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# The Nuremberg Trials: A Troubled Legacy

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Mach, Jacob T., "The Nuremberg Trials: A Troubled Legacy" (2018). *The Research and Scholarship Symposium*. 7.  
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The Nuremberg Trials: A Troubled Legacy

Jacob Mach

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9<sup>th</sup> Annual Research and Scholarship Symposium

April 11, 2018

The Second World War wreaked immense destruction on a scale unseen in human history. An unprecedented number of people died or were killed during the conflict across the European and Pacific theatres of war. Fighting waged for the better part of a decade, claiming nearly one hundred million lives, soldiers and civilians combined. American, British, and Russian forces finally surrounded Berlin in April 1945. Adolf Hitler, the obsessed and ideologically-driven leader who plunged the world into war, ingested a cyanide tablet and shot himself in his underground bunker only a week before Germany finally surrendered. The fighting in Europe finally ended in May of 1945, signaling an end to the bloodshed (Japan would surrender in August). The surrender of the Nazis, however, did not conclude the work of the Allies in Germany. An equally daunting task now faced the leaders of the free world: the trial of Nazi war criminals. While the Allies conducted numerous war trials in the years following the war, the most famous remains the Nuremberg Trial, conducted by the International Military Tribunal from November 20, 1945 to October 1, 1946.<sup>1</sup> The trial represented an unprecedented circumstance and changed the face of international law forever. Although the trials inevitably allowed many criminals to evade punishment, the circumstances surrounding the trial, its unprecedented nature, and the conviction of major war criminals proved equally important for the enduring legacy of the Nuremberg Trials.

As the war in Europe entered its third year, Hitler and his Wehrmacht army began to show signs of weakness. The failed attempt to support their Italian allies in North Africa combined with the infamous and militarily unthinkable attack on the Soviet Union had, for a moment, stemmed the tide of Nazi victories. British troops, having survived the harrowing

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<sup>1</sup> Whitney R Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946*, (Dallas, Texas: Southern Methodist University Press, 1999), 34 and 478.

attacks of the Luftwaffe during the Battle of Britain, long awaited American troops, and numerous Russian soldiers finally began to push back against the seemingly undefeatable Germans. 1942-43 proved to be a monumental period in the fight against Nazi Germany, leading to the joint-Allied invasion of Normandy in June 1944. As early as 1942, however, the Allies received reports from occupied states throughout Europe regarding the atrocities wreaked upon Jews and occupied civilian populations of Europe by the Nazis.<sup>2</sup> These reports detailed the systematic extermination of Jews, specifically in Nazi-occupied Poland and other Eastern European states. Later, the Allies learned of Hitler's roaming death squads, known as the Einsatzgruppen, who murdered hundreds of thousands of Jews, Poles, Russians, and others before the creation of the notorious death camps.<sup>3</sup> With little inroad into mainland Europe, there was little the Allies could do but gather information and wait for the invasion of Europe.

As the war progressed and the Allies made headway into Europe, preparations commenced for the eventual trial of Nazi war criminals. British and American officials showed great interest in these preparations, due to the miscarriages of justice following the First World War.<sup>4</sup> No European nation was satisfied with the prosecution of potential war criminals after the Great War. The Allied Powers tried only twelve men for war crimes; six received sentences.<sup>5</sup> They failed to produce a unified and comprehensive approach to trying war criminals and suffered for such neglect. Allied officials identified from previous failures three problems any new war trial must address: 1) lack of a concentrated plan, 2) lack of fact-finding about war

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<sup>2</sup> Robert H. Jackson, *ICMT: Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, D.C.: Department of State Publication 3080 (Government Printing Office), 1949), 10.

<sup>3</sup> Michael A. Bryant, *World History of War Crimes: From Antiquity to the Present* (London, United Kingdom: Bloomsbury Publishing, 2016), 158-159.

<sup>4</sup> *Ibid.*, 169.

<sup>5</sup> Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York, New York: Penguin Books, 1994), 11.

crimes during the war, and 3) how to procure assumed criminals before the trial.<sup>6</sup> The human rights abuses perpetrated by Nazi Germany during the Second World War forced the Allied countries to develop a better system to prosecute war crimes, one that would be a blueprint for generations to come. To ensure that war crimes were perpetrated correctly, Winston Churchill, at the behest of Polish and Czech governments-in-exile, called for the creation of an organization which would become known as the United Nations War Crimes Commission (UNWCC) in 1943.<sup>7</sup> This commission directed the information gathering of supposed war criminals during the war, though it held no power to prosecute. While the commission compiled a list of over thirty thousand possible war criminals, nothing could be done until Nazi Germany fell to the Allies. Thus, the prosecution of war criminals became a principle war aim.<sup>8</sup>

The Allies were anything but unified, however, in their approach to punishing war criminals following the conclusion of the conflict. Joseph Stalin, the Russian generalissimo, advocated for the systematic execution of fifty thousand perceived war criminals such as Nazi staff, officers, and technicians.<sup>9</sup> In light of Stalin's human rights record, such a solution seems less shocking. Likely more surprising to Westerners, however, is that many powerful US and British officials including Secretary of the Treasury Henry Morgenthau Jr. and Prime Minister Winston Churchill also advocated for the immediate execution of accused war criminals upon their capture and identification.<sup>10</sup> Such a hardline and "unjust" view seems barbaric and reactive to Americans today, but such beliefs were guided by resentment against Nazi Germany and the

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<sup>6</sup> Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York, New York: Penguin Books, 1994), 11.

<sup>7</sup> Valerie Genevieve Hebert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (Lawrence, Kansas: University Press of Kansas, 2010), 10-11.

<sup>8</sup> Ibid, 11.

<sup>9</sup> Michael A. Bryant, *World History of War Crimes: From Antiquity to the Present* (London, United Kingdom: Bloomsbury Publishing, 2016), 172.

<sup>10</sup> Ibid.

horrific acts perpetrated therein. As American, British, and Russian troops traversed Europe, human cruelty was displayed on a scale never seen. The Soviets liberated the first concentration and death camps in mid-1944 (including Auschwitz-Birkenau and Treblinka), while US troops liberated camps early in 1945.<sup>11</sup> While a full detail of concentration/death camps cannot be given in this essay, the initial discovery of these horrific creations understandably shook the Allies to their very core. In addition, over three million Soviet POW's died or were killed at the hands of the Nazi's during the Second World War (over 50% death rate, while most Allied camps saw <5% death rate).<sup>12</sup> It is understandable, if not justifiable, that the *initial* reaction of Allied leaders was immediate retribution.

Level heads and a sincere desire for justice ultimately ruled the day, and US officials such as Secretary of War Henry Stimson convinced President Roosevelt to call for an international military court to try the Nazi war criminals.<sup>13</sup> A more definitive plan was necessary before the trial could be properly planned, and Lt. Col. Murray Bernays was tasked with fashioning a comprehensive plan. The most difficult element of formulating a plan remained who would be charged with war crimes and how the criminals would be tried. Bernays recognized the delicate balance between lenient settlements with the defendants and cold-blooded revenge, foreseeing the effects the war trial would have on the denazification of Germany after the war.<sup>14</sup> Furthermore, Bernays believed that appropriate measures of justice must be utilized. He offered a substantial yet unprecedented solution: charge the leaders of the Nazi organizations who

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<sup>11</sup> "Liberation of Nazi Camps," United States Holocaust Memorial Museum, accessed February 7, 2018, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005131>.

<sup>12</sup> Michael A. Bryant, *World History of War Crimes: From Antiquity to the Present* (London, United Kingdom: Bloomsbury Publishing, 2016), 169.

<sup>13</sup> *Ibid*, 172.

<sup>14</sup> Valerie Genevieve Hebert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (Lawrence, Kansas: University Press of Kansas, 2010), 16.

perpetrated the war crimes (the SS, the Nazi Party, etc.) and charge them with conspiracy to commit crimes of war and crimes against humanity. This would allow the Allies to convict the organizations, implicating any members of the organizations, allowing them to be charged with the organizations.<sup>15</sup> While his proposal left problems to be discussed in the coming months (the plan was initially criticized by several US and British officials), President Roosevelt's untimely death preoccupied US officials. The US government gave tentative approval to the Bernays plan. Truman, now the sitting President of the United States, approved of the Bernays plan, prompting the British government to support the proposal as well. The Bernays plan would be revised by Robert Jackson, the chief prosecutor of the trial and used as the basis of the Nuremberg Charter.<sup>16</sup> Both Jackson and the Nuremberg Charter proved essential to the success of the trial.

In 1945 President Truman approached Robert H. Jackson, then an associate justice on the Supreme Court, to fill the role of chief prosecutor at the Nuremberg Trials.<sup>17</sup> Though an associate justice, he did not hold a law degree (he did attend some law school); Truman respected his record enough to select him for such a substantial position. He is the only man in United States history to serve as Solicitor General, Attorney General, and an Associate Supreme Court Justice. Although his cross-examination skills were admittedly weak (he was bested by Herman Goering several times during the trial), Jackson performed admirably as chief prosecutor.<sup>18</sup> Jackson understood the importance of the trial not only for the immediate defendants, but for international trials in years to come. The trial would set a precedent for international courts in the future and the Allies could not simply hand out convictions without a

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<sup>15</sup> Valerie Genevieve Hebert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (Lawrence, Kansas: University Press of Kansas, 2010), 16.

<sup>16</sup> *Ibid*, 17 and 21.

<sup>17</sup> Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York, New York: Penguin Books, 1994), 8.

<sup>18</sup> Robert E. Conot, *Justice at Nuremberg: The First Comprehensive Dramatic Account of the Trial of Nazi Leaders* (New York, New York: Harper & Row Publishers, 1983), 337-342.

legitimate trial. He cautioned US officials that such a trial could not be taken lightly, stating that “the world yields no respect to courts that are merely organized to convict.”<sup>19</sup> Jackson desperately desired to see not only that justice was appropriately administered, but also that the defendants were proven guilty of the crimes for which they were accused. In his mind, this would add to the legitimacy of the ruling, satisfying those who questioned the legality of such an international court in the first place. With a prosecutor selected and the war nearing its conclusion, the focus now shifted to how the trial would be conducted.

One of the major roadblocks to cohesion before the trial pertained to the theory of law that would undergird the entire ordeal. The Allies swam in uncharted waters; the charges brought before the defendants, as well as the trial itself, were unprecedented in the international arena.<sup>20</sup> Some Allied officials expressed concern over the legitimacy of the trial and the jurisdiction that a victorious alliance maintained over a defeated nation. To many officials, however, the acts committed by the Nazis were too heinous to not be punished in some way. Pragmatic natural law theorists argued the necessity of the court “to protect itself in the face of such unprecedented criminality.”<sup>21</sup> The majority of Allied leaders sided with the natural law theorists, and as the war ended in May 1945, they developed a charter to guide the International Military Tribunal conducting the trial.

The Nuremberg Charter consisted of thirty articles stipulating the manner in which the Tribunal would conduct its trial. Article 6 of the Charter remains the most significant, as it describes the “war crimes” charged against the Nazi leaders. The Charter described three

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<sup>19</sup> Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York, New York: Penguin Books, 1994), 8.

<sup>20</sup> Leon Goldensohn, *The Nuremberg Interviews: An American Psychiatrist's Conversations with the Defendants and Witnesses* (New York, New York: Alfred A Knopf, 2004), xvi.

<sup>21</sup> *Ibid*, xxviii.



separate categories: 1) crimes against peace, 2) war crimes, and 3) crimes against humanity.<sup>22</sup>

The Charter also decreed that Germans could be tried “whether as individuals or as members of organizations,” which allowed the reach of the Tribunal (and future tribunals) to grow exponentially.<sup>23</sup> Crimes against peace consisted of multiple parts, including the breaking of international treaties and initiating/waging a “war of aggression.” War crimes, the broadest of the three categories, included the breaking of the laws/customs of war (murder, slaver labor, mistreatment of POWs) and violence not deemed militarily justifiable. Crimes against humanity stood as the most damning of the categories. It included “murder, extermination, enslavement, deportation, and other inhumane acts against any civilian population.”<sup>24</sup> The most intriguing and far-reaching stipulation allowed the Tribunal to prosecute criminals for acts committed *before or during* the war (yet another unprecedented legal act), “whether or not in violation of the domestic law of the country where perpetrated.”<sup>25</sup> Article 10 held equally heavy pronouncements. It reaffirmed the ideas laid out by Bernays that an organizations culpability extended to its members.<sup>26</sup> Finally, Article 16 gave the defendants the right to defend themselves (legal rights like that of the US and GB).

Several articles need furthering explanation. First, the Charter made a *legal* distinction between murder and extermination. The Tribunal could try Nazi criminals for actions leading up to the mass extermination of Jews, not just the extermination acts themselves.<sup>27</sup> This distinction

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<sup>22</sup> Nuremberg Trial Proceedings, Vol. 1 Charter of the Nuremberg Military Tribunal, <http://avalon.law.yale.edu/imt/imtconst.asp>.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Nuremberg Trial Proceedings, Vol. 1 Charter of the Nuremberg Military Tribunal, <http://avalon.law.yale.edu/imt/imtconst.asp>.

<sup>27</sup> Guénaél Mettraux, ed. *Perspectives on the Nuremberg Trial* (New York, New York: Oxford University Press, 2008), 133

had never been made in an international court of law. A second peculiar aspect pertained to the recognition of some sort of “universal protection” of human rights, stemming from the natural rights theory discussed above.<sup>28</sup> While this idea of human rights may have existed before the Tribunal, no international body articulated the ability to punish people for violating such rights. Finally, the Charter brought groundbreaking changes to international law. It ruled that individuals are subject to international law and could be tried by a recognized international body. Additionally, the Tribunal broke with the traditional notion of immunity for those who committed “Acts of the State.”<sup>29</sup> Nazi leaders and soldiers alike who committed war crimes “under orders” could theoretically be tried and convicted, allowing all potential criminals to be appropriately tried.

With the Charter finalized, the Tribunal needed to solidify its defendants. Initially, it settled on twenty-four men, each one representing segments of the Nazi German government.<sup>30</sup> Dr. Robert Ley, one of the selected defendants, hung himself in prison before the Tribunal began, and Martin Bormann, Hitler’s private secretary, was tried in absentia.<sup>31</sup> Herman Goring, one of the top Nazi political leaders, remained the highest profile defendant. Heinrich Himmler second in command to Hitler, committed suicide months before the trial; Adolf Eichmann, another key member of the Nazi regime, escaped to Argentina where he remained until Israeli commandos captured him in 1962 (he was then executed in Israel).<sup>32</sup> The remaining defendants

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<sup>28</sup> Ibid, 69-70.

<sup>29</sup> Ibid, 55.

<sup>30</sup> William L. Shirer, *The Rise and Fall of the Third Reich: A History of Hitler’s Germany* (New York, New York: Simon and Schuster, 1960), 1142; Whitney R Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946*, (Dallas, Texas: Southern Methodist University Press, 1999), 29.

<sup>31</sup> William L. Shirer, *The Rise and Fall of the Third Reich: A History of Hitler’s Germany* (New York, New York: Simon and Schuster, 1960), 1142; John Keegan, *The Second World War* (New York, New York: Penguin Books, 1989), 590.

<sup>32</sup> “The Nuremberg Trials,” United States Holocaust Memorial Museum, accessed February 7, 2018, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007722>.

included Erich Raeder, Alfred Rosenberg, Julius Streicher, Ernst Kaltenbrunner (SS), and other important Nazi leaders.<sup>33</sup> The twenty-one defendants, representing the defeated Nazi regime, now faced Chief Prosecutor Robert Jackson and the eight Allied judges who would decide their fate (the USSR, France, GB, and the US each selected two judges). The defendants, many understanding the futility of their situation, reportedly appeared haggard and scared; devoid of power, they now face an uncertain future.<sup>34</sup> They were charged with four accounts: 1) conspiracy to commit war crimes, 2) crimes against peace, 3) war crimes, and 4) crimes against humanity.

According to most testimonies, the trial, which dragged on for nearly a year, was quite dull and difficult to conduct for a variety of reasons. The prosecutors spent most of their time entering evidence to be considered by the judges, a monotonous procedure that followed traditional legal protocol.<sup>35</sup> While the trial remained extremely tedious and uninteresting, there were several memorable moments. For example, the Allies called over one-hundred witnesses to the stand throughout the trial, including other important Nazi leaders or subordinates to gain information to implicate the men on trial. One of those men was Rudolf Hoess, commandant of the Auschwitz death camp. Hoess, transferred to Nuremberg on the wishes of Lt. Col. Whitney Harris, revealed information that stunned and horrified many at the trial.<sup>36</sup> His testimony detailed the extermination procedures at Auschwitz, including the usage of Zyklon B to gas Jews. One of his most important admissions, however, pertained to a rule that did not require his guards to participate in the killing process; those who did participate did so freely and without

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<sup>33</sup> "The Nuremberg Trials," United States Holocaust Memorial Museum, accessed February 7, 2018, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007722>.

<sup>34</sup> William L. Shirer, *The Rise and Fall of the Third Reich: A History of Hitler's Germany* (New York, New York: Simon and Schuster, 1960), 1142.

<sup>35</sup> Valerie Genevieve Hebert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (Lawrence, Kansas: University Press of Kansas, 2010), 23

<sup>36</sup> Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York, New York: Penguin Books, 1994), 315.

compulsion.<sup>37</sup> This information would allow Allied officials to prosecute common soldiers for war crimes at other trials, should they so choose. The trial remained somber and ritualistic. All the defendants naturally pleaded not guilty to the four charges, and many pleaded ignorance, arguing that few men knew what other Nazi leaders were doing in other departments.<sup>38</sup> This argument did not sway the judges, however, and after nearly a year, the judges readied their final verdict (the later recovery of documents from the Wannsee Conference supported the ruling of the judges, Nazi leaders did have knowledge of an overarching plan).

The court convicted nineteen of the twenty-two: twelve men received death sentences, three received life imprisonment, and four men received ten to twenty years imprisonment.<sup>39</sup> Four other men were acquitted or not charged. Only ten men were officially executed, however, as Goring followed in the footsteps of Himmler and Hitler, killing himself just before his execution time (Bormann remained missing).<sup>40</sup> After stipulating the punishments, the International Military Tribunal at Nuremberg ended. The military tribunals trying Nazi war criminals, on the other hand, did not end for many years. After the first Nuremberg Trial ended, the Allies implemented Control Council Law No. 10 which allowed the countries involved in the partitioning of Germany (Russia, England, France, and the US) to prosecute supposed war criminals inside their area of jurisdiction.<sup>41</sup> Only the United States held legitimate and noteworthy subsequent trials. Russia imprisoned thousands of supposed criminals but held few true trials; England and France

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<sup>37</sup> Ibid 318.

<sup>38</sup> Leon Goldensohn, *The Nuremberg Interviews: An American Psychiatrist's Conversations with the Defendants and Witnesses* (New York, New York: Alfred A Knopf, 2004), xvi.

<sup>39</sup> "The Nuremberg Trials," United States Holocaust Memorial Museum, Accessed February 7, 2018, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007722>.

<sup>40</sup> William L. Shirer, *The Rise and Fall of the Third Reich: A History of Hitler's Germany* (New York, New York: Simon and Schuster, 1960), 1143.

<sup>41</sup> Valerie Genevieve Hebert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (Lawrence, Kansas: University Press of Kansas, 2010), 29.

likewise held few tribunals.<sup>42</sup> In total the Allies tried over 1600 individuals for war crimes; of those tried, 426 received the death penalty.<sup>43</sup> Around 600 faced time in prison, but by the 1950's, almost all of the convicted men either had died in prison or were released. At first glance, this seems like a large number of executions. Comparatively, however, the number is shockingly low. After the war with Japan ended in August 1945, the US used a similar trial model to try Japanese war criminals. The Tokyo Trial found nearly 900 Japanese guilty and executed them based on their horrific treatment of Allied POWs during the war. Seven Japanese leaders also faced execution for their war crimes.<sup>44</sup>

In total, less than 500 Germans were executed for their crimes during the Second World War, which is shocking when one considers the tens of thousands of Germans who manned concentration and death camps, participated in death squad killings, and rounded up Jews for deportation, not to mention the abuse of civilians and POWs. There remains no doubt that many men escaped death or punishment of any form. Why? The Nuremberg Trial and its subsequent trials failed to adequately connect the Wehrmacht army to the atrocities committed during the war.<sup>45</sup> This left thousands of men who very likely did commit heinous war crimes un-tried. While historians, such as Daniel Goldhagen, have since implicated large numbers of German soldiers and civilians, the charge is too little, too late.<sup>46</sup> Even so, many historians, politicians, and officials remain critical of the Nuremberg Trial for its questionable legality and strained ethics. Congressman Robert Taft publicly criticized the Trials, arguing that Jackson and others used *ex*

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<sup>42</sup> Ibid, 30.

<sup>43</sup> Whitney R Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946*, (Dallas, Texas: Southern Methodist University Press, 1999), 545.

<sup>44</sup> John Keegan, *The Second World War* (New York, New York: Penguin Books, 1989), 590.

<sup>45</sup> Valerie Genevieve Hebert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (Lawrence, Kansas: University Press of Kansas, 2010), 197.

<sup>46</sup> Daniel Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York, New York: Alfred K. Knopf, 1996).

*post facto*<sup>47</sup> arguments that would not have stood up in a typical American court.<sup>48</sup> Others argued that the Trial undermined Western law and presented a stark contrast to the ideals of the Allied nations. Criticism of the Trial continued for decades and is still debated in historical and legal circles today.

While some criticisms laid against the Trial are valid, such as the “double standard” exhibited by the Allies in not trying Soviet war criminals, the unprecedented nature of the trial and the crimes committed by Nazi Germany could not have feasibly been dealt with in any other fashion. When men witness the pinnacle of human cruelty, hear the perpetrators freely admit to committing the act, refuses to act justly on behalf of the abused, one must question the humanity of such persons. The International Military Tribunal could not ignore the cries of the millions of innocent lives slain. The Nuremberg Trial encountered an evil unseen on the world stage. They could not refuse to act. While it may have been imperfect, many felt that “any punishment was wholly inadequate” for the crimes committed.<sup>49</sup> In the words of Sir Simon Birkett, it was “the greatest trial in history,” and the Allied leaders who oversaw it understood the gravity of the situation and recognized that such evil could not go unpunished.<sup>50</sup> Natural law, the belief that all humans have rights (whether one believes they are bestowed by God or not), dictated the direction of the Nuremberg Trial and for the better. Subsequent international courts followed the precedent set by the IMT bringing justice to thousands. The people of the world have the Nuremberg Trial to thank for that.

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<sup>47</sup> Meaning that the prosecution accused them of crimes being committed that were not technically illegal when committed. Racial prejudice to such a degree, however, seems to include human rights violations, regardless of the *ex post facto* rule.

<sup>48</sup> John F. Kennedy, *Profiles in Courage* (New York: Pocket Books, 1957).

<sup>49</sup> Valerie Genevieve Hebert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (Lawrence, Kansas: University Press of Kansas, 2010), 202.

<sup>50</sup> Michael Robert Marrus, “The Nuremberg Trial: Fifty Years After,” *American Scholar* 66, 4 (1997): 563-570.



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