. Toward the end of his cross-examination of the crafty, arrogant Franz von Papen, Sir David Maxwell-Fyfe put a key moral question to him. Von Papen was-or at least ought to have been, Maxwell-Fyfe thought-moved by the murders by the Nazis of his close friends and associates. One after another these had been cut down as Hitler consolidated his power. Yet Von Papen himself remained a pillar of the regime and moved along from vice chancellor to minister in Vienna and then Ankara. The British prosecutor put it squarely to Von Papen: "Why didn't you after this series of murders which had gone on over a period of 4 years, why didn't you break with these people and stand up like General Yorck or any other people that you may think of from history, stand up for your own views and oppose these murderers? Why didn't you do it?"

One of only two defendants not charged with crimes against humanity, Von Papen may have felt freer to answer than other defendants. He remained on the job from the day Hitler took power, he lectured the British prosecutor, not out of cowardice, vanity, ambition, or submissiveness. His reasons were patriotic.

From that day onward I did my duty - my duty to Germany, if you wish to know. I can understand very well, Sir David, that after all the things we know today, after the millions of murders which have taken place, you consider the German people a nation of criminals, and that you cannot understand that this nation has its patriots as well. I did these things in order to serve my country, and I should like to add, Sir David, that up to the time of the Munich Agreement, and even up to the time of the Polish campaign, even the major powers tried, although they knew everything that was going on in Germany, to work with Germany.<sup>56</sup>

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<sup>55</sup> IMT, XVIII, p. 117.

<sup>56</sup> IMT, XVI, p. 416.

After hearing evidence and argument for close to a year, the tribunal issued its judgment at the end of September 1946. Some 50,000 words in its final form, it took two days to read. The climax came on October 1, when the four voting judges came to the sections dealing with each of the twenty-two defendants, announcing nineteen convictions on one or more counts, three acquittals (Schacht, Von Papen and Fritzsche), and the sentences of the court. Of the eighteen defendants charged with crimes against humanity, sixteen were found guilty. Of these, twelve were sentenced to hang, one to life imprisonment, two to twenty years, and one to fifteen years in prison.

The judgment opened with a rather dry, factual historical section outlining the origins and aims of the Nazi party, the Nazi seizure of power in 1933, the consolidation of power and German rearmament, seen as part of the preparation for war. Jewish issues were raised in the context of the Nazis' "determination to remove all sources of opposition," along the road to power. "From the earliest days of the NSDAP, antisemitism had occupied a prominent place in National Socialist thought and propaganda," the tribunal stated, and then went on to describe how the "persecution of the Jews became official state policy."<sup>57</sup> In the eyes of the judges this persecution was among various steps taken to carry out the "common plan or conspiracy" mentioned in the indictment—the others being the "seizure of power," terror, the destruction of trade unions, the attack on Christian teaching and on churches and the regimentation of German youth.

Reviewing the various crimes charged in the indictment, the judges shared the Americans' emphasis on the "common plan or conspiracy" and "crimes against the peace." Here, the tribunal maintained, was the core of the case: launching aggressive war, the judges said, "is the supreme international crime . . . in that it contains within itself the accumulated evil of the whole."<sup>58</sup> In an important ruling, the judges rejected the prosecution's contention that the "common plan" included both "war crimes" and "crimes against humanity." By their reading of the charter (which was accepted as "decisive and binding on the tribunal"), the conspiracy involved only "the common plan to prepare, initiate and wage aggressive war": crimes against the Jews, therefore, except

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<sup>57</sup> IMT, I, pp. 179-181.

<sup>58</sup> IMT, I, p. 186.

insofar as they could be shown to be part of war preparations, fell exclusively within counts three and four, “war crimes” and “crimes against humanity.” There was to be no separate crime of conspiracy to commit crimes against humanity, therefore, and hence no crime of conspiracy to murder the Jews. The crime against the Jews was in the actions themselves, as outlined in Articles 6(b) and 6(c) of the charter. According to the wording of these articles, this restricted their application to acts committed during the war, outside the area of the German Reich.<sup>59</sup> These were important limitations, against which Jewish émigrés had lobbied vigorously in the United States since the latter days of the war.

The judgment summarized the evidence on “war crimes and crimes against humanity”-the murder and ill-treatment of prisoners of war and civilians, the pillage of private and public property and slave labor. There was a separate section on the persecution of the Jews. As to the scale and impact of that persecution there was no doubt whatever: “consistent and systematic inhumanity” had been proved beyond any doubt. The judges balked at formally associating antisemitic policy with the planning of aggressive war, simply repeating prosecution claims to that effect. In any event, the brunt of Nazi persecution was that “pursued during the war in the occupied territories.” And in the remainder of the section, the judgment summarized horrors committed against Jews, culminating in systematic mass murder. The judges ignored the connection, established during the trial, between the murder of Jews and the elimination of “useless eaters”-the murder of the incurably ill and insane in special institutions, sometimes using gas chambers. But they were graphic in describing the shootings by the Einsatzgruppen, the complicity of the Wehrmacht, the suppression of the Warsaw ghetto, and “the systematic extermination of Jews in concentration camps.”<sup>60</sup> They drew pointedly from the testimony of Rudolf Höss, quoting his description of the killing process. The section concluded by referring to Adolf Eichmann, “put in charge of this

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<sup>59</sup> For a detailed discussion of this complex point, see Schwelb, “Crimes against Humanity,” pp. 178-226; and Goldenberg, “Crimes Against Humanity,” pp. 1-55.

<sup>60</sup> IMT, I, p. 251.

program by Hitler,” and his estimate of the number of victims—“6 million Jews, of which 4 million were killed in the extermination institutions.”<sup>61</sup>

Finally, with regard to “crimes against humanity,” the judges confirmed the limitation widely understood to have been imposed by the Berlin Protocol of October 1945, namely, that these crimes were to be considered “in execution of or in connection with any crime within the jurisdiction of the Tribunal,” specifically “crimes against peace” or “war crimes.” In practical terms, this meant that the pre-1939 persecution of the Jews could only be considered among the incited crimes by the tribunal if it were part of the preparations for war. And this the judges failed to do, however “revolting and horrible” they found this persecution to be.

Among Jews, there was some disappointment with the judgment for this and other reasons. Notably, some Jewish legal experts were unhappy with the tribunal’s restrictive interpretation of the conspiracy charge, which excluded the planning and preparation of “war crimes” and “crimes against humanity” from the “common plan or conspiracy” charged in the indictment. As Jacob Robinson of the Institute for Jewish Affairs in New York and the leading Jewish authority on the trial put it some years later, there was ample evidence presented at the trial of a “‘common plan or conspiracy’ first to persecute and then to exterminate the Jewish people.”<sup>62</sup> Robinson felt that if the tribunal had allowed the conception to stand that there had been a conspiracy to commit “war crimes” and “crimes against humanity” it would have been easier to consider the Holocaust “as a unit in fact and in law.”

In retrospect, given the failure of the common-plan-or-conspiracy approach to understanding Nazi policy in several areas—foreign affairs, racial engineering, as well as the Jewish question—the tribunal’s restrictive interpretation may not seem so unwise or so unfortunate. In retrospect, the American prosecution’s notion of a Nazi conspiratorial plan has not stood up well under close historical investigation. Although interpretations vary, historians tend not to accept the notion of a detailed blueprint for aggression, imperial domination, or mass murder. And so the tribunal’s unwillingness to include a charge of

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<sup>61</sup> IMT, I, p. 253.

<sup>62</sup> Robinson, p. 7. See also Anatole Goldstein, “Crimes Against Humanity: Some Jewish Aspects,” *Jewish Yearbook of International Law* (1948), pp. 206-225

conspiracy to persecute and murder the Jews of Europe—admittedly, for reasons having mainly to do with the wording of the charter, rather than with historical interpretation—has not ill-served the cause of historical understanding.

A much more serious deficiency was the trial's failure to set the Nazis' assault on the Jewish people within the framework of a well-articulated antisemitic ideology. Both the prosecution lawyers and the judges were rather inclined to see antisemitism and anti-Jewish policy in instrumental terms—as means to hold the Nazi movement together, eliminate enemies, consolidate power, mobilize support, or for robbery or intimidation. Seeing things in this way may have been the result, in part at least, of an American prosecution strategy which sought to trace Nazi criminality, in its essence, to the movement's commitment to wage aggressive war and to see other criminal impulses as largely derivative. Another reason may have had to do with the defendants. None of the accused who were principally involved with Nazi ideology—pornographer Julius Streicher, broadcaster Hans Fritzsche, youth leader Baldur von Schirach, or the muddled “philosopher” of the party and imperial proconsul Alfred Rosenberg—seemed impressive enough thinkers to be taken seriously in historical terms. And while several of the other defendants admitted that they were antisemitic, to a man, including Hermann Göring, they denied that their ideology pointed in any way to mass murder. Preoccupied with other issues, and feeling perhaps that they had more than enough evidence to convict, the prosecutors tended not to pursue the accused on this point. And finally, the Soviet prosecutors, no mean ideologists themselves, had their own reasons not to dwell upon a Nazi ideology that might have been seen to have had other priorities than vast, territorial conquest—largely at the expense of the Soviet Union.

So far as Robinson's concerns of seeing the Holocaust “as a fact,” however, the trial had a much more positive result than the Jewish critic allowed. At Nuremberg, the Jewish case was overwhelming, and largely unchallenged. In Robinson's own calculation, more than 800 Nazi documents and the testimony of thirty-three witnesses were devoted, in whole or in part, to the

question.<sup>63</sup> Nuremberg linked the most important facts having to do with the Nazis' mobilization against the Jews in a chain extending from prewar persecution to mass murder. The leading advocates of the four great powers spoke eloquently on the subject, and indeed sought to show how Nazi Jewish policy was part and parcel with the most grievous of Nazi crimes, making war on the rest of the world.

After Nuremberg, the murder of European Jewry could be authoritatively argued to be an established fact of great historical importance. Nuremberg began the removal of the Jewish catastrophe from the wartime Jewish isolation of inner Jewish suffering, of lobbying and beseeching the wider society to recognize, to intervene, to rescue, to acknowledge the Jews' private agony.

Not surprisingly, the judges and lawyers did not get it all right in 1945-46. They made mistakes in detail and in wider conception, and they left much work to be done in order to understand what we have come to call the Holocaust. But they built a good foundation for including the murder of European Jews in an understanding of Nazism and World War II. The evidence of Nazi atrocities, including visual evidence on film, was so shattering that the image of transgression presented during the trial long outlasted and had a far greater impact than the restrictive legal arguments made by the prosecutors. Imperfect, both as a trial and as a historical exercise, I would contend that Nuremberg served the world reasonably well in 1945-46.<sup>64</sup>

**Source: *Yad-Vashem Studies*, Vol. XXVI, Jerusalem 1998, pp. 5- 41.**

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<sup>63</sup> See the important compilation in Jacob Robinson and Henry Sachs, *The Holocaust: The Nuremberg Evidence* (Jerusalem: Yad Vashem, 1976).

<sup>64</sup> To put this trial in a wider context, see the excellent article by Mark J. Osiel, "Ever Again: Legal Remembrance of Administrative Massacre," *University of Pennsylvania Law Review*, 144 (1995), pp. 463-704.