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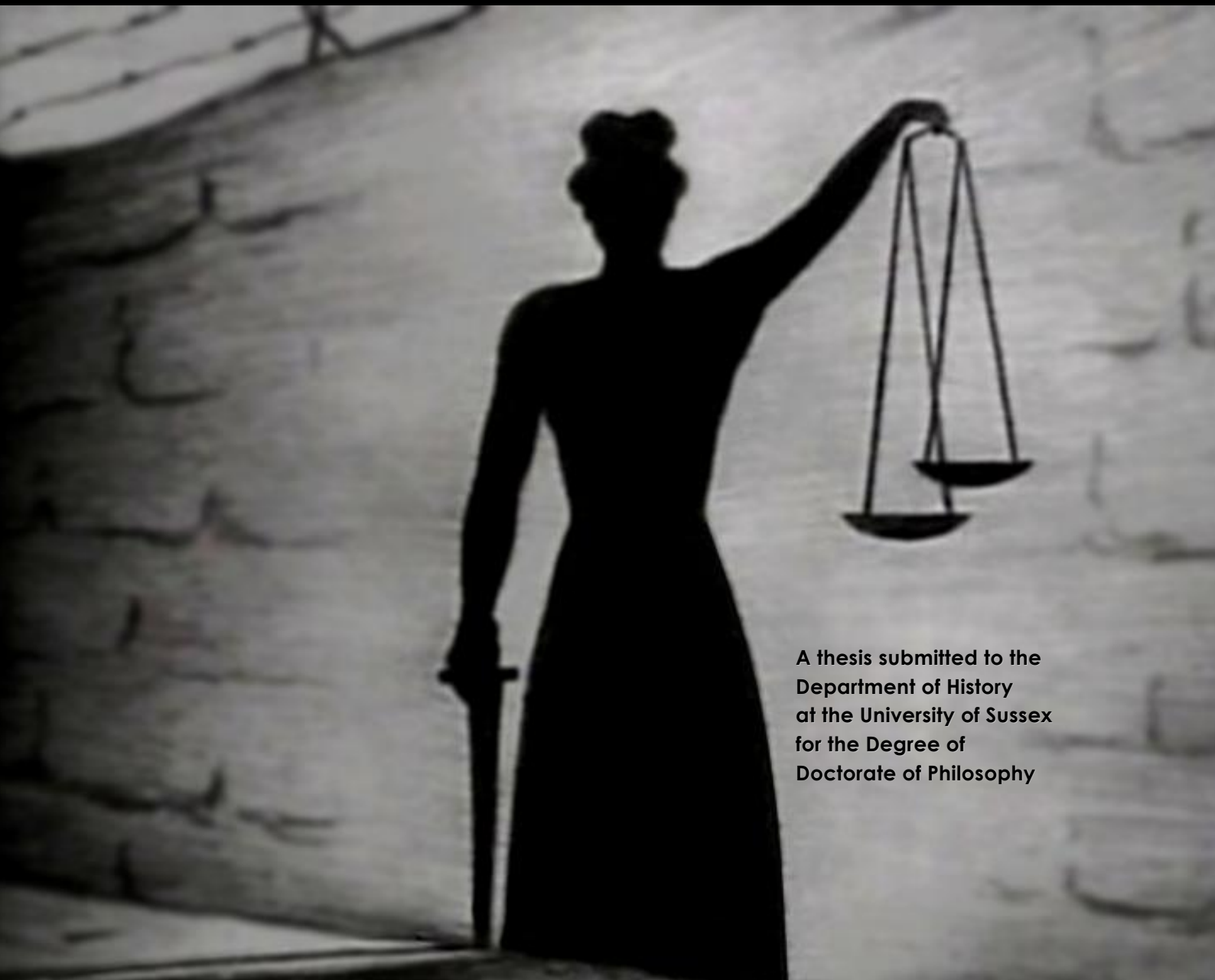
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# THAT JUSTICE BE SEEN

THE AMERICAN PROSECUTION'S USE OF FILM  
AT THE NUREMBERG INTERNATIONAL MILITARY TRIBUNAL



A thesis submitted to the  
Department of History  
at the University of Sussex  
for the Degree of  
Doctorate of Philosophy

Image from E.R. Kellogg (Dir.), *That Justice Be Done*, (USA: OSS, 1945)

KEVIN PATRICK REYNOLDS

September 2011

**Statement**

I hereby declare that this thesis has not been, and will not be, submitted in whole or in part to another university for the award of any other degree.

Signature .....

Kevin Patrick Reynolds  
University of Sussex

## **THAT JUSTICE BE SEEN**

### **THE AMERICAN PROSECUTION'S USE OF FILM AT THE NUREMBERG INTERNATIONAL MILITARY TRIBUNAL**

#### **SUMMARY**

This dissertation examines the use of motion-picture film by the American Prosecution before and during the 'Trial of the Major War Criminals' at the Nuremberg International Military Tribunal (IMT) in Germany, 1945-1946. My research is based on never before used material including newly discovered film, official papers, and private letters. I argue that investigating the use of film, more than any other medium, enables us to comprehend the American Prosecution's vision of justice after the Second World War. I focus on three crucial themes: the political, juridical and moral concerns of the American planners and prosecutors.

Although much historical scholarship focuses on American designs to 're-educate' Germans, I show that the American planners of Nuremberg felt that the education of *Americans* was also essential. The trial was designed to draw a distinction between Nazi 'barbarism' and 'Western civilization' and presented an opportunity that Americans used to promote their political values at home as well as abroad. They used film to affirm and showcase – to millions of their fellow citizens – some of the values and methods of liberal democracy.

The American planners and prosecutors viewed the Nazi defendants as responsible representatives of the German people and used the controversial doctrine of 'conspiracy' to facilitate the new principle of individual accountability in international law. Additionally, they also proclaimed that planning and waging 'aggressive' war had constituted, years before the Nazis came to power, *criminal* activity. Yet representing 'conspiracy' and 'aggression' with film graphically exposed the limits of law in dealing with unprecedented injustice.

The particular form of spectacle arising from the American use of film at Nuremberg has remained overlooked by scholarship in a variety of relevant fields. The American Prosecution staged a form of *morality play* with film. The aim, however, was not the redemption of the Nazi defendants; it was, rather, only to condemn and punish them. The Americans confronted the defendants with images of atrocity, as well as images of themselves. This technique functioned as a theatrical device in which onlookers felt that they could examine the defendants for signs (or the absence) of remorse. This spectacle enabled the presentation of a particularly powerful *moral* case against the defendants and the Nazi ideology they had espoused.

This dissertation, therefore, offers a new contribution to our understanding of the visual culture of legal procedure by using an historical case-study of transitional justice after the Second World War.

## ACKNOWLEDGEMENTS

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First, many thanks to Professor Paul Betts for his patience and relentlessly upbeat approach. Paul first inspired me with undergraduate German history at the University of Sussex and further encouraged me to pursue postgraduate research there as well. As my main supervisor, he has been extremely generous with his time and advice. Next, many thanks to Professor Clive Webb, my 'secondary' supervisor, who was kind enough to come on board at a relatively late stage. His supervision also helped enormously with both content and style (although, of course, I am entirely responsible for any deficiencies). For a variety of other services well beyond the call of duty (rendered throughout my entire time at Sussex), I would like to express my thanks, in particular, to six other faculty members of the History Department: Prof. Ian Gazeley, Prof. Alun Howkins, Dr. Uffa Jensen, Dr. Eugene Michail, Dr. Lucy Robinson and Prof. James Thomson. Thanks also to Margaret Reynolds for a fine example of administrative competence, and to Dr. Christian Wiese for help in quickly deciphering Robert H. Jackson's handwritten notes.

I was very fortunate to have my research funded by the AHRC (see below) in the form of a 'Collaborative Doctoral Award' which, in my case, entailed working with the Imperial War Museum (IWM). I am very grateful to the many staff I came into contact with, not all of whom, unfortunately, can I mention here. The first I wish to mention, however, is Stephen Walton, Archivist at Duxford. As my IWM supervisor, Stephen went out of his way to be helpful and make me feel welcome among the initially overwhelmingly large collections of foreign documents held at Building 6. Many thanks to Pamela Wright and Brenda Collings who were also extremely helpful and welcoming there. Thanks also to the many helpful IWM staff based in London, especially Suzanne Bardgett, Kay Gladstone, Richard Golland and Hilary Roberts. Thanks to the staff of the British Library and the National Archives in the UK.

It was a real pleasure to visit the National Archives & Records Administration in Washington D.C. and receive advice and help from Amy Schmidt, Ken Schlessinger, John Taylor, and Robert Wolfe. Thank you very much to the staff at Myron Taylor Hall, Cornell University, including Thomas Mills, Brian Eden, Kathy Hartman, Claire Germaine & students Eugene & Vivian who photocopied an enormous amount from the William J. Donovan collection. Many thanks to the staff at Special Collections, Harvard Law Library, including Margaret Peachy, Ed Moloy and especially Lesley Schoenfeld. Thanks to all the staff in the Manuscript Reading Room of the Library of Congress and, in particular, Frederick J. Augustyn, Jr. Thanks also to Nicola Shayer at the Thomas J. Dodd Center, University of Connecticut, Ronald Bulatoff at the Hoover institution archives and Bruce Levy at the US Holocaust Memorial Museum.

Of all those I met during my travels in the US, the most helpful assistance with my research was provided by Sandra Schulberg who, like her father Stuart and uncle Budd (who both worked for the O.S.S./American Prosecution), demonstrated an incredible and inspirational spirit of generosity and kindness. Thank you

for the spare room, the access to your father's papers, and the conversations. Thanks also to Fred Whitehead for some information on the O.S.S.

For the encouragement that only friends can provide (i.e., wild optimism with no appreciation of the difficulties involved), I must thank the following happy campers: Matt Allen, Phil Corran, Becca & Dan Connolly, Michael Lindsay and Kedysha Sassi. Thanks to all for the roasts, the drinkable wines, and the finest humour available to humanity. For the encouragement of friends (first) who also happen to be academic historians (and thus do understand); for their comradeship and lashings of ginger-beer, thanks especially to Dr. Becca Searle and Dr. Ben Jones. Thank you Annie Sturge for arranging, and Gregory Fried & Christina Hardway for providing, a place to stay in Boston.

Thanks to Gitti Daldrup, Dorit Hannig, Andre Pohlmann, and Little Lina for encouragement, entertainment, meat and (copious amounts of) fine German beer. Thanks to Manfred Hannig for more of the same and his intimate knowledge of German roof-rabbits during the Second World War. For the many pleasant and fruitful evenings spent discussing jurisprudential, ethical and historiographical topics, I would like to express my sincere gratitude to Archie Reynolds, without whom I would probably have finished a lot sooner.

Thanks so much to Mum & Dad – for everything that would take too long to mention here.

Most of all, thank you my dearest Elena Hannig for the love, support, friendship and everything else.

This research would not have been possible without funding from the Arts and Humanities Research Council. Many thanks to the helpful staff there. I am also very grateful to the German Historical Society for helping with travel costs at a time when it was crucial.

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## ACRONYMS AND ABBREVIATIONS

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ACC	Allied Control Council (Germany)
BWCE	British War Crimes Executive
ETO	European Theatre of Operations
FED	Foreign Exchange Depository (OMGUS), Frankfurt, 1945-50.
FPB	Field Photographic Branch of the OSS
HI	Hoover Institution (US)
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal or its 42 Vol. publication, 'The Trial of the Major War Criminals' (see bibliography)
IWM	Imperial War Museum (UK)
JAG	Judge Advocate General
JBDP	James B. Donovan Papers, Hoover Institution (US)
LoC	Library of Congress (US)
LWP	Leonard Wheeler Papers, Harvard Law Library
NA	National Archives (UK)
NARA	National Archives and Records Administration (US)
NCA	<i>Nazi Conspiracy and Aggression</i> (11 volume publication by the American Prosecution, see bibliography)
NMT	<i>Trials of War Criminals before the Nuremberg Military Tribunals</i> , (15 volume publication re trials subsequent to IMT– see bibliography)
NKVD	The People's Commissariat for Internal Affairs (Народный Комиссариат Внутренних Дел Narodnyy Komissariat Vnutrennikh Del) (The Soviet Secret Police).
NSDAP	National Socialist German Workers' Party (Nazi Party)
OCC	Office of the Chief of Counsel (US) [short abbreviation for OCCPAC]
OCCPAC	Office of the Chief of Counsel for the Prosecution of Axis Criminality (US)
OMGUS	Office of Military Government for Germany (US)
OSS	Office of Strategic Services (US)
OWI	Office of War Information (US)
PS- <i>n</i>	"Paris-Storey". Document used at the IMT sourced from the Paris document processing office of the OCC headed by Colonel Robert G. Storey.
R&A	Research & Analysis Branch of the OSS
RHJ	Robert H. Jackson
RHJP	Robert H. Jackson Papers, Library of Congress
RSHA	<i>Reichssicherheitshauptamt</i> (Reich Security Head Office)
SHAEF	Supreme Headquarters, Allied Expeditionary Force
SS	Schutzstaffel (Shield Squadron of the NSDAP)
SSP	Stuart Schulberg Papers (held by Sandra Schulberg, NY)
TJDP	Thomas J. Dodd Papers (Thomas J. Dodd Centre, US)
UNWCC	United Nations War Crimes Commission
WAC	War Activities Committee (US)
WJDP	William J. Donovan Papers, Cornell Law Library (US)
WVHA	[SS] <i>Wirtschaftsverwaltungshauptamt</i> (Economic and Administrative Main Office of the RSHA)

### Some Notes on the Text

With the hopeful aspiration of being relevant to readers on both sides of the Atlantic, I have chosen to use an alpha-numeric date format dd/Mmm/yyyy rather than the more typically British numeric dd/mm/yyyy (for example, 7/May/1946 rather than 7/5/1946).

Perhaps the most commonly cited published source that I use in this dissertation is, to mention its full title here: International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, (Nuremberg: International Military Tribunal, 1946-9). So widespread among historians is use of only the abbreviated authorship (IMT), with only volume and page referenced, (ie without reference to the title), that I have decided to retain this format with the exception of including a date when referring to the transcripts of the proceedings.

Crimes against peace, war crimes, and crimes against humanity are often used by lawyers and historians to refer to all manner of accepted uses of these terms. When referring to the specific legally defined crimes in the London Charter of 8/Aug/1945, therefore, I have chosen to capitalise the wording in order to avoid any doubt or misunderstandings. 'Crimes against humanity', for example, are defined with much greater breadth today than 'Crimes Against Humanity' in the London Charter.

## CHAPTER 1

# INTRODUCTION

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This dissertation examines the use of motion-picture film by the American Prosecution before and during the 'Trial of the Major War Criminals' at the Nuremberg International Military Tribunal (IMT) in Germany, 1945-1946. All criminal trials possess political, legal, and moral dimensions that can provoke numerous questions. Some of these can appear, in different cases, to be more resolved than others. Who has the authority and right to pass judgement and inflict punishment? What are the appropriate laws and procedures to be applied? Do moral transgressions also constitute legal wrongs (and visa versa)? What is the appropriate punishment? The three themes of politics, law and morality are what I am concerned with in regard to the Nuremberg IMT. I will argue that the way in which the American Prosecution used film provided it with the best available means to impart political and moral lessons – not only to Germans, but also, in particular, to Americans.

I begin, as Judith Shklar proposed, with the recognition that law is a form of political action.<sup>1</sup> Due to the unprecedented historical circumstances that led to the proceedings of the IMT at Nuremberg, it is relatively easy to recognise the workings of political authority and choice-making which, usually in more subtle forms, exist in every instance of legal procedure (international or not). Shklar coined the term *legalism* to describe an ideology that proclaims belief in the existence of a body of rules within a (legal) sphere entirely isolated from political concerns. She characterised this ideology as a form of political choice itself. In regard to modern 'war crimes trials' including the Nuremberg IMT, Gary Jonathan Bass has developed this theme further, characterising the legalism of liberal international lawyers as a form of *idealism* (in contrast, and in opposition to, political *realism*).<sup>2</sup> Amongst a series of convincing propositions, Bass suggests that, in choosing to marshal the machinery of legal procedure in an international setting, liberal states occasionally accompany such legalism with an attempt to apply and proselytise domestic political norms. A notable example he cites is the impulse to extend, beyond the borders of the United

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<sup>1</sup> Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (2nd ed.) (Cambridge, Mass.; London: Harvard University Press, 1986), p. 143.

<sup>2</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton; Oxford: Princeton University Press, 2002), pp. 5-12.

States of America, some of the principles enshrined within the American Constitution.<sup>3</sup> This impulse is quite apparent in the case of the Nuremberg IMT where the American Prosecution condemned Nazi leaders for – in addition to war crimes against their own soldiers – Crimes Against *Humanity*. The victims of such crimes had been deprived of their *rights* to life, liberty and property without due process of law. Bass' emphasis, therefore, is on the way in which domestic norms are *exported* by liberal legalists and applied to foreign victims as well as to the 'war-criminals' of defeated regimes.

Much other research has been produced in regard to the varieties of justice – not all in legal form – applied to past wrong-doers in societies undergoing political transformation. 'Transitional Justice' has become a 'field' of research which demonstrates that a legal response to injustice constitutes only one political choice of action of which there are numerous varieties and alternatives.<sup>4</sup> In common with Bass' research, the focus on the ideas and practices of the agents of justice is geared towards consideration of their immediate and long-term effects on societies which have emerged from the traumatic experiences of illiberal and violent rule. In the case of the Nuremberg IMT, such approaches beg questions such as: from where and how did the ideas of Nuremberg originate and what effects did they have on German society?

This dissertation is similarly concerned with the political ideas and practices of legalists – in this case, of the American prosecutors and planners of the Nuremberg IMT. But, rather than investigating the way in which they exported American ideas and methods for German reception, I focus on the way in which they were concerned with domestic, American reception. Informative research, utilizing opinion polls and other sources, has already been conducted on the American public's attitudes to the trial and its laws.<sup>5</sup> My primary interest, however, is the effects such a concern with domestic reception had on American involvement with the Nuremberg IMT – the influences it had on American planners and lawyers and thus on the proceedings and the law itself. In Chapter 2, I investigate the attempt to persuade the American public of the value of legal proceedings by examining a film made by the Office of Strategic Services (OSS) that was shown to millions of Americans (many OSS staff were, by then, working for the American Prosecution in various capacities). The only previous research on this film I have discovered amounts to a straightforward

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<sup>3</sup> Ibid., p. 22.

<sup>4</sup> Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); Christine Bell, 'Transitional Justice, Interdisciplinarity and the state of the 'Field' or 'Non-Field', *The International Journal of Transitional Justice*, Vol. 3, No. 1 (2009).

<sup>5</sup> William J. Bosch, *Judgment on Nuremberg: American Attitudes toward the Major German War-Crime Trials* (Chapel Hill, University of North Carolina Press, 1970).

description of its content written in French.<sup>6</sup> But by examining *That Justice Be Done* in considerably more depth and utilizing previously unused but highly relevant documentation (files of the OSS, released from the late 1990s), I demonstrate that, even before the filmmakers were assigned to working for the American Prosecution, they became committed to using their craft in order to persuade the American public that a trial, rather than a 'political' solution (i.e. summary execution), was the appropriate response to Nazi injustice. Once American prosecutors became involved with the production of this film, the legal, political and moral lessons they strove to impart – not only via the film, but also via the trial itself – were influenced significantly by a concern with American public opinion. The legal approach was conceived and portrayed as the American, democratic way – in dramatic contrast to Nazi (in)justice. The medium of film provided American legalists with the most practical and powerful means in persuading their fellow citizens that democracy and legal justice – including the principle of due process – went hand-in-hand.

Sixty-five years after the birth of international criminal law, our own era is awash with many legacies of the Nuremberg IMT.<sup>7</sup> The most salient *legal* legacies rediscovered during the first post-Cold-War decade were the universalizing categories of *crimes against humanity* and *genocide*.<sup>8</sup> Genocide, unlike in 1945, is now generally deemed by international lawyers and others to be the worst of all crimes.<sup>9</sup> The term, first coined in print by Raphael Lemkin in 1944, appeared in the Nuremberg IMT indictment but, due to its conflation with more traditional war crimes by both prosecutors and judges, was seldom mentioned throughout the proceedings and not at all in the Tribunal's Judgement.<sup>10</sup> The United Nations' adoption of both legal constructs demonstrated to some international lawyers only that the road to hell was paved with good conventions.<sup>11</sup> Like their humanitarian antecedents, most notably in

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<sup>6</sup> Christian Delage, *La Vérité par l'image: De Nuremberg au procès Milosevic* (Paris: Denoël, 2006), pp. 185-189.

<sup>7</sup> This point is borrowed from: Jonathon A. Bush, "'The Supreme ... Crime' and its Origins: The Lost Legislative History of the Crime of Aggressive War," *Columbia Law Review*, Vol. 102, No. 8 (2002), p. 2325. These many legacies are not merely confined to international or even national arenas. The Nuremberg IMT has, for example, left its marks on the local politics and the physical environment of that 'Haunted City'. See: Neil Gregor, *Haunted City: Nuremberg and the Nazi Past* (New Haven, Conn.; London: Yale University Press, 2008).

<sup>8</sup> For the definition of crimes applied at the Nuremberg IMT, see Appendix II.

<sup>9</sup> Patricia M. Wald, 'Genocide and Crimes Against Humanity,' *Washington University Global Studies Law Review*, Vol. 6, No. 3 (2007), p. 624.

<sup>10</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944). For the IMT judgement see: IMT, Vol. XXII, pp. 441-587.

<sup>11</sup> B.V.A. Röling, 'The Law of War and National Jurisdiction since 1945', *Recueil des Cours*, Vol. 100, No. 2, (1960), p. 445, cited in: Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*

the Hague Conventions at the start of the century, these measures of inhumanity seemed to function purely like Cassandra's prophecies of more horrors to come. Merely surviving on UN paper in a frozen state throughout the Cold War – despite the numerous instances of illegal state-sponsored mass killings<sup>12</sup> – they were not applied in the form of criminal prosecutions until the onset of a New (Dis)Order at end of the 20<sup>th</sup> century.<sup>13</sup> With the institution of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the terms *crimes against humanity* and *genocide* would, for some murderous leaders and their underlings, come to convey, once again, something a little more meaningful than the mere moral posturing of diplomats that one sceptical UN insider of the 1960s condemned as no more than theatre, a (pseudo) *Sacred Drama*.<sup>14</sup> Like Nuremberg, however, the ICTY was an *ad hoc* affair and it will eventually be closing its doors for good. Yet the dream of some jurists who witnessed Nuremberg – the idea of a *permanent* international criminal court – finally became a reality in 2002.<sup>15</sup>

However, official American participation in current developments in international criminal law is considerably less than it was. In the 1940s, in addition to participating in the IMT, the Americans ran twelve 'Subsequent' Trials at Nuremberg which, although run exclusively by themselves, made use of the same international criminal law enshrined in the London Charter of 1945.<sup>16</sup> Whilst each of these trials was a more humble affair than the IMT, the combined effort constitutes a truly mammoth undertaking representing what was a considerable American commitment to, and faith in, the rule of international criminal law. But today, America is not one of the 'State Parties' to the Treaty of Rome which defines the authority and jurisdiction of the International Criminal Court (ICC) at The Hague. Furthermore, the legacy of America's

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(2nd ed.) (London: Penguin, 2002), p. 179.

<sup>12</sup> See, for example, Robert Gellately & Ben Kiernan, (eds.), *The Specter of Genocide: Mass Murder in Historical Perspective*, (Cambridge: Cambridge University Press, 2003).

<sup>13</sup> For the text of the *Convention on the Prevention and Punishment of the Crime of Genocide*, see on the United Nations website: <http://www.un.org/millennium/law/iv-1.htm> (last access: 24/Sep/2010). For the *Universal Declaration of Human Rights*, see: <http://www.un.org/en/documents/udhr/> (last access: 24/Sep/2010).

<sup>14</sup> Conor Cruise O'Brien & Feliks Topolski, *The United Nations: Sacred Drama* (London: Hutchinson, 1968).

<sup>15</sup> See, for example, Vespasian V. Pella, 'Towards an International Criminal Court,' *The American Journal of International Law*, Vol. 44, No. 1 (1950). Pella assisted Lemkin in producing the text of the UN 'Convention on the Prevention and Punishment of the Crime of Genocide'.

<sup>16</sup> The crimes outlined (but not comprehensively defined) in the London Charter were as follows: Crimes Against Peace, War Crimes, Crimes Against Humanity and, as I contend in Chapter 2, Conspiracy to commit *all* of the foregoing (the Tribunal's interpretation of the Charter restricted the relevance of conspiracy to only Crimes Against Peace). See Appendix II for Article 6 of the London Charter. For a record of relevant documents relating to the negotiations at London, including minutes of many discussions between American, British, French and Soviet representatives, see: Robert H. Jackson, (ed.), *International Conference on Military Trials*, (Washington, D.C.: Department of State, 1949). For a record of the 'Subsequent' Nuremberg Trials, see: Department of the United States Army, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, October 1946 - April 1949*, 15 Vols. (Washington, D.C.: U.S. Government Printing Office, 1949).

legal strategy at Nuremberg has not fared well. The crime of 'aggressive war' was emphasised by the Americans at Nuremberg as the 'supreme crime,' a proposition which was supported by the Tribunal in its judgement. But its inclusion in the London Charter was highly controversial. At the time, many jurists criticised it as a retrogressive, *ex post facto*, application of a standard which hardly merited the name of 'law' at all.<sup>17</sup> More relevant today, for many critics, the attempt to condemn individuals for starting wars was, and is, viewed as moral and political business better done without recourse to law.<sup>18</sup> Although 'aggressive war' is mentioned in the Rome Statute of 1998, this document states that agreement would be required between the State Parties over its definition and use before the ICC can exercise its jurisdiction with this crime. Delegates to the first ICC Review Conference in Kampala, 2010, finally agreed on its definition but could not agree on the more fundamental issue of whether the court should be authorised to judge such cases. This failure to reach agreement reflects the very political nature of identifying and condemning 'aggressive war' with its implicit requirement to distinguish between 'just' and 'unjust' wars.<sup>19</sup>

The American Prosecution's obsession with 'aggressive war' features throughout this dissertation since I argue that the prosecutors believed it addressed the political and moral concerns of the American public. But if we wish to identify a *purely* American influence on the use of law at Nuremberg there is no better example than the American planners' and prosecutors' insistence on using the legal doctrine of conspiracy. Research on the use of this doctrine at Nuremberg is usually concerned with the American Prosecution's (unsuccessful) attempts to convince the Tribunal to attach responsibility to the defendants for pre-war activity that reached back to the formation of the Nazi party in 1919. In this way, the Prosecution viewed and portrayed the creation of German concentration camps, for example, as preparatory measures – part of the conspiracy to wage 'ruthless' and 'aggressive' war (the Tribunal, however, maintaining that it only held jurisdiction over crimes directly connected to war, was only willing to consider the existence of a 'concrete' conspiracy for 'aggressive war' dating from 5/Nov/1937).<sup>20</sup> Another use of this legal doctrine was to

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<sup>17</sup> Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', *The International Law Quarterly*, Vol. 1, No. 2 (1947), p. 164.

<sup>18</sup> See, for example, Baron Maurice Hankey, *Political, Trials and Errors* (Oxford: Pen-in-hand, 1950).

<sup>19</sup> Having reached agreement over a definition of the crime, the decision of whether or not to give the ICC the authority to hear cases of aggression has been postponed yet again. The matter will be revisited in 2017. See: website: Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=aggression> (last access: 28/Sep/2010); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th ed.) (London: Allen Lane, 2006).

<sup>20</sup> This was the date of a meeting in the Reich Chancellery between Hitler, and, among others, the defendants Goering, von Neurath and Raeder. The subject was the aims of German foreign policy

confer culpability onto the many thousands of Germans who would not fit into the dock with their leaders. In treating some of the leaders at Nuremberg as representatives of particular organizations, and detailing the criminal aims and deeds of these organizations, the Prosecution convinced the Tribunal to declare most of them, along with the individual defendants, to be criminal. The plan was to enable other courts to convict members of these organizations relatively quickly on the basis of their membership alone. But this was never put into action, since 'de-Nazification,' with its questionnaires and categories of political guilt, plus 're-education,' became the chosen alternatives of the Allied Control Council.

My purpose in examining the American Prosecution's use of the doctrine of conspiracy, however, is to show that the Tribunal's interpretation of it left the most fundamental aim of the London Charter severely compromised. So taken for granted is the belief that individual responsibility was defined unambiguously within the London Charter, and that applying this principle at the trial was a straightforward matter, that I have discovered no investigations of what I contend to be a crucial inter-dependant link between individual responsibility and the use of conspiracy at Nuremberg.<sup>21</sup> With an examination of Article 6 of the London Charter in Chapter 2, I chart just how the principle of individual responsibility became dependant on the American Prosecution's use of conspiracy, and how the Tribunal's differing (and limiting) interpretation of that doctrine subsequently rendered the application of individual responsibility legally flawed. The point is that the law, on its own (legalist) terms, and as used by the American Prosecution, did not succeed in doing much justice at Nuremberg. Instead of doing justice via *legal* means, the Americans were far more successful in other ways.

The Nuremberg IMT has been described and defended by Mark Osiel as an example of a 'liberal show-trial': '[t]o maximize their pedagogic impact,' he states, 'such trials should be unabashedly designed as monumental spectacles'. Yet he acknowledges that liberal-legal narratives, in their attempt to disclose the 'minutiae' of their stories, may become dull – as evinced by Rebecca West's characterisation of the Nuremberg court as 'a citadel of boredom' in the closing stages of the IMT trial.<sup>22</sup>

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which could only be 'settled by force'. The minutes were recorded by Colonel Hossbach. See PS-386, IMT, Vol. XXV, p. 402.

<sup>21</sup> For one example, of which there are many thousands of others: Christian Tomuschat, 'The Legacy of Nuremberg,' *Journal of International Criminal Justice*, Vol. 4, No. 4 (2006).

<sup>22</sup> Mark Osiel, 'In Defense of Liberal Show Trials - Nuremberg and Beyond' in Guénaél Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008), pp. 704-705, 715; Mark J. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick; London: Transaction, 1997); Rebecca West, *A Train of Powder* (London: Macmillan, 1955), p. 3. It is, however, worth reiterating that West's observation came towards the end of the trial – after a lengthy period of Defence presentation



Although stating that no universal moral consensus is possible during trials of transition like the IMT, Osiel does view 'liberal show-trials' as being self-consciously designed to demonstrate the value of 'liberal morality'. His emphasis remains, however, on the liberalism: the *politics* of 'liberal show-trials'. But we can run with Osiel's observations on morality a little further and suggest that, in the case of the Nazi defendants, there was, at least, some potential for the *beginnings* of consensus – the acceptance of their accusers' moral values – through feelings of guilt for what they had done. Of course, a *privately* held sense of guilt was not quite enough. But a *public* acknowledgment from the defendants, a *show* of guilt, would promote the legitimacy of their accuser's moral values and this is what the American Prosecution hoped to attain.

The remaining chapters (4-6) together chart the fortunes of what I describe as a form of morality play: a drama of virtues and vices with moral lessons for Germans and Americans. In setting the stage for an 'American Show' as I frame it, the American Prosecution received considerable assistance from the OSS, a fact that remained neglected until Michael Salter's research on that organization was published in 2007.<sup>23</sup> With OSS assistance came its personnel's high expectations for drama and a desire to bring meaning to a huge war-effort. Salter's research is mostly concerned with the influence that the OSS leader, William J. Donovan, had on the high-level planning of the trial. Donovan hoped and believed that the trial would amount to 'the greatest morality tale ever told'.<sup>24</sup> My research demonstrates that individuals much lower down in the organization's hierarchy – such as an architect, film-editors, and others, were equally enthusiastic about putting on a good show (furthermore, many of them remained at Nuremberg for the duration of the American Prosecution's case, whilst Donovan left soon after the trial began<sup>25</sup>). The American Chief Prosecutor, Robert H. Jackson, began by meeting such expectations, impressing the judges, his colleagues, and press reporters with a masterful opening speech that dramatized the 'evil' of Nazism and contrasted it with the virtue of 'imperilled civilization'.<sup>26</sup> But, seemingly in accord with Osiel's observations, the minutiae of the Prosecution's subsequent attempt to build an engaging narrative of Nazi criminality

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which was far more tedious than the Prosecution's. West's observation is sometimes quoted as though her comments apply to the entire proceedings in general – or to the beginning. See, for example, Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005), p. 202.

<sup>23</sup> Michael Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies regarding the role of the Office of Strategic Services* (Oxon: Routledge, 2007).

<sup>24</sup> *Ibid.*, p. 404.

<sup>25</sup> *Ibid.*, pp. 432-433.

<sup>26</sup> IMT, 21/Nov/1945, Vol. II, pp. 99-100.

quickly appeared to bleed Nuremberg dry of any drama whatsoever.

Chapter 4, however, demonstrates that the boredom was caused, to a great extent, by purely practical problems encountered with the novel arrangements for the first ever multilingual international criminal trial that took place in a room full of many defendants, their counsel and prosecutors. I show that the use of witnesses was, in contrast to the expectations of the Prosecution, an opportunity for the Defence to widen the scope of enquiry and slow down the pace of the trial – a problem already exacerbated by the slow pace of 'simultaneous' translation which also drained the impact of any speech delivered in German (at least, for an English-speaking audience). The American Prosecution's emphasis on using documents – a room full of documents – was the favoured method of the Chief American Prosecutor in providing incontestable proof of the defendants' guilt. There can be little doubt – despite Donald Bloxham's contention that producing narratives within the legal framework of Nuremberg resulted in bad history – that Jackson's preference for documents bequeathed a valuable legacy to historians of the Third Reich and even to historians of the Holocaust.<sup>27</sup> Some of them, like Raul Hilberg made very good use of this record.<sup>28</sup> Nevertheless, the use of documents failed to provide the engaging narrative that the Prosecution had hoped for.

As I show in Chapter 5, all the practical problems encountered with witnesses and documents were avoided with the use of film, a medium that provided the opportunity to deliver a controlled narrative of Nazi wrong-doing. Film was used, however, for more than that. Whilst most general histories mention the American use of film as a high point of drama in the trial, there are very few who examine its use at Nuremberg in any detail.<sup>29</sup> Laurence Douglas, however, examines in some detail the use of *Nazi Concentration Camps*, the first film to be shown at Nuremberg.<sup>30</sup> Perhaps his most important insight is that the filmmakers and the American prosecutors did not perceive the horrific images on the screen as evidence of the Holocaust – this despite its subsequent use by lawyers in other legal settings who did just that. As with other

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<sup>27</sup> Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); IMT. The first volume of IMT reproduces the London Charter, the indictment, and other 'pre-trial' information; the transcript is reproduced in 21 volumes (2-22); Vols. 23 and 24 provide chronological and subject indexes as well as a document index; a further 18 volumes (25-42) reproduce Prosecution and Defence documents in their original language (usually German).

<sup>28</sup> Raul Hilberg, *The Destruction of the European Jews* (3rd ed.) (New Haven; London: Yale University Press, 2003).

<sup>29</sup> For what are, perhaps, the two best general accounts of the IMT trial, see: Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (London: Bloomsbury, 1993); Ann Tusa & John Tusa, *The Nuremberg Trial* (London: Macmillan, 1983).

<sup>30</sup> Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).

historians looking at film related to the Holocaust, as well as numerous legal scholars examining the use of film more generally, Douglas characterises film itself as a form of witnessing. But I contend that the way it was used by the American Prosecution at Nuremberg means it could function in a much more effective way than human witnesses at Nuremberg could: its use echoed a particular theatrical device, a play-within-a-play, which facilitated a very effective form of spectacle.

There appears to be only one historian who comes close to explaining the phenomenon with which I am concerned. Christian Delage states that the point of presenting *Nazi Concentration Camps* in court was to force the defendants to recognize the crimes for which they were responsible.<sup>31</sup> I continue from the point at which he concludes: the point of using the film, I contend, was to invite observers to watch the defendants as they, in turn, watched the film. I apply Dagmar Barnouw's findings to this spectacle at Nuremberg: as with the way American Signal Corps cameramen invited their audience to inspect German civilians for signs, or the absence, of remorse (as they were forced to witness the horrors of the camps) so too did the American Prosecution invite the rest of those present within the courtroom to examine the defendants for signs, or the absence, of remorse.<sup>32</sup> They did this because they hoped to believe that the defendants, despite proof of their 'evil' deeds, shared the same moral values as themselves: that they had known what they had done was wrong.<sup>33</sup> I argue that, given the impossibility of achieving any commensurate punishment for the defendants' unprecedented wrongs, this spectacle functioned as method in delivering a limited form of punishment. It was this that would ensure that justice was seen.

Chapter 6 applies the themes of preceding chapters – politics, law, and morality – to other films shown by the American Prosecution at Nuremberg. In particular, I examine the use of what appears, at first sight, to be the most boring piece of film presented at the trial. This does, in fact, help to demonstrate that the moral spectacle of using film in the courtroom did not depend entirely on the gruesome nature of the images. What was important was the accusatory nature of the public spectacle itself. As I show, the use of the short film *Reichsbank Loot*, despite (Cold War) political and legal (evidentiary) problems, succeeded in appearing to evince a moral conscious-

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<sup>31</sup> Christian Delage, 'Image as Evidence and Mediation: The Experience of the Nuremberg Trials' in Michael Freeman (ed.), *Law and Popular Culture* (Oxford: Oxford University Press, 2005), p. 503.

<sup>32</sup> Dagmar Barnouw, *Germany 1945: Views of War and Violence* (Bloomington, Ind.: Indiana University Press, 1996).

<sup>33</sup> For an alternative view, see: Claudia Koonz, *The Nazi Conscience* (Cambridge, Mass.; London: Belknap, 2003).

ness in one of the defendants. It was, I contend, this moral form of justice – via the spectacle of projecting film in the courtroom – that was most successfully conducted by the American Prosecution at Nuremberg.

## CHAPTER 2

# EXPLODING THE SWASTIKA

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*The issue comes to just this: whether Mr Jefferson or Mr Hitler has sized us up best. The answer is no longer in doubt. Not only Virginians, but Yankees as well, and all our countrymen and lovers of freedom the world over fight today under the banner of Thomas Jefferson. Under it and by reason of it we will shatter to bits this new and ugly authoritarianism.*

Robert H. Jackson (13/Apr/1944).<sup>1</sup>

*The first step is to acknowledge that law is a form of political action.*

Judith Shklar (1964).<sup>2</sup>

In the spring of 1945, on the grounds of the Zeppelin field that had served the Nazi Party's Nuremberg Rallies throughout the 1930s, L. Bennett ("Elby") Fernberg, with his eyes closed, recorded on his Signal Corps movie camera the moment in which a gigantic metal swastika was blown to pieces with American explosives.<sup>3</sup> He later recalled that he had narrowly avoided death during this incident when a piece of metal about 10 feet long fell close by; about a dozen other soldiers, he estimated, were injured by pieces of flying metal. Without realising the power of the images he had recorded until years later, he had managed to capture a symbolic record of American purpose that would be carried through – with successes, limitations, problems and failures – to the occupation of a defeated Germany. This scene would come to symbolise the destruction of Nazism in a visual form utilized by director Stanley Kramer in the opening sequence of his 1961 epic, *Judgment at Nuremberg*.<sup>4</sup> What its use by Kramer implied was a continuity from Allied war-time aims with the post-war transformative function of courtroom justice: a determination to destroy the political and moral traces of Nazism that had constituted an unprecedented era of injustice. In particular, Kramer's art reflected the reality of a very *political* drama.

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<sup>1</sup> Robert H. Jackson, 'Thomas Jefferson, A Great American', speech to the Virginia State Society, 13/04/1944, reprinted in: USA Congressional Record, 90<sup>th</sup> Congress, pp. A2047-8.

<sup>2</sup> Shklar, *Legalism*, p. 143.

<sup>3</sup> Lynwood Abram, *The Houston Chronicle*, 4/3/2007, p. B2, cited by: John Q. Barrett, 'Blowing up the Swastika, Nuremberg, Spring 1945', (2007), Faculty Profile Page, St. John's University, last viewed 14/02/2009, <http://www.stjohns.edu/media/3/b218e321c9b54732afc1d33bb53a888a.pdf>

<sup>4</sup> The fictional film was based loosely on the third 'subsequent' Nuremberg Trial devoted to prosecuting members of the judiciary who had presided over the administration of Nazi 'justice'. Stanley Kramer (Dir.), *Judgment at Nuremberg*, (U.S.A.: M.G.M., 1961).



**FIGURE 1, A/B.** Poetic Justice in visual form: 'Elby' Fernberg's U.S. Signal Corps footage of an exploding swastika at Nuremberg.

It is not the politics of domestic Party ideologies that this chapter is concerned with, for, as we shall see, a certain American Democrat could agree with a certain American Republican (who, in turn, could tolerate Marxists) that a trial was the best way to deal with the Nazi leaders at the end of the war. Rather, I am concerned here with the politics of patriotism or what might be termed the comparative politics of international law. Donald Bloxham has provided insights into how certain legal thinking that shaped the trial (particularly the idea of 'conspiracy') affected the subsequent historiography of the Holocaust by – amongst other things – rendering a particularly *intentionalist* interpretation of the Third Reich. But the extent of his critique of the legal process 'doesn't entirely convince'.<sup>5</sup> What is missing from his account is any detailed analysis of how the laws applied at Nuremberg were shaped in great measure by American concerns over the domestic (American) reception of the IMT trial. What this chapter will demonstrate, through examining the production of a film aimed at the American public, is that these political concerns were central to the way in which American planners and prosecutors designed and conducted it. The 'primacy of foreign politics', so often cited as a guide to explaining the history of domestic German politics, helps to explain the American approach to international law too. Nuremberg was a piece of foreign policy which its designers felt would help to define the character of American democracy – at home and abroad. It would, however, require domestic consent which could not be manufactured but, instead, required persuasion. The use of film, as we shall see, provided the American planners and prosecutors with the best means to advocate their vision of justice to the American people.

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<sup>5</sup> Bloxham, *Genocide on Trial*; Lawrence Douglas, 'Review: Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory,' *Holocaust and Genocide Studies*, Vol. 18, No. 1 (2004), p. 137. (Emphasis added). Douglas rightly points out that the mistakes of historians are just that – not merely the mistakes of the law or of lawyers.

## 2.1. Politics By Other Means

Perceiving injustice itself involves political choices: at the most fundamental level, where some see injustice, others choose to class the same phenomena as misfortune.<sup>6</sup> Yet even when, as among the Allies after the Second World War, there was little doubt that a multitude of grave injustices had taken place, no universal consensus existed in the prioritization of cases for condemnation and retribution. Nazis had perceived the very existence of Jews and the 'problem' of having to destroy them as merely Germany's misfortune. Genocide was not, however, the most salient issue, either during or after the war, for the Allied governments who, although claiming to be outraged and in some position to respond, offered little more than condemnatory or sympathetic words. What usually counted first were the national victims that states represented.<sup>7</sup>

During the war, representatives of émigré governments from European nations that were occupied by Germany, along with British and American professors and governmental representatives, convened and instituted in Britain a variety of commissions and assemblies in order to plan methods of retribution.<sup>8</sup> The most well known and official of these was the United Nations War Crimes Commission (UNWCC) which, although sidelined by the British and American governments (and snubbed from the outset by the Soviets) made significant progress in conceiving juridical responses to German behaviour.<sup>9</sup> Rather than merely concerning itself with criminal investigations, which several members of the commission deemed to be inadequate, such progress went beyond the remit that the British and American governments had been willing to tolerate. This included, for example, the creation of a committee to discuss matters of law, such as the proposal by Dr. Bohuslav Ečer, the Czech representative, to prosecute leading Nazis for the crime of 'aggressive war'.<sup>10</sup> Central to the retributive response that would eventually materialise at Nuremberg were particular interpretations of Nazi injustice which, in the end, were those of *particular*

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<sup>6</sup> Judith N. Shklar, *The Faces of Injustice* (New Haven; London: Yale University Press, 1990).

<sup>7</sup> For this reason, as Hannah Arendt observed, the trial of Adolf Eichmann was viewed by the Prosecution at Jerusalem as an opportunity to rectify the lack of emphasis on Jewish victims at Nuremberg. See: Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Rev. and enl. ed.) (New York; London: Penguin, 1992), pp. 6-7.

<sup>8</sup> See for example, mention of the *International Commission on Penal Reconstruction and Development* and the *London International Assembly* in Bush, "The Supreme ... Crime" and its Origins,' pp. 2341-2342.

<sup>9</sup> See Arie J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, N.C.; London: University of North Carolina Press, 1998).

<sup>10</sup> *Ibid.*, pp. 93, 97.

nation-states: those represented by the 'Big Three' at Yalta, plus France.<sup>11</sup> For other nations (many of whom had been represented in the UNWCC), such as Poland and Czechoslovakia, and groups, such as the American Jewish Conference and the World Jewish Congress, there was encouragement to mark official support for the Tribunal or expressions of sympathy, but little chance for direct involvement in courtroom proceedings.

What was new and significant in the early days of May 1945, alongside imminent victory in Europe, was that the United States had finally instituted a civilian-led *ad hoc* office devoted to the creation of an international court and the prosecution of the leaders of Nazi Germany. It was the plan initiated in the War Department by Colonel Murray Bernays in the autumn of 1944 that would, more than any other, affect the manner in which 'Nuremberg' was run.<sup>12</sup> But by the spring, the project was no longer a military one. The Office of the United States Chief of Counsel for the Prosecution of Axis Criminality (OCC) was answerable only to the President, and only one civilian individual was to be held directly accountable.

That man was Robert Houghwout<sup>13</sup> Jackson, the 54-year-old Supreme Court Justice, who was not only deemed to be the best representative for the ideals of democratic justice, but also happened to be a living embodiment of the American Dream. Brought up on the farmlands of upstate New York, he belonged to the last generation of lawyers who could be admitted to the Bar without a university degree. From within a community characterised by social and political conservatism, he was influenced by the independent streak in his father, a freemason who never went to church and always voted Democrat. Once Robert completed his apprenticeship at his cousin's law firm in Jamestown, he busied himself with building a practice of his own and gaining a reputation as the successful advocate of local business in its fight against big outsiders. In 1934, he moved to Washington to work in the Treasury Department. He progressed to the position of Assistant Attorney General in the Tax Division of the Department of Justice and, subsequently, in the Antitrust Division. He had become an advocate for Roosevelt's New Deal, for the American citizen against the undemocratic 'conspiracies' of corporate tax evasion, monopolization and corruption.<sup>14</sup> After only a brief spell as Solicitor General he was appointed, in 1940, as

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<sup>11</sup> France was offered a place on the tribunal due to the fact of its being part of the occupation. David Reynolds suggests that the French, due to British insistence at Yalta, secured a greater involvement than Stalin would otherwise have intended. See: David Reynolds, *Summits: Six Meetings that Shaped the Twentieth Century* (London: Allen Lane, 2007), p. 123.

<sup>12</sup> Bradley F. Smith, *The Road to Nuremberg* (London: Deutsch, 1981), pp. 48-74.

<sup>13</sup> Pronounced "How-uff" as one contemporary pointed out: anonymous, 'Biographical Sketch', June, 1941, LoC/RHJP, 189/5.

<sup>14</sup> He was a loyal servant of President Roosevelt and wrote a biography of him which was published



Attorney General. Only a year after that did he become an Associate Justice on the bench of the Supreme Court. Whilst retaining this position at the end of the war, President Truman chose him to be 'America's Advocate' in order to prosecute the case against the 'Major War Criminals' of a defeated Nazi Germany, a project that he would later remember as the most important experience of his life.<sup>15</sup>

## 2.2. Operation Justice

On the 2<sup>nd</sup> May 1945, President Harry S. Truman gave Jackson authority to undertake 'Operation Justice' in the form of Executive Order number 9547:

[1] Associate Justice Robert H. Jackson is hereby designated to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against [...] the leaders of the European Axis Powers [...]

[2] [He] is authorized to select and recommend to the President or to the head of any executive department, independent establishment, or [...] agency necessary personnel to assist in the performance of his duties [...]. The head of [any such organization] is hereby authorized to assist [Jackson] and to employ such personnel and make such expenditures, [...] as [Jackson] may deem necessary to accomplish [...] this order, and may make available, assign, or detail for duty with [Jackson] such members of the armed forces and other personnel as may be requested [...].

[3] [He] is authorized to cooperate with [...] any foreign government to the extent deemed necessary by him [...]<sup>16</sup>

This extraordinary order represented a designation of responsibilities and authority that had traditionally resided elsewhere. The Office of the Judge Advocate General (JAG), the traditional administrative office of military justice, might otherwise have assumed the responsibility for applying the programme outlined in Point 1.<sup>17</sup> Point 2

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posthumously: Robert Houghwout Jackson & John Q. Barrett, *That Man: An Insider's Portrait of Franklin D. Roosevelt* (Oxford; New York: Oxford University Press, 2003).

<sup>15</sup> The first and, currently, only biographical monograph covering Jackson's entire life is: Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* (Indianapolis.: Bobbs-Merrill, 1958). For a concise and relatively recent account of his role at Nuremberg, see: John Q. Barrett, 'The Nuremberg Roles of Justice Robert H. Jackson,' *Washington University Global Studies Law Review*, Vol. 6, No. 3 (2007). Barrett's book-length account of Jackson's role at Nuremberg is forthcoming. Jackson, together with Harlan B. Phillips, edited the substantial text of his reminiscences in an unpublished oral biographical history held in the Library of Congress: LoC/RHJP/258-9. It was revised by Jackson himself and returned to Phillips in 1954, just one week before the Justice's death. See also chapters 8 & 9 in Jeffrey D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham, Md.: Rowman & Littlefield Publishers, 1996).

<sup>16</sup> Jackson, (ed.), *Conference*, p. 21.

<sup>17</sup> A War Crimes Office dedicated to the investigation and accumulation of evidence for post-war trials was, in fact, set up in JAG by direction from the Secretary of War on 25/09/1944: Thos T. Handy, 'Memorandum for the Judge Advocate General ... Punishment of War Criminals', 30/11/1944, NARA/RG-226/148/76. The remit, however, resembled the traditional military tribunal in its direction to 'Collect from every available source all evidence of cruelties and atrocities ... against members of our armed forces or other Americans...'.

gave unprecedented independence and powers to a civilian to negotiate with, and take control of, any military personnel in the European Theatre of Operation (ETO), a physical and legal zone of military occupation. The last paragraph represented plenipotentiary powers that usually rested only with the State Department. But his authority stretched even further: in addition to being a prosecutor and a negotiator, he would also, effectively, become a legislator of international criminal law. That such powers were relatively quickly assigned to a single individual in the form of a single side of hastily-worded typescript, suggests that not only did the President have considerable confidence in the abilities and reliability of Jackson, but also that the circumstances were quite novel.

What was most new, and in direct contrast to the aftermath of the First World War, was the American determination, explicitly expressed, to bring legal justice to the highest leaders of Germany. That Nazi leaders would be brought to trial had been assumed by some already in their interpretation of the Moscow Declaration of 1943, signed by Churchill, Roosevelt and Stalin. The declaration was, however, mostly concerned with the trial and punishment of *direct* perpetrators of atrocities in particular places – for which there would be little doubt of the validity of legal jurisdiction. Only the final paragraph addressed the issue of the ‘Major’ criminals: ‘[This] declaration is without prejudice to the case of major criminals, whose offenses have no particular geographical localization and who will be punished by joint decision of the Governments of the Allies.’<sup>18</sup> It was quite possible to interpret this – as most in the British Foreign Office did – to mean that ‘punishment’ meant summary execution, as Lord Simon advised Prime Minister Churchill who took on board Simon’s proposal before discussing the matter with President Roosevelt in Quebec.<sup>19</sup> It was not until towards the very end of the war that the American and British governments resolved on bringing the highest-placed Nazi leaders to justice through legal means.<sup>20</sup>

A few days after Jackson had been given the authority of his new office, it had become clear to him that, although plenty of discussion had taken place on both sides of the Atlantic in regard to theories of international criminality and courts, far less hard evidence of the type that he deemed necessary – connecting high leaders to decision-making involving war-making and atrocities – had actually been gathered by any agency. The UNWCC, he had been advised, had garnered much of its ‘evidence’ from little more than newspaper-reports and intelligence that, in many cases, had been forwarded from American military sources. Those sources themselves

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<sup>18</sup> Jackson, (ed.), *Conference*, p. 12.

<sup>19</sup> Kochavi, *Prelude to Nuremberg*, p. 80.

<sup>20</sup> Smith, *The Road to Nuremberg*, pp. 190-246.

had proved to be far less fruitful than Jackson had understood at the time he accepted his new role.<sup>21</sup>

### 2.3. The Office of Strategic Services

There was, however, one American organisation that was ideally suited to assisting Jackson: the Office of Strategic Services (OSS). This young (but soon to be disbanded) organisation had considered in some depth the issue of collecting 'war crimes' evidence from almost the moment of its inception in the summer of 1942.<sup>22</sup> By default, the OSS had become the principal US agency in considering post-war legal justice because the issue had been given little direction from Roosevelt until the last months of the war: with such a dearth of policy, few departments or agencies were willing to address the issue that would flare into a 'war on the Potomac' during those last months of the European war.<sup>23</sup> As a result, the OSS was, by the end of the war, most suited (and willing) to assist in the Nuremberg project to such a degree of significance that has only recently been appreciated and explained by Michael Salter.<sup>24</sup> That its operatives had engaged in espionage and 'special operations' alongside resistance and underground fighters throughout Europe meant that it was uniquely suited to locating sources of incriminating evidence. Yet it had also succeeded in tapping the talents of America's brightest civilians at home: intellectuals and academics of the Research and Analysis Branch (R&A), including several anti-Nazi émigrés from Europe who spent much of the war busying themselves writing secret reports that amounted to first drafts of Nazi-Germany history, international criminal jurisprudence, and much else besides. They included such luminaries as Gordon Craig, Felix Gilbert, Sheldon Glueck, H. Stuart Hughes, Otto Kirchheimer, Raphael Lemkin, Herbert Marcuse, Franz Neumann, Hajo Holborn, Carl Schorske and many others, several of whom would contribute in various ways to the proceedings of the IMT at Nuremberg.<sup>25</sup>

The OSS was headed by William J. Donovan, a decorated general from the previous war and a highly successful civilian attorney whose law-practice operated

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<sup>21</sup> RHJ, Diary, 7/May/45, LoC/RHJP/95/'Diary'.

<sup>22</sup> The OSS was created through a reorganisation of intelligence gathering that concluded in the summer of 1942. See: Bradley F. Smith, *The Shadow Warriors: O.S.S. and the Origins of the C.I.A* (London: Deutsch, 1983), p. 141.

<sup>23</sup> The quotation is part of the title of the first chapter in: Smith, *The Road to Nuremberg*. It describes the bitter inter-departmental struggles to decide a post-war war-crimes policy.

<sup>24</sup> Salter, *Nazi War Crimes*. Chapter 8.

<sup>25</sup> Barry Katz, *Foreign Intelligence: Research and Analysis in the Office of Strategic Services 1942-1945* (Cambridge, Mass.; London: Harvard University Press, 1989).

from No. 2, Wall Street.<sup>26</sup> Unlike Jackson, he was a Catholic and supporter of the Republican Party but he was willing to tolerate the presence of Marxists or left-leaning individuals within his organizations so long as they were devoted to defeating the Nazis.<sup>27</sup> Almost as soon as the OSS had been created, Donovan addressed the issue of gathering war crimes evidence by declaring the need to procure statements from (ex-) prisoners of war.<sup>28</sup> In the autumn of 1942, the organisation identified the need to begin the process of constructing a list of individual Nazi war criminals.<sup>29</sup> One powerful motive for the early production of such a list was to ensure that OSS double-agents would not be treated as war criminals if captured by Allied troops. A year later a list of high-ranking Nazi individuals was produced including some who would appear as defendants in the IMT at Nuremberg (the list would be further revised during the war).<sup>30</sup>

Although, throughout the war, Donovan himself maintained the view that a *legal* response towards the very highest-placed Nazi individuals was highly problematic, the R&A Branch of OSS, headed by William L. Langer, had nonetheless devised a method for determining individual responsibility that would avoid merely arbitrary selection of defendants in any trial that might eventually take place. It was as early as June 1943, that R&A report 3113 outlined proposals for a legal response to 'Principal Nazi Organizations Involved in War Crimes'.<sup>31</sup> Together with a handful of other war-time OSS papers related to war-crimes, it would, before August 1945, end up in the hands of Robert Jackson.<sup>32</sup>

Aiming to 'establish the juridical responsibility of such organizations and institutions as the Nazi Party, the Reich government, and the Armed Forces (Wehrmacht) for the commission of crimes', the report suggested an approach that would later lend itself to the useful application of the legal construct of 'conspiracy', suggesting that:

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<sup>26</sup> R. Harris Smith, O.S.S.: *The Secret History of America's first Central Intelligence Agency* (Berkeley; London: University of California Press, 1972), p. 15. For a biography of Donovan which makes no mention of Nuremberg, see: Anthony Cave Brown, *The Last Hero: Wild Bill Donovan* (New York, N.Y.: Times Books, 1982).

<sup>27</sup> Smith, O.S.S., p. 29.

<sup>28</sup> Salter, *Nazi War Crimes*, p. 309.

<sup>29</sup> *Ibid.*, p. 310.

<sup>30</sup> *Ibid.*, pp. 311-312.

<sup>31</sup> OSS, R&A 3113, 5/Jun/1943, Donovan Papers, Vol. 19.

<sup>32</sup> J.B. Donovan, 'OSS Documents and Memoranda', 2/Aug/1945, NARA/RG-238, 51/18. This memorandum lists 38 OSS documents that had been given to Jackson by 2/Aug/1945. It is likely that some would have been given in early May 1945.

The group approach (as opposed to the consideration of isolated persons) is based on the assumption that the indictment of these organizations ... may expedite the prosecution of war criminals and help to prove that Nazi war crimes are not purely individual acts committed in violation of existing laws but are *the manifestations of an overall plan* which relied, integrally or implicitly, on specific organizations as instruments essential or incidental to the execution of its purpose.<sup>33</sup>

Although ostensibly concerned principally with *organizational* responsibility (something that would become highly significant in IMT and subsequent trials after the war), such an approach, most significantly, was to be used as 'a proper basis for the selection of the individual defendants.'<sup>34</sup> As Bradley Smith pointed out, the plan to try organisations as criminal entities has often been treated as though it were an afterthought rather than the heart of the American Prosecution's thinking. As Smith put it, 'The individual defendants were merely the performers through whom the main drama was played out.'<sup>35</sup> If, first, organizations could be identified as being responsible for what were essentially characterised as institutional crimes, then, rather like a class-action in American municipal law, the most representative leaders of such organisations could be indicted for crimes of a 'common plan or enterprise' relating to any particular charge.<sup>36</sup> The modern novelty (in international law) of individual criminal responsibility, not only for war crimes, but planning and waging a war of 'aggression', exists in this document. The four charges defined in the report were as follows:

- I. Plot for World Domination
- II. Launching of Illegal Wars, Aggression, and Violation of International Treaties
- III. Violation of International Rules of Warfare
- IV. Domestic Crimes

This report also listed comprehensively all appropriate forms of evidence that it suggested should be gathered, including official German documents, the testimony of witnesses, and German-made films.

Although this concise report outlined a theory of prosecution and a method for collecting evidence related to an expanded definition of 'war crimes', this subject was not the principal concern of the R&A branch or the OSS as a whole. The fundamental purpose of R&A was to produce research (not only based on clandestine intelligence) that would be useful for the Joint Chiefs of Staff and the military more generally in the fight to win the war. By extension, it also worked towards

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<sup>33</sup> OSS, R&A 3113, p. 1. (Emphasis added).

<sup>34</sup> Ibid., p.3.

<sup>35</sup> Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), p. 64.

<sup>36</sup> The term 'common enterprise' is still synonymous with 'conspiracy' in Anglo-Saxon law and appears in various places (from p. 4) within R&A 3113 (op. cit.).

ensuring that the Allies would win the peace and produced several influential reports detailing the issues that would result from the eventual military occupation of Germany. Amongst several 'Civil Affairs' guides printed by the war department, R&A produced such papers as 'Dissolution of the Nazi Party and its Affiliated Organizations', 'Policy toward revival of old parties and establishment of new parties in Germany', 'Police and Public Safety in Germany' and 'German Principles of Administration and Civil Service in Germany'.<sup>37</sup> Thus, the proposals to indict and try Nazi leaders sat within a wider scheme of political transition that was being considered within the OSS during the war. These reports were not only to be read by prominent officials in preparation for military government. Some of them were also to be distilled in a more accessible form for a wider audience of civilian and military personnel that would be involved in the occupation of Germany. For this audience, however, the ideal medium was the 'orientation' film which could be produced in-house: by the Field Photographic Branch (FPB) of the OSS.

#### **2.4. The Field Photographic Branch**

As its name implied, the FPB had been created to capture still and moving images of strategic importance for overt and covert military operations. It also produced training films for OSS and military personnel. Films were made not only to demonstrate the use of newly designed weapons or devices, but also in order to assist in the provision of more generalized military training. Many of these films relied upon R&A research. But once victory against Germany seemed assured, concerns in both the R&A and FPB switched to dealing with the administration of military government in a defeated Germany once the war would be over. The outline for one such film was entitled *The Pattern of German Conspiracy* and was written in the final days of the European war.<sup>38</sup> Although the film itself was never made, the written outline highlights the thread of consistency between FPB thinking before and after the OSS came to Jackson's aid in preparing for the prosecution of the 'major war criminals'.

Designed to be shown to 'all military personnel concerned with the administration of military government in Germany, as well as for interested State Department and Congressional groups', this outline was informed by readings of a variety of R&A

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<sup>37</sup> O.S.S./State Department Intelligence and Research Reports, British Library Microfilm holdings/ OPL 973.0076.

<sup>38</sup> Budd Schulberg, 'The Pattern of German Conspiracy: A Cinematic Supplement to the Guide for Civil Affairs', c. April 1945. NARA/RG-226/148/73/1050. This document, and the related memorandum in the same file, is undated. My approximate dating of both is based, therefore, on the content of the following indented quotation in the main text.

reports as well as Sigrid Schulz's *Germany Will Try It Again*, Louis Nizer's *What to do with Germany*, and 'numerous writings by Lord Vansittart, Dorothy Thompson, Brookings Institute, etc'.<sup>39</sup> It was subtitled 'A Cinematic Supplement to the Guides for Civil Affairs' and began by suggesting that, although the war was almost won militarily, the Allies would still need to win the peace:

After five years of struggle, suffering and tireless devotion to the cause of freedom, the peace-loving nations have overcome the most ambitious conqueror the world has ever known. As this prospectus is being written, mighty armies converge on Berlin from the east and from the west. For war-weary millions throughout the world, the conflict seems almost at an end. But is it?<sup>40</sup>

The rhetorical question was soon followed by another which asked 'What to do with Germany?'<sup>41</sup> Rather than providing any single straightforward answer, the outline was designed to highlight likely problems that would be encountered during the military occupation and control of Germany. But rather than dealing only with the near-future, it was mostly concerned with the past – and, more precisely, the lessons that history might teach. As an accompanying memo put it, it was intended to be:

a visual survey of the German pattern of anti-democratic and militarist activity, with special attention to the 1918-1923 period, focusing the minds of the audience on the mistakes and misconceptions of the Allied Commission during the previous occupation, and on the methods of deception and evasion which have become traditional with German nationalist groups.<sup>42</sup>

Thus the film was intended to serve as a warning from history to the future American civil and military administrators of an occupied Germany. Starting with the story of the Treaty of Versailles, delivered by 'the well-intentioned' Wilson, the decline of the Weimar Republic was narrated in dramatic form. A scenario – invented rather than gleaned from any text or footage – pictured a demobilized German lieutenant questioning his war-hero, General Ludendorff, who advised him to bide his time and view the instigation of republican democracy as only a temporary imposition. This was followed by 'Free Corps' and 'Schwarz Reichswehr' sequences detailing the methods of Germany's illegal and clandestine remilitarisation.

A sequence entitled 'War Criminals' set out a list of German crimes including 'International Acts in defiance of treaties and international law' and 'Torture of civilians, execution of hostages and systematic terrorism'. Yet in order to highlight the dangers of compromising on the public demand for justice the narration explained that these 'crimes listed above are not taken from a list of those committed by the

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<sup>39</sup> Anon., 'Memo on German Military Government Film', NARA/RG-226/148/73/1050.

<sup>40</sup> Schulberg, 'The Pattern of German Conspiracy', p. 1. (Emphasis in original).

<sup>41</sup> Ibid.

<sup>42</sup> Anon., 'Memo on German Military Government Film', NARA/RG-226/148/73/1050.

missionaries of Kultur between 1939 and 1945. They are vintage 1914-1918. They are part of the list of 32 crimes against International Law drawn up by the Allies' Special Commission in 1919.'<sup>43</sup> There subsequently followed the sorry tale of the abandonment of international criminal justice after the First World War: how an Allied Special Tribunal had failed to try the Kaiser due to the gift of refuge provided by Holland 'whose very independence was owed to the strength of Allied arms'; how an Allied High Tribunal had been set up to try German officers, soldiers and civilians but had been thwarted by Allied acquiescence in the establishment of an alternative, German, Tribunal that merely acted as a sounding-board for the myth-making of an undefeated Germany and the legend of the 'stab-in-the-back'.

The drama in this outline, which would reappear in subsequent film-scripts, derived not only from the emphasis of the injustice of atrocities but also from the guilty going free whilst, as the narration put it, 'Dame Justice tapped her feet impatiently'.<sup>44</sup> Of the 'tens of thousands' of Germans that might have been indicted after the First World War, 'the list was cut to 1500' and then to 896. The 896 'somehow or other dwindled to 14' and the number kept reducing until the 'farce and tragedy' of Leipzig (German-run war crimes trials) resulted in only a handful of convictions accompanied by inappropriately light sentences.<sup>45</sup> This history lesson was designed to emphasise the crucial importance of a concerted effort to impose justice once the occupation of Germany was underway.

This outline was written by Hollywood scriptwriter Budd Schulberg, author of the novel *What Makes Sammy Run* and, later, the creator of the screenplay *On the Waterfront*.<sup>46</sup> Some weeks after completing *The Pattern of German Conspiracy*, Schulberg and the FPB were directed to working on 'War Crimes' for Robert Jackson's office, an enterprise that became far more involved than the assistance that had already been given to the Judge Advocate General's War Crimes Office. As John W. English, the executive officer of FPB in Washington, explained to a colleague on the 14<sup>th</sup> May:

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<sup>43</sup> Schulberg, 'The Pattern of German Conspiracy', p. 9.

<sup>44</sup> Ibid., p. 11.

<sup>45</sup> The Leipzig trials began as an Allied endeavour but saw the withdrawal of the Allies – France and Britain – after disagreements over defendant selection and procedures. See Chapter 3 of Bass, *Stay the Hand of Vengeance*.

<sup>46</sup> Budd Schulberg, *Moving Pictures: Memories of a Hollywood Prince* (Harmondsworth: Penguin, 1981).



...OSS has entered the war crimes situation. Mr. Justice Jackson [...] has requested the assistance of the organization. It is consequently necessary for us to decide on making every contribution we can. We should be prepared to work in a coordinating capacity in getting out photographic evidence on war crimes. It is more than likely that we should make a picture on the subject and we should plan on giving coverage to the big War Crimes trials...<sup>47</sup>

Schulberg's early work on the War Crimes programme was to develop an outline for a documentary on the preparation for the international trial (Nuremberg was not yet chosen as the venue). There was, at this point, little official (written) discussion or reasoning behind the need for such a film, yet the subtitle to *Crime and Punishment* was 'An Outline of a Picture on War Crimes for the American Public' and it developed further some of the themes already existing in *The Pattern of German Conspiracy*, the most prevalent being the injustice of war crimes suspects having evaded justice after the First World War.<sup>48</sup> After an introductory sequence portraying the aggressive nature of statements from public speeches of leading Nazis (Hitler, Göbbels and Göring), this outline also offered a history-lesson beginning with the time of the Treaty of Versailles.

Again, but in bolder relief, the dwindling numbers of suspects who were to face justice was brought home, this time, with the proposed use of graphics:

NARRATION:

Of the thousands of Germans accused of war crimes ... fifteen hundred were selected for the "first" trials.

ANIMATION:

No. accused on an "initial" list – 1500.

NARRATION:

This list was "abridged" to 896.

ANIMATION:

No. accused on the "abridged" list – 896.

[...]

The number finally convicted was 6.

ANIMATION:

No. actually convicted – 6.

NARRATION:

The longest sentence was four years. It was never served.

What happened?<sup>49</sup>

In a new development, Schulberg made more explicit in the narration of this outline the *legal* failings of the period after the First World War, implying that this time the 'mistakes and misconceptions of the Allied Commission during the previous occupation' must not be repeated. Such 'mistakes' included adherence to the traditions of immunity for heads-of-state as well as acknowledgement of the defence of 'superior orders':

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<sup>47</sup> John W. English to E. R. Kellogg, 14/May/1945, NARA/RG-226/148/72/1021, p. 3.

<sup>48</sup> Budd Schulberg, 'Crime and Punishment', NARA/RG-238/51/26/'Moving Pictures'; NARA/RG-226/90/12/126.

<sup>49</sup> Ibid.

By definition a war crime could not be committed by "heads of state". In practice, Generals and high government officials were also exempted. On the other hand, a war crime could not be committed by a German soldier since he acted on orders from a superior who acted on orders from a superior who acted on orders from ...

FADE OUT

After scenes of cheering Germans supporting their Nazi leaders, the narration asked 'What were they heiling?' and proceeded to answer this with an exposition of Nazi crimes against 'religions, racial minorit[ies] and political opposition'. These examples of crimes were from *before* the outbreak of the Second World War: the imprisonment of Niemöller and other prominent clergymen, and the internment of political opponents of the regime at places like Dachau. The next sequence that did seek to expose Nazi injustice during the war itself sought to represent the injuries caused to innocent Allied civilians: the 'vengeance' aerial bombing of 'undefended cities' using stock shots of devastation in Rotterdam, Canterbury and Coventry and, after images of V1 and V2 rocket-bombs in flight, scenes of the resulting damage caused including women and children being carried away from the wreckage. After 'a "reprisal" speech' by Himmler, images of Oradour-sur-Glane were proposed to be shown.

After considerable coverage on the subject of slave labour, the outline included a sequence entitled 'Concentration Camps' which first proposed to picture emaciated prisoners, but no images of the dead. The method applied was to highlight and confront a pattern of denial emanating from all levels of German command about knowledge or responsibility for the camps. Starting with a German private who 'may say he did not like his job but had no choice since he was acting under orders' this sequence progressed, via a SS commander charged with guarding Buchenwald, to the top command where Göring continued the mantras of denial:

Finally we reach the level of Goering, who says, (NY Times, May 11, 1945) that he had no knowledge of atrocities or concentration camps: "I was never so close to Hitler as to have him express himself on the subject to me." OVER this statement, we see a SHOT OF HITLER AND GOERING conferring together, as intimate and friendly a shot as is available.

Goering's voice (in translation) continues: "I believe the atrocities and concentration camps are merely propaganda."

Over Göring's final words, 'merely propaganda', was to appear 'some of the shocking evidence of mass murder' at Buchenwald, Belsen, Majdanek and Auschwitz, accompanied by figures of death superimposed onto the screen. The list of camps and figures of the dead made no distinction between those designed as prisoner camps and those designed purely for extermination. In fact, the figures that had been estimated for Majdanek, Auschwitz and Treblinka (1,500,000, 1,765,000 and 1,000,000) had not yet been calculated for the other examples (Buchenwald, Belsen and Dachau) which each had only a question-mark for the figures to be worked out later.

This sequence reinforced the identification of the double-edged injustice of immunity for heads of state combined with the age-old defence of 'superior orders' – an injustice that traditionally saw the guilty go free. But this time, the guilty – heads of state *and* those who followed their orders – would have to be punished. This raised the question of just what crimes particular individuals could be held accountable for. The most significant point was Schulberg's acknowledgement of the *novelty* of Nazi crime and the requirement for a new way to describe it:

Narrator: There was no word to describe these crimes, which could only be committed in an age where evil is armed with science. Homicide is the wilful killing of a man. This is genocide,[sic] the wilful killing of [a] people.<sup>50</sup>

As a reflection of its novelty, the spelling (by an experienced and talented script-writer) of the typescript word 'genocide' [sic] stood corrected only in pencil (the letter 'a' was also only later inserted in pencil in order to signify a 'people' in the singular). The decision to supplement the description of this new crime with quotations from Marshal Von Rundstedt was inspired by a reading of Raphael Lemkin's *Free World* article of April 1945, 'Genocide – A Modern Crime', in which the originator of the term began his piece by quoting the Marshal as saying:

One of the great mistakes of 1918 was to spare the civil life of the enemy countries, for it is necessary for the Germans to be always at least double the number of the people of the contiguous countries. We are therefore obliged to destroy at least a third of their inhabitants...<sup>51</sup>

This quotation was not only sourced by Schulberg for use in the film outline; Jackson also had possession of the Lemkin article whilst in Nuremberg before the trial started.<sup>52</sup> The use of this quotation in the film-outline was coupled with an interview with von Rundstedt in which the marshal admitted responsibility only for military strategy – and not for the treatment of civilians. But if there was any doubt that a policy of depopulation did not come from the very top of the Nazi leadership, Hitler himself was quoted as saying:

We shall have to develop a technique of depopulation...the removal of entire racial units... If I can send the flower of the German nation into the hell of war without the smallest pity for the spilling of precious German blood, then surely I have the right to remove millions of an inferior race that breeds like vermin!<sup>53</sup>

These words were taken from Hermann Rauschning's *Hitler Speaks*.<sup>54</sup> Although, without

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<sup>50</sup> Schulberg, 'Crime and Punishment', p. 13.

<sup>51</sup> Raphael Lemkin, 'Genocide – a modern crime', *Free World*, (April, 1945), pp. 39-43. The word was first coined in print in: Lemkin, *Axis rule in occupied Europe*.

<sup>52</sup> Robert Jackson, 'Main Office Files' [Lindenstrasse, Nuremberg] NARA/RG-238/51/34/'Genocids'.

<sup>53</sup> Schulberg, 'Crime and Punishment', p. 14.

<sup>54</sup> Hermann Rauschning, *Hitler Speaks: A Series of Political Conversations with Adolf Hitler on his Real Aims* (London: Thornton Butterworth, 1939), p. 140.

context, it would be easy to presently read this narrative as relating to Hitler's intentions towards Jews, this text was sourced from a passage that purported to convey Hitler's views on the dangers of 'the Slav races'.<sup>55</sup> The use of Rauschning's testimony here served to demonstrate that Hitler's pre-war intent was genocidal and that – most significantly from an audience's point of view – he had expressed this intent explicitly (but only in private).<sup>56</sup> Given that, not until the 1980s, 'professional' historians subsequently expressed serious doubts regarding the reliability of *Hitler Speaks*, it is only possible to say with hindsight that the use of such material in this film-outline was a mistake.<sup>57</sup> It was not an effort, through the use of black propaganda, to mislead.

There are two more significant aspects to *Crime and Punishment* that signify the attempt to convince the American public that the right approach to post-war justice was underway. First, although insignificant when compared to the perpetration of genocide against Jews and other Europeans, the 'mistreatment' of American prisoners of war comprised an entire sequence itself. Brief interviews with convalescent American soldiers were proposed in which they would tell of 'starvation, beatings, lack of sanitation and medical care, torture and murder marches and other crimes against the Geneva Conventions'. At this point, one might have expected some explicit reference and considerable time devoted to the massacre of American troops by members of the 1<sup>st</sup> SS panzer division at Malmedy, Belgium, in December 1944. Yet since the month after this war crime, such was the level of American public awareness and outrage at these murders of dozens of troops that it had become quite unnecessary to inform the American public of this once again.<sup>58</sup>

Instead of dwelling on what was understood by the public to be the single most infamous crime against their fellow Americans, the following part of this sequence rather served to illustrate the *breadth* of German injustice against Americans – and to connect such injustice directly to the Nazi leadership. Thus after an order by Hitler to execute parachute troops; after Göbbel's encouragement to lynch downed American fliers; after further examples of 'incitements' by leading Nazis 'to unlawful acts', the viewers of the film would see 'a quick flash of the results of these policies – the group of American paratroopers shot [...], the machine-gunning of American survivors of torpedoed ships, hanging of American fliers, and death of starved

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<sup>55</sup> Schulberg, 'Crime and Punishment'; Rauschning, *Hitler Speaks*, pp. 138-141.

<sup>56</sup> It is also worth reiterating that the American endeavour of proving responsibility and knowledge of genocide among the Nazi leaders on trial – or, as the indictment was framed, Conspiracy to commit War Crimes and Crimes against Humanity – in no way relied upon Rauschning's work.

<sup>57</sup> Ian Kershaw, *Hitler: 1889-1936 - Hubris* (London: Allen Lane, 1998), p. xiv.

<sup>58</sup> Smith, *The Road to Nuremberg*, p. 115.

American prisoners.' This was followed by a proposed stream of quotations from German soldiers exhibiting – like their predecessors after the First World War (depicted at an earlier stage in the outline) – the continual denial of responsibility and the defence of 'superior orders'.

Next, as though to make the point that, by learning from the mistakes of history, America must not be doomed to repeat the failures of the past, that failure was dramatized by showing, once again, the statistics of legal failure: from an original number of 1,500 suspects, the total diminished down to only 6 that were actually convicted with a combined sentence of only one-and-a-half years.

The following and final sequence proposed a direct address to the camera by Jackson, even suggesting the text that he would speak. To be overlaid with images of UNWCC staff pouring over voluminous documentary evidence, it made clear the historical significance of the moment:

Jackson: "...It is our task to see that Germany does not again win from the Allies' forgetfulness of her crimes. This has been a war for international justice and against [...] Nazi [...] militarist philosophies. Our successful prosecution of the men and organizations most responsible for the crimes that have been depicted will prove our war aims before the civilized world: To sustain and revive the dignity of man."

(Over this part of Mr. Jackson's address, we see a panorama of the most shocking crimes, Buchenwald, Lidice, Coventry, etc.)

As Mr. Jackson concludes, THE CAMERA returns to him again, looking direct into the faces of the audience:

"The war will not have been fully won unless the conscience of the world – including the conscience of Germany [...] – understands that wrong must be righted, crime must be punished, international law restored, strengthened, maintained and enforced so that the people of the world may live in security and peace."

FADE OUT  
THE END

What this text made evident was the openly espoused, self-conscious proposition that the postwar international justice to be spearheaded by Jackson's office would serve the political aims of the war. It would bring meaning to that war as an effort by Americans to 'revive the dignity of man'.<sup>59</sup> Unlike the 'mockery' represented by the bold statistics of justice delayed and denied after the First World War, a concerted effort to bring leading Nazis to book would awaken the German conscience and, in doing so, open the way to a more settled peace.

In early June, Jackson examined the outline of *Crime and Punishment* as it existed thus far - in purely textual form - and, whilst acknowledging his non-expertise in the field of film-production, stated that it seemed 'a very effective presentation'.<sup>60</sup> Yet this

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<sup>59</sup> Telford Taylor was later explicit in his (private) statement that subsequent trials at Nuremberg brought 'meaning' to the war - cited in: Ibid., p. 251.

<sup>60</sup> RHJ memo to Lt. James Donovan, 8/Jun/1945, NARA/RG-238/51/26/'Moving Pictures'.

was, perhaps, merely an attempt to preface his subsequent criticism in as polite a mode as possible. The problem, as he expressed it, was an ethical issue with his own appearance in the film:

I think this would be a very doubtful propriety from the standpoint of professional ethics and might cause offense to our colleagues abroad. As you know, the British are particularly sensitive about lawyers trying their own cases in the newspapers and other vehicles of communication. There is some sensitiveness on that score in this country although not as much as I think there ought to be. My conclusion is that I ought not to depart from the role of a reasonably dispassionate prosecutor.<sup>61</sup>

Although it had been made clear in a footnote to the text of this speech that it was only a suggested outline and that Jackson would be free to speak his own words, it was, in fact, the overtly 'political' tone of the entire text that made the Justice recoil from appearing in the film. The hope that, in the face of Nazi crimes, a prosecutor might be 'dispassionate' only highlights some contradiction in the belief that a transitional legal process could remain entirely de-politicized. Jackson argued that the film could still achieve its goal in 'educating' the American public without taking part in it himself. The belief in a solid line dividing politics and the application of law was tellingly conveyed in his subsequent comments:

After all, *in the political sphere* President Roosevelt, Marshall Stalin and Churchill signed the Moscow Declaration, which would be a good climax [for the film], and Truman followed it through by making an appointment and a statement concerning it. I think it would be well to discuss with the people who know this field other means of driving home the lesson without using any of the staff who would actually appear in the prosecution...<sup>62</sup>

Jackson liked to believe that, at the moment of his appointment by Truman, politics ended and the sphere of law – in which he functioned – began.<sup>63</sup> It therefore seemed highly unlikely that he would ever agree to appear in any film that openly avowed the political nature of American or international justice. Yet he would come to bemoan the fact that his own role required more than the collection of evidence and the organisation of a prosecution case. He later privately admitted (in a letter to his daughter) that his increasingly 'hectic' role entailed the combined functions of

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<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.* (Emphasis added).

<sup>63</sup> Jackson told a sceptical Treasury Department official that it was Truman's decision to hold a trial and that his job was merely to carry it out. RHJ, Diary, 18/May/1945. LoC/RHJP/95/'Diary'. This was true, but implied that the political and legal processes were discrete. Yet the manner in which he chose to carry out his plans for Nuremberg entailed political decisions – such as the jurisdiction of the court and whether or not to continue negotiations with the British, French and Russians (or to 'go it alone' with a trial of prisoners in American hands). See: Sir A. Cadogan, 'Brief for Mr. Attlee', 1/Aug/1945, repr. in: Rohan Butler & M. E. Pelly, (eds.), *Documents on British Policy Overseas*, Vol. I, (London: HMSO, Foreign Commonwealth Office, 1984), p. 1101.

'diplomacy' and that of a 'lawyer'.<sup>64</sup>

## 2.5. London Politics

His admission came in the midst of the negotiations in London that were devoted to shaping the form and jurisdiction of an International Military Tribunal. After a brief spate of optimism on Jackson's part, it became apparent to him in mid July that the French, and to a greater extent, the Soviet delegation, would not, like the British, tend to adopt the role of adding only minor alterations and amendments to previously issued American working documents with a view only to limiting the scope of the trial and the number of defendants.<sup>65</sup> The Soviets were far more rigorous in their criticisms of American suggestions – particularly when it came to the proposals for trying individuals on a charge of 'conspiracy' as well as indicting organizations.<sup>66</sup> This seems to have been driven by genuine concerns relating to differences in Continental and Anglo-American jurisprudence and procedures rather than any concerted effort to scupper the negotiations.<sup>67</sup> Yet despite the difficulties, both the Soviet and American delegations, in keeping with their perceived respective traditions, envisaged utilitarian purposes in persevering with a multinational tribunal. For the Soviets, involvement in this multinational trial provided the ideal platform for justifying the punishment of the enemies of Communism. The most prominent of those *individual* enemies were not in Soviet custody and without collaborating with the Americans, they would have been left only with a couple of less-prominent Nazis with which to stage their spectacle. Furthermore, although there was considerable debate on how to deal with Nazi organizations, the Soviets could agree with the Americans on certain fundamental *aims* that the British chief negotiator, Sir David Maxwell-Fyfe, quoted from the Yalta Declaration:

"It is our intense inflexible purpose to bring all war criminals to just and swift punishment ..." – and these are the important words – "to wipe out the Nazi party, Nazi laws, organizations and institutions, remove all Nazi and military influences from public office and from the cultural and economic life of the German people".<sup>68</sup>

Yet Soviet revolutionary interpretations of the functions and purposes of law caused difficulties in the negotiations. As a result, the all-too 'political' nature of inter-

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<sup>64</sup> RHJ to [I]Rene Jackson, [21/Jul/1945], LoC/RHJP/2/3.

<sup>65</sup> For Jackson's optimism transmitted to the President in early June with the expectation that the negotiations might be finished in a week, see Smith, *Reaching Judgment*, pp. 48-49.

<sup>66</sup> *Ibid.*, pp. 50-51.

<sup>67</sup> *Ibid.*

<sup>68</sup> Jackson, (ed.), *Conference*, p. 133.

national postwar justice became quickly apparent to the Anglo-Americans in the early days of the negotiations when one of the Russian negotiators, General Nikitchenko, outlined the general Soviet attitude:

The first [explanation of our position] is with regard to the character of the trial. We are not dealing here with the usual type of case where it is a question of robbery, or murder, or petty offenses [...but] with the chief war criminals [...] whose conviction has been already announced by both the Moscow and [Yalta] declarations by the heads of governments, and those declarations both declare [the intention] to carry out immediately just punishment for the offenses which have been committed.<sup>69</sup>

Soviet purpose was thus chiefly concerned with *punishment*: not only through executions of 'war-criminals' but also through the very public spectacle of their swift condemnation. Despite the self-image of a revolutionary society at the forefront of modernity, this did, in fact, reflect an approach more consistent with pre-Enlightenment 'justice'.<sup>70</sup> It was the case that all the Allied delegates to the conference deemed the Nazi leaders to be guilty and that they deserved stern punishment – the leaders were continually referred to as 'criminals' rather than 'suspects'. The Soviet view, however, explicitly declared law and justice to be *entirely* political matters. The Anglo-American legalist position, on the other hand, held that the very process of publicly demonstrating *proof* of criminal guilt through the use of evidence stood outside politics and would serve a wider purpose than (only) retribution. Yet they would find themselves in partnership with a delegation that felt comfortable with the idea that the international trial could only be a show-trial and that any pretence otherwise would be to deny reality and lead to unnecessary delay. As Nikitchenko continued:

[T]he Soviet Delegation considers that there is no necessity in trials of this sort to accept the principle that the judge is a completely disinterested party with no previous knowledge of the case. [...] the judge, before he takes his seat in court, already knows what has been quoted in the press [...] there is, therefore, no necessity to create a sort of fiction that the judge is a disinterested person who has no legal knowledge of what has happened before.<sup>71</sup>

Nikitchenko's view of the 'fiction' of a disinterested judge was consistent with the immediate Soviet condemnation, in the early years of the revolution, of the principle of judicial objectivity: an aspiration dismissed as 'bourgeois falsification'.<sup>72</sup> Yet for at least some of the American, British and French lawyers present such an ideal reflected

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<sup>69</sup> Ibid., pp. 104-105.

<sup>70</sup> On the pre-Enlightenment practice of punishment as public spectacle, see Chapter 1 of: Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (trans. Alan Sheridan) (London: Allen Lane, 1977).

<sup>71</sup> Jackson, (ed.), *Conference*, p. 105.

<sup>72</sup> Julie A. Cassiday, *The Enemy on Trial: Early Soviet Courts on Stage and Screen* (DeKalb: Northern Illinois University Press, 2000), p. 38.



a deeply-held and sincere faith in the mythical metaphors of the Goddess of Justice who not only held a sword and set of measuring scales, but wore a blindfold too.<sup>73</sup> Such differences in ideology remained irreconcilable. As Jackson put it: 'We are making slow progress with the Russians. Their life and tradition and experience are so different that even after translation of language it is hard to understand each other.'<sup>74</sup> Nikitchenko would demonstrate, practically, his belief that an impartial judge could only be a fiction to be swept aside: he would, unlike Jackson who would appear as a prosecutor, come to sit on the bench as a judge at Nuremberg.<sup>75</sup>

Jackson's concerns with the Soviet approach had been further compounded by a viewing of a Russian film on the subject of the Kharkov trial.<sup>76</sup> Held after the recapture of the Ukrainian town in December 1943, this Military Tribunal managed to convict and condemn to hanging all four defendants (three Germans and a Russian 'collaborator') in a matter of days. Wide press coverage in Russia and access for Western reporters was facilitated with the aim of displaying the first Allied example of a legal process against German nationals accused of perpetrating atrocities.<sup>77</sup> To the Soviets, it represented the very first example of the determination to have war-criminals 'brought back to the scene of their crimes and judged on the spot by the peoples they [had] outraged' as outlined in the text of the Moscow Declaration.<sup>78</sup> Yet Jackson's understatement that the Kharkov film was a 'very interesting exposition of the Russian method of proving a case by the defendants themselves' suggested distaste (at the very least) for the Soviet practice of questioning defendants before they answered with dubiously lengthy and forthright confessions of guilt.<sup>79</sup> What was of paramount importance to Jackson was the transparent exposition of fair and open procedure so that not only the contemporary world, but also future generations, would, because of such very methods, believe that the guilt of the defendants, as

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<sup>73</sup> On the mythical aesthetics of justice, and, in particular, interpretations of the blindfold, see: Martin Jay, 'Must Justice be Blind? The Challenge of Images to the Law' in Costas Douzinas and Lynda Nead (eds.), *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago; London: University of Chicago Press, 1999). Also see: Denis E. Curtis & Judith Resnik, 'Images of Justice,' *Yale Law Journal*, Vol. 96, No. 8 (1987), pp. 1721-1772.

<sup>74</sup> RHJ to [I]Rene, 4/Jul/1945, LoC/2/3.

<sup>75</sup> One of the French negotiators, Robert Falco, also ended up on the bench – in his case, as an 'alternate'.

<sup>76</sup> Jackson first saw this film in the original Russian on 17/May/1945 (see note 79). He was subsequently offered a viewing during the London conference after the OSS had shortened the film and added English translation. See: Gordon Dean to RHJ, 25/Jul/1945, NARA/RG-238/51/26/'Moving Pictures'.

<sup>77</sup> Kochavi, *Prelude to Nuremberg*, pp. 66-73. See also: Arie Kochavi, 'The Moscow Declaration, The Kharkov Trial and the Question of a Policy on Major War Criminals in the Second World War,' *History*, Vol. 76, No. 248 (1991).

<sup>78</sup> Jackson, (ed.), *Conference*, p. 12. It should be pointed out, however, that the text of the Moscow Declaration was explicitly directed to dealing with perpetrators only once an armistice had been granted to Germany. For British and American concern over the dangers of administering justice in this specific case and more generally, see: Kochavi, *Prelude to Nuremberg*, pp. 70-73.

<sup>79</sup> RHJ, Diary, 17/May/1945, LoC/RHJP/95/'Diary'.

well as the moral duty to condemn them, was beyond question. This concern with 'posterity' – in both the construction of an incontestable documentation of the Nazi past, and the construction of an international legal apparatus that might affect the behaviour of future state-leaders – is one aspect to their approach that distinguished American legalists in contrast to the Soviet emphasis on the political utility of immediate punishment – so much so that some *American* staff, more concerned about the immediate importance of re-educating the German public, would occasionally find frustrating.<sup>80</sup>

## 2.6. Democratic Justice

Jackson chose to characterise the essential differences between Soviet and American methods as being a matter of legal *procedure* rather than any significant disagreement over issues of substantive law. Due process and the open contestation of events and responsibility – as would be achieved through the Anglo-Saxon method of adversarial procedure – was, to Jackson, the *democratic* way. He justified his unwillingness to concede what he deemed to be this essential aspect to American legal tradition by invoking the need to consider American public opinion.<sup>81</sup> And, as has often been neglected in accounts of the major trial, this legalist approach had a considerable democratic mandate from the United States Congress.<sup>82</sup> In contrast to Britain, France and the Soviet Union, there was – before the negotiations in London – widespread bipartisan demand from America's democratic representatives for a legal process to deal with the top Axis leadership. Although calls for 'commensurate punishment' of such leaders had been made in the House as early as 1943, it was in late March, 1945 that Congressman Emmanuel Celler sat before the House Committee on Foreign Affairs in an attempt to have submitted a joint resolution directing the President to 'appoint a Commission to cooperate with the United Nations War Crimes Commission, or any other agency [...] of the United Nations in the preparation of definite plans for the punishment of war criminals of the Axis countries'.<sup>83</sup> The recent recall of Herbert C. Pell from his role as American representative to the UNWCC could be easily perceived as an American retreat from international cooperation in the trial and punishment of 'war criminals'.<sup>84</sup> This renewed

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<sup>80</sup> Stuart to Barbara Schulberg, 19/Oct/1945. SSP.

<sup>81</sup> Jackson, (ed.), *Conference*, p. 113.

<sup>82</sup> A notable exception can be found in: Bosch, *Judgment on Nuremberg*, pp. 67-86.

<sup>83</sup> *Ibid.*, p. 69.

<sup>84</sup> Kochavi, *Prelude to Nuremberg*, pp. 160-161.

Congressional activity was, in part, a reaction to this withdrawal. However, with the potential to force the government into negotiations with a great number of Allied representatives – over the potentially complex issues regarding the design of laws and procedures – it appears that this resolution went further than the State Department was willing to tolerate. It was not the commitment to a legal process *per se* that was objectionable, but the spectre of becoming bogged-down in interminable, fruitless negotiations, or being forced to cooperate with Allied institutions on the latter's terms. Instead, it appears that the Foreign Affairs Committee was persuaded into favouring a *concurrent* resolution, put forward instead by Congressman Cecil R. King, that would merely serve to *advise* the executive of the desires of Congress.<sup>85</sup> In this way, the House could make the principles and priorities of forthcoming justice clear without committing the executive to cooperating with Allies to an extent that might force it to abandon such very principles or practices in the process. Although less powerful than the original joint resolution proposed, it equated more closely to the American approach that would materialise at the London Conference and at Nuremberg:

That it is the sense of the Congress that it should be the policy of the Government and its agencies and representatives ...To determine no one exempt from trial or punishment by virtue of his status as head of state, or as an official of any state, or as an industrialist or civilian, or by virtue of the fact that the acts involved were the acts of state or were performed under the compulsion of superior orders.<sup>86</sup>

Although the resolution garnered unanimous support from both houses in Congress, various criticisms and suggestions were directed towards ensuring greater transparency and accountability – including the demand that a permanent record of Nazi perpetration of atrocities be made.<sup>87</sup> Although this did not become part of the resolution for technical reasons, it also reflected a crucial aspect to the IMT trial that would take place at Nuremberg. (This suggestion was also made to Jackson by Sheldon Glueck – who had kept abreast of Congressional workings – during the London Conference negotiations<sup>88</sup>).

Just as the American democratic *mandate* for trial and punishment of Germany's individual leaders was clear, a self-consciously 'democratic' method in the theory of prosecution was also discernible. The process – already described above – of first deciding upon *organizational* responsibility for crimes before choosing *representative* individual defendants was itself a mark of an inherently 'democratic' sensibility: in short, it evinced an adherence to the principle of representational responsibility and

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<sup>85</sup> Bosch, *Judgment on Nuremberg*, p. 70.

<sup>86</sup> H.Con.Res.30, 79th Congress, 1st Session, 19/Feb/1945.

<sup>87</sup> Bosch, *Judgment on Nuremberg*, p. 71.

<sup>88</sup> Sheldon Glueck to RHJ, 'Historical Record of the War Crimes Enterprise', 24/Jun/1945, NARA/RG-238/51/27/'Suggestions Re Publicity'.

accountability.<sup>89</sup> As Jackson put it in reply to the Soviet view expressed at the London Conference, 'We think of this as rather *more* than trying certain persons for some specific offences'.<sup>90</sup> 'Merely as individuals,' Jackson would later state in his opening speech of the trial, 'their fate is of little consequence to the world'.<sup>91</sup> Their individual punishment – though deserved if fairly proven guilty – was secondary to the condemnation of the 'social forces' that they *represented* now that they had merely become but 'living symbols' of the numerous injustices that had been perpetrated under their direction.<sup>92</sup>

## 2.7. That Justice be Seen by Americans

As the trial would represent the democratic alternative to both Nazi and Soviet methods, it was important to *present* it as such – in order to demonstrate to the American people that it would be distinct from 'political' or 'victor's' justice. Democratic justice, however, in maintaining an element of fairness to the defendants, and observing certain rules of procedure that might entail considerable time, would always be subject to a particular problem that Nazi and Soviet methods circumvented: being fair to the defendants might very well turn out to be a very laborious and time-consuming affair. Jackson publicly acknowledged this problem at the close of the London Charter negotiations, but attempted to brush aside such concerns with what, in hindsight, appears to be considerable optimism regarding the likely duration of the trial:

This will be a dreary business and there is no use trying to dodge that fact [...] But I do not think the world will be poorer even if it takes a month or so, more or less, to try these men who now are prisoners and whose capacity for harm has now been overcome...<sup>93</sup>

Such a potentially 'dreary business' would require justification and propagation. The trial needed to be presented as a process in keeping with American ideals – democracy and the rule of law. The slow pace, huge effort and considerable

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<sup>89</sup> The method of first choosing organizations before justifying the choice of individuals has been pointed out in: Smith, *Reaching Judgment*, p. 64. But such thinking in the American camp can be traced to the much earlier war-time period mentioned here on page 6. Richard Overy points out the seemingly arbitrary nature of defendant selection: Richard Overy, 'The Nuremberg Trials: international law in the making' in Philippe Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003), pp. 8-14. Yet neither Smith nor Overy explicitly interpret the American method of assessing organizational responsibility (as a prelude to *representative* individual selection) as being indicative of an essentially *democratic* sensibility.

<sup>90</sup> Jackson, (ed.), *Conference*, p. 113. (Emphasis added).

<sup>91</sup> IMT, 21/Nov/1945, Vol. II, p. 99.

<sup>92</sup> *Ibid.*

<sup>93</sup> RHJ, 'Statement by Robert H. Jackson Representing the United States', 7/Aug/1945, LoC/RHJP/95/'London Conference'.

expense entailed in planning and running a trial based on democratic principles would need to be justified to American citizens and taxpayers as the price worth paying in order to maintain such ideals. Why did they need to be persuaded? Jackson was well aware that the American public was in no mood for a 'fair trial' for Nazi leaders. He had been confronted, for example, by a sceptical government official in Washington, with the fact that a Gallup poll reported widespread desire for harsh treatment of Germans (generally) without the trouble of legal proceedings.<sup>94</sup> Another poll, from May 1945 had found that 67% of American respondents, when given the choice between a trial and other ways to treat Hermann Goering, preferred to simply have him killed (only 4% preferred to have him tried first).<sup>95</sup> Despite Jackson's retort that he held no stock in Gallup polls, it was obvious that – if he took democracy as seriously as he proclaimed – he would need to consider such views and attempt to persuade the American public that a trial such as he proposed represented the best, most American, democratic, and 'civilized' alternative to unleashing a vengeful hand.

Although the press was a useful medium of dissemination about the forthcoming trial – and, to this end, press releases were occasionally issued throughout the summer of 1945 – editorial control was always left, by definition, to the editors of newspapers. The ideal medium, therefore, was film: where editorial control would be total, and the reach of dissemination would be greater. It would also allow for some drama to detract from the potentially 'dreary business' of legal procedure. Most importantly, it would provide the opportunity to persuade viewers that something more than 'victor's justice' was both desirable and possible.

Already before the final session of the London conference in early August, therefore, an American film about the forthcoming trial – made by the OSS FPB and subject to approval by Jackson before release – was shown to him and some of his accompanying staff on 30<sup>th</sup> July in the London office of the OSS.<sup>96</sup> The *Crime and Punishment* film script that Budd Schulberg had written now lay abandoned and the considerably shorter alternative was now entitled *That Justice Be Done*.<sup>97</sup> It was directed by Lt. E. Ray Kellogg, the former Special Photographic Effects Chief of 20<sup>th</sup>

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<sup>94</sup> RHJ, Diary, 18/May/1945, LoC/RHJP/95/'Diary'.

<sup>95</sup> Bosch, *Judgment on Nuremberg*, p. 93.

<sup>96</sup> Gordon Dean Memo to [various], 30/Jul/1945, NARA/RG-238/51/26/'Moving Pictures'; RHJ, Diary, 30/Jul/1945, LoC/RHJP/95/'Diary'.

<sup>97</sup> Lt. E. R. Kellogg (Dir.), *That Justice Be Done*, (U.S.A.: War Activities Committee Motion Picture Industry, 1945). From some point in June work on the shorter film about the trials had begun (with a working title of *Nazis on Trial* – see note 113). By August 1945, *Crime and Punishment* had been dropped and *Nazis on Trial* had been renamed *That Justice Be Done*. Monthly production reports briefly stating the status of ongoing OSS FPB projects can be found at: NARA/RG-226/90/36/661. The final version would be ten and a half minutes in duration.

Century-Fox, who had been working for the OSS FPB throughout the war.<sup>98</sup> As Gordon Dean – also a member of the OSS and the American Prosecution's Public Relations officer – had put it in his instructions to Schulberg (now also responsible for writing the new script):

...the general public will still be somewhat confused as to who is doing what, and screaming for speed in the trial of the major war criminals – their attention being focused on the majors such as Goering.  
Consequently, I think that our most important message and the theme of the picture should be "Something IS Being Done About War Criminals".<sup>99</sup>

Thus the new film was to be more concerned with the *present* rather than with the failures to bring justice in the past (after the First World War, as the emphasis had been in *Crime and Punishment*). For Dean, there was no longer even any need to convey the depths of Nazi injustice to the American people who, he felt, were already 'screaming' for retribution. Not only would the prosecution of major war criminals – that still lay ahead – need to be explained. The film provided an opportunity to portray the coming major trial as the most significant process within a broader project of postwar justice that was already underway.

However, after the preview, Jackson, in a tone of resignation, noted in his personal diary that the film was 'terrible'.<sup>100</sup> He gave no further (written) explanation at that time. It is not possible to reconstruct entirely the exact content of the film when he saw this early version. Yet what is certain is that it underwent considerable revision and re-editing before being viewed in public and could not have been released without his approval.<sup>101</sup> In fact the comments he later made about the progress of the film – in a more detailed and constructive manner – suggest that his earlier despondency had been acted upon in the editing room. In early September, he saw the latest edit in the Washington office of the OSS and noted in his diary:

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<sup>98</sup> In keeping with OSS film-making protocol, all personnel who worked on the film were not credited on-screen. As a result, most information on the internet in this regard constitutes inaccurate guessing. For example, George Stevens is occasionally credited as the director (he only, in fact, directed the filming of certain scenes at concentration camps and had no input to the pre or post-production of the film). The list of those principally involved – all working for the OSS FPB in Washington D.C. – are as follows: Lt. E. R. Kellogg (Director/producer), Lt. Budd Schulberg (writer), Irving Pichel (narrator), Lt. Stephen M. Newark (researcher), Lt. A. Lehman Engel (music), Lt. John W. English (legal advisor), CWO Paul O. Mohn (Special Effects), CPO Michael Luciano (editor). NARA/RG-226/90/12/124.

<sup>99</sup> Gordon Dean to Budd Schulberg, 2/Jun/1945, NARA/RG-238/51/26/'Gordon Dean'. (Emphasis in original).

<sup>100</sup> RHJ, Diary, 30/Jul/1945, LoC/RHJP/95/'Diary'.

<sup>101</sup> See note 104 below which refers to such approval (and changes to the film suggested by Jackson).

After conferring with the [unnamed] others who saw the film, I made four criticisms of it: First, a section showing me mounting the gang plank of a plane should be omitted; second, a reference to hanging with a gruesome picture of a hanging should be omitted; third, it should be brought up to date to include the signing of the Agreement for international trials; and fourth, it should be brought up to date by showing the Nuremberg set-up. I was called later by Lt. [E. R.] Kellogg who said that these changes were all desirable and would improve the dramatic quality of the picture.<sup>102</sup>

Jackson's more positive reaction suggests that he did not object to any attempt to make the film dramatic. The two suggestions for negative amendments – i.e. that scenes should be cut – suggested that what he deemed to be important was maintaining some level of human 'dignity' or decency in the picture (by removing what he thought of as an unnecessarily gruesome picture of a hanging) and fairness by eliminating any unnecessary appearance of himself, in order to maintain as much of a 'dispassionate' image of a prosecutor as possible.<sup>103</sup> His authority to affect not only the content but also the *timing* of the film's release is confirmed by the letter he wrote two days later to the Chief of the Office of War Information:

I have recently reviewed the one-reel picture [...] 'That Justice Be Done'. It is my opinion that [it] can do much to bring about public understanding of what we are attempting to do [...] and that a reasonably early release date is necessary if the picture is to be timely.

[...] I would therefore appreciate it if you would advise [the film's director] Lt. [E.] Ray Kellogg, of O.S.S., [of] the available release dates in order that he may, in my absence, make one or two minor changes that I have suggested and get the picture into the theatres.<sup>104</sup>

The final version of the film was distributed by the War Activities Committee, the club of distributors and theatre-owners within the 'motion picture industry' working in cooperation with the Office of War Information throughout the United States. As a result, it was screened nationally in approximately 16,000 theatres and seen by millions of Americans from October 1945.<sup>105</sup> The theme that remained consistent from the earliest scripts to the final version that we can still view today is the dramatic contrast in political conceptions of justice. It suggested a relatively simple dilemma that might be approximated as a straightforward choice between speedy (Nazi-style) 'summary justice' which might satisfy impatience and outrage; or the democratic, 'dispassionate' procedures entailing an involved process of legal accounting that represented a more 'civilized' method of justice. As [E.] Ray Kellogg, the chief of FPB, had put it:

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<sup>102</sup> RHJ, Diary, 06/Sep/1945, LoC/RHJP/95/'Diary'.

<sup>103</sup> See p. 28 and note 61 for Jackson's concern to be 'dispassionate'.

<sup>104</sup> RHJ to Mr. Taylor Mills (OWI), 8/Sep/1945, NARA-238/51/26/'Moving Pictures'.

<sup>105</sup> Cedric Larson, 'The Domestic Motion Picture Work of the Office of War Information,' *Hollywood Quarterly*, Vol. 3, No. 4 (1948), pp. 437-438.. A (war-time) estimate of 90,000,000 American viewers of such films is suggested by Larson.

[...] The purpose of this film is to orient the public to a clearer understanding of the role of the United States in the forthcoming trials of major war criminals. It will emphasize the responsibility of the Office of the US Chief of Counsel for the prosecution of Axis criminality. In this picture an effort will be made to show the people the great amount of work necessary in the preparation of these trials.<sup>106</sup>

The film would therefore serve to justify the protracted effort (and delay) in bringing justice to the major war criminals. Whilst making every effort to demonstrate that much activity was already underway (in particular, with lower ranking Nazis), the slow pace of justice was framed as a necessary price to pay for a 'democratic' rather than summary (or a Nazi form of) justice.

In the opening sequence of *That Justice Be Done*, Jackson's favourite Founding Father was quoted alongside shots of the recently completed memorial devoted to him in Washington, D. C.: "I, Thomas Jefferson, have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man".<sup>107</sup>



**FIGURE 2 A/B.** Political Drama: The first two scenes in *That Justice Be Done* contrast the solemn, tolerant words of Thomas Jefferson with the fanatical screams of Adolf Hitler.

And then, with hardly more dramatic – and political – contrast possible, there screeched a voice from the Nuremberg of 1934 – from within the huge Luitpoldhalle replete with seas of uniforms and swastikas. Despite appearances, Hitler's original words (in German) were quite mundane.<sup>108</sup> Yet the English translation, affecting stereotypically harsh Teutonic intonations and overdubbed some seconds into the speech, were those of Rauschning's *Hitler Speaks*.<sup>109</sup> This was the same quotation (slightly amended) that had been used in the film-script for the abandoned *Crime and Punishment*: 'If I, Adolf Hitler, can send the flower of the German nation into the hell of war without the smallest pity for spilling precious German blood, then surely I

<sup>106</sup> Chief of FPB [E.R. Kellogg] to Mr. John A. Stacy, 16/Jul/1945, NARA/RG-226/90/15/196-A.

<sup>107</sup> These words are carved in the stones of the memorial itself and can partly be seen behind the statue of Jefferson.

<sup>108</sup> These scenes were taken from Leni Riefenstahl (Dir.), *Triumph of the Will* (1935).

<sup>109</sup> Rauschning, *Hitler Speaks*, p. 140.



have the right to remove millions of an inferior race that breeds like vermin.'<sup>110</sup> However, in contrast to the limited implications of using this quotation in *Crime and Punishment*, now the (American) viewer would perceive that such genocidal intentions had been made explicit by Hitler before a huge audience in the Luitpoldhalle, and before the nation through the medium of film (these words had, however, been purported by Rauschning to have been uttered in private).

As has already been pointed out, using Rauschning's (now discredited) text did not constitute any intention to mislead viewers (in fact the filmmakers – along with others – had been misled by Rauschning themselves). The consequence of applying recently found film-footage to fit a pre-written script, however, was to convey, with little room for doubt, the collective guilt of an entire nation – dating from 1934. To the subsequent "Sieg Heil"s, after Hitler had spoken, came shot after shot of Nazi salutes and approval: from women at the back of the hall, from members of the chastened SA, and from the *Fuehrer* himself. And as the cries of German adulation and conformity continued, there suddenly appeared on the screen images of horrific prophecies fulfilled: of atrocities against civilians, so clearly innocent, and so clearly murdered.<sup>111</sup> The display of atrocity imagery in *That Justice Be Done* was highly effective yet relatively brief.<sup>112</sup> Combined with continual cries of adulation and conformity from within the Luitpoldhalle, the use of such imagery suggested a widespread support from the Nazi movement, not only for Hitler's genocidal intentions before the war, but also for the actual atrocities that had been perpetrated.

The first *post-war* shots of living Germans were those of civilian women being forced to view piled corpses of murdered inmates of 'liberated' concentration camps. Such scenes had originally been deemed suitable to open the film.<sup>113</sup> Combined with the ongoing recurrence of "Sieg Heil"s from the Luitpoldhalle, they made explicit the American accusation of collective *German* (not just Nazi) responsibility – at the very least of what Karl Jaspers would soon dub the 'political' guilt of his fellow Germans.<sup>114</sup>

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<sup>110</sup> See p. 26 and *Ibid*.

<sup>111</sup> There was, for example, a shot of a murdered child.

<sup>112</sup> Atrocity footage appeared for a total of approximately 40 seconds during the first three minutes of this ten-minute 'one-reeler'.

<sup>113</sup> The first script, *Nazis on Trial* (see note 97), begins: '1. The most horrifying shot available of corpses with Germans reacting'. NARA/RG-226/90/12/124.

<sup>114</sup> Karl Jaspers, *The Question of German Guilt*, (trans. E. B. Ashton) (New York: Dial Press, 1947).



**FIGURE 3 A/B.** The German witnessing of atrocity in *That Justice Be Done*: Allied cameramen search for remorse in the faces of German women - but find only horror.

Yet to attempt a clear distinction between political and moral guilt was more likely to emerge from a German, rather than American, liberal thinker more interested in salvaging some of the nation's cultural past in looking ahead to political and moral regeneration.<sup>115</sup> For the occupiers, intent – at least in 1945 – on a comprehensive political, moral and cultural *overhaul* of Germany, any distinction between moral and political responsibilities was far less clear. But the political implications of these images were clear enough: the scenes of atrocity were the results of Nazi rule that the German people had supported or, at least, tolerated.<sup>116</sup>

Briefly focusing on Germans also had some practical use for the OSS film makers, who discerned a particular problem with too much use of atrocity pictures by themselves. Too many atrocity images, it was feared, might serve to damage the effort to convince the American population that the appropriate response in dealing with 'war criminals' was the establishment of an International Tribunal.<sup>117</sup> So emotive were these images, that they had the power to incite hatred, anger and frustration – derived from an overwhelming sense of injustice. Too many of them might evoke a desire for vengeance. As Gordon Dean had expressed it in mid June: 'People are now pretty well convinced that the atrocities took place and that they were wholesale and the only effect of showing [more atrocity] film at this point is to make them mad that something isn't being done about it.'<sup>118</sup> Thus, as the point of *That Justice Be Done* was to convince its audience that the right approach was being taken in the interest of Americans, two fundamental issues needed to be addressed in

<sup>115</sup> For a critique of Jasper's 'excessively broad understanding of guilt', see: Raphael Gross, 'Relegating Nazism to the Past: Expressions of German Guilt in 1945 and Beyond,' *German History*, Vol. 25, No. 2 (2007), pp. 232-238.

<sup>116</sup> For the moral dimension to recording and showing such forced confrontation we shall return to this phenomenon in Chapter 5.

<sup>117</sup> Gordon Dean to RHJ, 14/Jun/1945, NARA/RG-238/51/'Gordon Dean'.

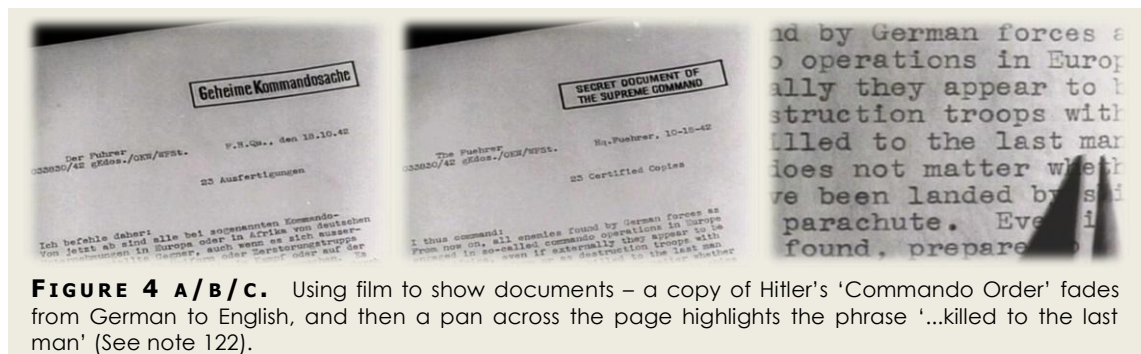
<sup>118</sup> Ibid.

the film: that justice was being done for *American* victims and that the use of law was a better alternative to pure vengeance.

A telling change in regard to the first priority was that, instead of the new crime of genocide, as Schulberg had identified it in *Crime and Punishment* (see page 25), Nazi crimes were now simplified and made more relevant to an American audience:

This is murder, deliberate murder. Defying every written and unwritten law of man. Not only premeditated but carried out by official decree. American soldiers shot in the back while wearing American uniforms in open defiance of established rules of warfare.<sup>119</sup>

It is not possible to discover whether this change was made on Schulberg's own initiative or whether (as seems more likely) he was directed to drop the use of the word 'genocide' by his superiors in the FPB or by Jackson himself. What is certain is that such a change (from that of 'genocide' in *Crime and Punishment* to simply 'murder' in *That Justice Be Done*) reflected the conflation of War Crimes with Crimes Against Humanity that would occur in the London negotiations and at Nuremberg itself, where the only mention of the word in the indictment would appear within the charge of War Crimes (rather than, as we might expect today, Crimes Against Humanity).<sup>120</sup> It also reflected perspectives of injustice that, whilst claiming the legitimacy of a universal morality and natural law ('every unwritten law of man'), were nevertheless based upon the more particular interests of a particular Allied nation-state.<sup>121</sup>



Combined with the images on screen, including a shot of Hitler's 'Commando Order' (see Figure 4), the perpetration of 'deliberate murder...carried out by official decree' implied to an American audience that the relevant subjects of such officially sanctioned murder was, in particular, the killing of Americans.<sup>122</sup> In fact, most victims

<sup>119</sup> Kellogg (Dir.), *That Justice Be Done*.

<sup>120</sup> 'Genocide' had appeared in a working (American) document at the outset of the London negotiations, only to disappear from subsequent drafts of the London Charter, so that although the term reappeared in the indictment, it was used infrequently throughout the trial.

<sup>121</sup> For the conflation of War Crimes and Crimes Against Humanity see Douglas, *Memory of Judgment*.

<sup>122</sup> For copies of the 'Commando Order', see PS-498 in: NCA, Vol. III, p. 416 (in English); IMT, Vol. XXVI, p.

of this order were British and Canadian soldiers.<sup>123</sup> Yet, for the American public, the most relevant Nazi crimes were those perpetrated against individual Americans (this would mostly fall under the traditional rubric of war-crimes) as well as the 'crime' of dragging the U.S. into a second European war (the new crime of 'aggressive war'). The crime of genocide, the crime against the *universal* category of humanity (but actually most particularly directed against the Jews), was of little value in persuading an American public to support engagement in an international Military Tribunal. Hence, crimes against non-Americans – including 'German Jews' – were rationalized as instances of an overall, totalitarian war against 'opposition' to Nazism and conflated with the suffering of American soldiers:

For if the Nazis were to carry through their master plan they had to wipe out every trace of opposition: religious opposition, political opposition, the opposition of peace-loving nations. And when our troops pried open the doors of the human slaughter houses we found Poles, Frenchmen, Russians, German Jews, Spanish anti-fascists ... and some Americans.<sup>124</sup>

What followed this narration was a brief excerpt from an interview with an American Lieutenant, Jack H. Taylor, during which he explained the many ways that his fellow prisoners – including two American soldiers – had been murdered in and around Mauthausen concentration camp.<sup>125</sup> As an OSS operative, fighting behind enemy lines in the Balkans, Taylor had been captured by the Nazis and labelled (literally, with a red triangle) as a political prisoner – rather than as a regular combatant and prisoner of war.<sup>126</sup> Whilst such a distinction did not justify atrocious treatment of *any* prisoners, these circumstances happened to reinforce the perceptions of the film-makers that 'opposition' to Nazism by Americans and, for example, by 'German Jews', were in some way comparable. As pointed out above, little distinction, other than numbers of those murdered, was understood to exist between the extermination camps of the east and those discovered by the Allies in the west. This reinforced the recurring disinclination to distinguish between victims of genocide and victims of 'opposition', i.e. of 'aggressive and ruthless war'. This, by implication, tended to imply to the audience of *That Justice Be Done* that Nazi responses to such 'opposition' were meted out to all and any opponents in a uniform manner (which might include Americans).

With the case made that Americans were as deserving of justice as anyone, it

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<sup>101</sup> (in German).

<sup>123</sup> Taylor, *Anatomy*, p. 254.

<sup>124</sup> Kellogg (Dir.), *That Justice Be Done*.

<sup>125</sup> Salter, *Nazi War Crimes*, pp. 267-269. For further discussion of the use of Jack H. Taylor's interview within the film *Nazi Concentration Camps*, see below, Chapter 5, pp.169-171; Douglas, *Memory of Judgment*, pp. 33-35.

<sup>126</sup> For more about Taylor, see below pp. 129-131.

remained for the film to explain just why the best response was a legal one. "How can we rectify these crimes?" asked the narrator before expounding upon the dilemma:

We may arrest the sadist in charge of Buchenwald, but we cannot torture *him* to death – as he tortured his victims. We may indict the scientist who developed the gas chamber but we cannot strangle him to death slowly as his gasses strangled thousands of others.<sup>127</sup>

Thus summary justice would not be enough. But the question of how (or whether) to confront some of the greatest injustices of the war would continue to raise doubts in the mind of Tom Clark, the U.S. Attorney-General, who took no part in the film or planning for the Nuremberg IMT: 'These [war criminals] have perpetrated almost unbelievable horror on humanity. What the hell can I do with them?' he wondered.<sup>128</sup> The identity and professional position of this mystified doubter, as much as the question itself, is revealing: in light of the inadequacy of punishment, the very nature of any justice to be done was, eminently, an unprecedented political dilemma. What is even more revealing, however, is that Clark was referring to the leaders of Japan, not Germany. The Nuremberg IMT, which was under way when he made these comments, did not appear to provide him with any answers. But he did not have the same faith in international law that Robert Jackson possessed. If the response to such injustice were to involve anything more than swift vengeance, it would require a leap of faith and some imagination that reached beyond the traditional confines of international law. Jackson and the other American planners of Nuremberg hoped to convince the American public that the required legal innovations would only enhance the value of their own faith in the rule of international law.<sup>129</sup> But it would also be necessary to portray such innovations to be in keeping with traditional, democratic, and American values.

The way forward, according to the film, was simply to be found in the "historic" Moscow Declaration of 1943 with which "law-abiding" nations - the United States, Great Britain, and the Soviet Union – had agreed that those responsible would 'be judged by the people they have outraged' so that – in the words of the Declaration, now repeated by the narrator – "justice may be done".<sup>130</sup> As we have seen, in fact, no mention of any *legal* justice was mentioned at the Moscow Conference in regard to the 'major war criminals' – only punishment was mentioned. Yet here, the film

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<sup>127</sup> Kellogg (Dir.), *That Justice Be Done*.

<sup>128</sup> Cited in: Robert Donihi, 'War Crimes', *St. John's Law Review*, Vol. 66, (1992), p. 765. The brackets (and the words 'war criminals') are Donihi's, not Clark's or mine.

<sup>129</sup> As Jackson had said in a speech on International Law to the American Society of International Law in April 1945, 'I am happy to join you in a timely and resolute confession of faith'. Robert H. Jackson, 'The Rule of Law among Nations,' *American Bar Association Journal*, Vol. 31, No. 6 (1945), p. 290.

<sup>130</sup> Jackson, (ed.), *Conference*, p. 12.

implied, a practical American and international *legal* response to Nazi injustice had its origins in 1943. Once again – as with the opening scenes of Jefferson and Hitler – the contrast between Nazi 'justice' and the American way was made explicit when the narrator asked, 'What kind of justice do we mean? Do we mean the kind of justice of Dr. Hans Frank, Nazi Minister of Justice, who said, "[...] Anything which benefits our nation is just."' "



**FIGURE 5 A/B/C.** What Kind of Justice? The narrator contrasts Nazi 'justice', as expounded by Justice Minister Hans Frank, with 'the democratic concept of justice [that America] fought to establish', showing a statue of Abraham Lincoln, and an example of orderly American legal procedure.

Alongside the appearance of more Founding Fathers, followed by American troops engaged in battle, and an example of orderly American legal proceedings (see Figure 5), the narrator continued:

Or do we mean *the democratic concept of justice* our nation fought to establish, fought to develop and is fighting to preserve: public trial, equality before the law, the right of defendants to prepare their own defence, a trial so orderly, so thorough, so free from passion, that no would-be martyrs would ever be able to point to themselves as victims of enemy lynch-law; [...] that is the kind of justice we are establishing.<sup>131</sup>

The politics of justice, therefore, was portrayed as a straightforward choice between 'lynch-law' and truly legal proceedings – the Nazi way of totalitarian violence or the American, democratic way entailing due process. It would be difficult for American viewers to advocate the former. Instead, they would be informed by the film of the appropriate methods of the latter. But they would have to wait. The narrator explained that translating American concepts of justice into the 'unprecedented machinery of international law' was not something that could be achieved 'overnight'.

This was followed, however, by the attempt to demonstrate that something was already being achieved. Thus General Weir, the Director of the War Crimes Office of the Judge Advocate General, could look straight into the camera and confidently assure the American public that:

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<sup>131</sup> Kellogg (Dir.), *That Justice Be Done*. (Emphasis added).

In France under General Betts, and in Italy under General Richmond, trials are underway. As fast as we can identify, hunt down, and apprehend those guilty of war atrocities against American prisoners of war, we are bringing them to trial and holding them accountable for their acts.<sup>132</sup>



**FIGURE 6 A/B.** General Weir and OSS graphics assure the American public that something is being done about war criminals. Not only is the 'International Tribunal' being prepared, but already there are being conducted 'National Traitor Trials', 'Local Minor Trials', and 'U.S. Military Trials'.

But what of the 'Major War Criminals'? These were men whose crimes were so all-embracing, according to the narrator, that President Truman had appointed a suitably qualified Chief Prosecutor named Robert H. Jackson: a Supreme Court Judge and former Attorney General. He was to be assisted, told the narrator, by William J. Donovan and 'a staff that calls upon some of America's outstanding legal talent who will join forces with the most eminent jurists of Great Britain, France and the Soviet Union'. Thus, appointing the most talented people available was already a step towards rendering some justice for Americans. This staff, continued the narrator,

will not content themselves with hanging a tyrant by his heels, but with laying bare the ugly core of his evil designs. [...] They will not content themselves with convicting a criminal on a single count [...] but will seek conviction on conviction in order to put teeth into the international laws that condemn those crimes.

[The Nazi leaders would undergo a] public trial that should serve as an unprecedented warning to those who would plunge the United Nations into another criminal war in defiance of the laws and treaties of peaceful nations who have joined together to outlaw man's greatest inhumanity to man: the crime of War.<sup>133</sup>

The tyrant that appeared on screen was Mussolini (but instead of the filmmakers' original intention to show him after being lynched, he could be seen in his more fortunate days speaking from a balcony). However the Italians might mete out justice (the film implied) American, democratic justice would involve the investigation of truth, of 'laying bare' the evils of Nazism. This would involve multiple investigations of each Major War Criminal so that producing a record of such crimes would itself

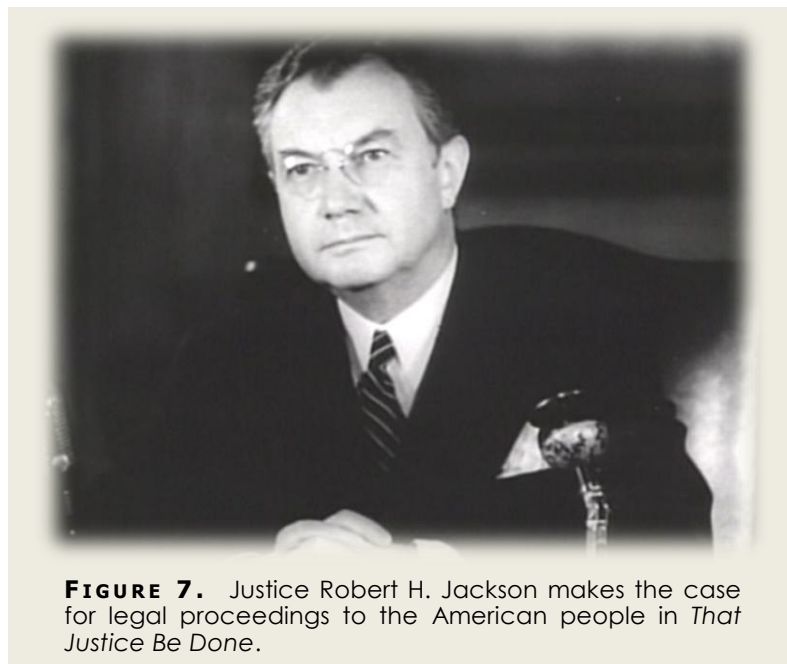
<sup>132</sup> Ibid.

<sup>133</sup> Ibid.



constitute a form of justice. It would also serve the more utilitarian purpose of deterring war. It is easy to overlook the fact that the Nuremberg IMT began only three months after America had ceased being at war. *That Justice Be Done* was released to the American public only two months after the Japanese surrender which had materialised only after high rates of American casualties. America itself had dropped two bombs that foretold of the potential for even more destructive wars to come. The prospect of a precedent to hold individual leaders accountable for starting wars, therefore, appeared to be the most relevant legal innovation that the American Prosecution could cite in convincing Americans of the value of a trial.

To reinforce this point Jackson, despite his initial disdain for the idea, would make an appearance in the film himself.<sup>134</sup> Perhaps what had originally made him so reluctant was that the filmmakers' sense of *political* drama was quite self-consciously present throughout. What perhaps made it palatable for him, however, is that the politics propagated in the film was framed as a matter of *methods* rather than a choice of ideology: between *democratic* justice (not liberalism, despite its *implicit* ubiquity throughout) and lawlessness. Given there can be little doubt that he had considerable control over the film's content, it is possible to infer that he became convinced, to some extent, of the value of his own appearance. Not only would this confer more obviously the authority of an official imprimatur to the film, but in doing so, he probably believed that the sincerity of his words would make some dramatic and persuasive impact on his viewers.



**FIGURE 7.** Justice Robert H. Jackson makes the case for legal proceedings to the American people in *That Justice Be Done*.

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<sup>134</sup> There also remains a very brief cut (less than one second) of Jackson on the 'gang plank' of a plane. It is so brief that we can only speculate as to whether or not this is the very scene that Jackson proposed should be cut, and, if so, whether it was shortened as a compromise.



Thus, an excerpt from what appeared to be an originally longer piece-to-camera by Jackson materialized towards the end of the film: 'I am convinced that we have an opportunity to bring to a just judgement to those who have thought it safe to wage aggressive and ruthless war.'<sup>135</sup> This summarized the interpretive thrust of the entire American case: first and foremost, a conspiracy to wage an 'aggressive' war was cast as the supreme international crime which had, in turn, led inevitably to other 'ruthless' transgressions, including the perpetration of atrocities. As despicable as those transgressions were, Jackson interpreted them as merely by-products of this conspiracy – the quashing of opposition – rather than ends in themselves. It was the conspiracy for aggression after all – and not the perpetration of atrocities – that had resulted in bringing America into the war and now evoked it as a plaintiff in the realm of law. His concern with American domestic opinion could only serve to further encourage his preference for making the crime of conspiracy to wage aggressive war the centrepiece of the American case against the Nazi leaders. It was this crime against America – rather than War Crimes or Crimes Against Humanity perpetrated on European soil – that had affected every single American in some way and would, therefore, be most relevant to a large domestic audience.

It also reflected his utilitarian philosophy of international law as something more than punishment or retribution alone. The law, he felt, had to be marshalled in order to keep the peace in a future overshadowed by the potential for unimaginable destruction.<sup>136</sup> It was this, he believed, that everyone – including Americans – needed to understand. The following remark, however, would be cut from the final edit of the film: 'The measure of our success will of course depend upon the support we have from the people of the United States.'<sup>137</sup> Perhaps, felt Jackson, such comments appeared, too explicitly, to betray the very purpose of the film: to *persuade* the American public that Nuremberg – the process of law – was a necessity. What Jackson could not bring himself to admit was that Nuremberg itself was a *political* necessity (in his case, derived from his desire for a world of perpetual peace). So too was the propagation of its value. The attempt to persuade appears to have been successful. As William J. Bosch found from research based on numerous American opinion polls, American 'popular opinion greeted with satisfaction the legal methods chosen'.<sup>138</sup>

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<sup>135</sup> It is clear that a) the scene is cut as Jackson is about to continue speaking and b) the involved process of setting up for an interview would not have involved the recording of only a single sentence.

<sup>136</sup> These opinions can be gleaned from a speech that Jackson made to the American Society of International Law in Washington D.C. on 13<sup>th</sup> April 1945: Jackson, 'The Rule of Law among Nations.'

<sup>137</sup> Schulberg, 'That Justice Be Done', ('1<sup>st</sup> script'), NARA/RG-226/148/72/1087, p. 16.

<sup>138</sup> Bosch, *Judgment on Nuremberg*, p. 91.



**FIGURE 8.** Lady Justice: her shadow appears at the beginning and end of *That Justice Be Done*.

The film closed just as it had begun, with the long shadow of Lady Justice falling upon a bleak wall atop with barbed wire. From one raised hand she held a set of measuring scales, in the other, pointing to the ground, a sword. Whether or not she wore a blindfold, however, was impossible to discern.<sup>139</sup> The ambiguity in this image reflects the contradiction with Robert Jackson's legalist outlook and the very political reality of inventing laws and instituting an ad hoc Tribunal devoted to confronting an unprecedented era of injustice. Although Jackson wished to believe that law existed as a sphere of knowledge and practice beyond political concerns, we have seen that he began, at least privately (and only partially), to acknowledge that he was also engaged in a political process. The London Conference was a matter of international 'diplomacy'. And during those negotiations, Jackson and his American colleagues advocated the adoption of particular laws and methods that were based on liberal and democratic principles. Furthermore, throughout the negotiations in London, Jackson remained mindful of domestic American popular opinion. The advocacy of holding Nazi leaders accountable for the conspiracy to wage aggressive war closely reflected a particularly American perspective – what might also be termed the (American) 'national interest'. Finally, Jackson and his colleagues also engaged in attempting to *shape* American popular opinion: screening *That Justice Be Done* was an exercise in political persuasion.

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<sup>139</sup> See note 73 on p. 26.

## CHAPTER 3

# THE FOG OF RETRIBUTION

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*The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness.*

Hannah Arendt to Karl Jaspers (17/Aug/1946).<sup>1</sup>

*No, we do not have that conception of conspiracy. We would have to make new law.*

Professor André Gros, (19/Jul/1945).<sup>2</sup>

Before any informed assessment can be made of the American case against the defendants at the IMT – by examining (in subsequent chapters) Prosecution speeches, witnesses, documents and films – it is first necessary to chart the evolution and application of the legal framework which affected the selection and use of evidence at Nuremberg. As already noted in chapter 2, the concern to do justice in keeping with American public opinion led to foregrounding ‘aggressive war’ as a crime deemed graver than War Crimes or Crimes Against Humanity. Yet this crime (framed as Crimes Against Peace in the London Charter<sup>3</sup>) was not an American invention.<sup>4</sup> It had happened to be a favoured idea of at least one senior Soviet jurist even before the onset of the Second World War.<sup>5</sup> Furthermore, as we have already seen, during that war, the Czech delegate of the UNWCC suggested that, once the fighting was over, the Nazis should be indicted for waging aggressive war.<sup>6</sup>

What was entirely American, however, was the introduction of ‘conspiracy’ at Nuremberg. The evolution and application of this legal doctrine must be appreciated to contextualize the use of all evidence offered by the American Prosecution. There was some poetic justice in accusing Nazis – consummate conspiracy-theorists themselves – of this crime. But the meaning of ‘conspiracy’ as it appeared during the IMT trial caused considerable confusion and misunderstanding at the time, and has continued to do so ever since. As with ‘aggression’, neither its meaning nor purpose was defined in the London Charter. General usage of the term has tended to suggest visions of secret plots and machinations, the hatching of evil, meticulously thought-out

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<sup>1</sup> Lotte Kohler & Hans Saner, (eds.), *Hannah Arendt, Karl Jaspers, Correspondence, 1926-1969* (trans., Robert & Rita Kimber, 1992), (London: Harcourt Brace Jovanovich, 1992), p. 54.

<sup>2</sup> Jackson, (ed.), *Conference*, p. 296.

<sup>3</sup> See Appendix II.

<sup>4</sup> For a purely American (and thus incomplete) story, see: Bush, “The Supreme ... Crime” and its Origins.’

<sup>5</sup> For Soviet ideas on ‘aggression’ dating back to 1937, and their influence on the London Charter of 8/Aug/1945, see: Francine Hirsch, ‘The Soviets at Nuremberg: Propaganda, and the making of the Postwar Order,’ *American Historical Review*, Vol. 113, No. 3 (2008), pp. 705-710.

<sup>6</sup> See above, p. 13.

plans. Although popular interpretations of the word has significance to the wider historiographical context of the trial, the purpose of this chapter is to examine the use of this doctrine within the context of the birth of modern international criminal law. By its very nature, this new field of law finally addressed the issue of *individual* leadership-responsibility for the actions of subordinates or others. As this chapter will make clear, it is no coincidence that the first international trial that held individuals criminally responsible was also the first to make use of the doctrine of conspiracy. Conspiracy, although presented as a form of crime was, at the Nuremberg IMT, also used as a *method* for attaching responsibility to individuals in the dock. Thus, any problems in convincing the Tribunal to accept this doctrine would reflect upon the American Prosecutions' logic of rendering individual culpability in international law.

Gleaned from Anglo-American domestic criminal (common) law, the basic definition of conspiracy was (and remains) 'an agreement between two or more persons to do something unlawful by lawful means, or something lawful by unlawful means, or [it seems, rather superfluously,] something unlawful by unlawful means'.<sup>7</sup> Thus, the *agreement* or *consent* to assist in illegal means or ends, rather than any active engagement in any particular activity, was enough to render culpability (for what amounts to a thought-crime). Doubts immediately arose in the French delegation as to the legitimacy of this doctrine and why the Americans so doggedly insisted on its use. As to its purpose and effects – in particular, regarding the matter of individual criminal responsibility – it is necessary to acknowledge the existence of at least four differing perspectives on 'conspiracy' in relation to the IMT trial. In examining these perspectives, I will address the straightforward question that is most relevant to my general thesis: how well did American law perform at Nuremberg?

### 3.1. The Bernays Plan

The first significant view is what has sometimes been referred to as 'the Bernays Plan' and reflects the original intentions of Colonel Murray Bernays who worked in the War Department and, on 24<sup>th</sup> October 1944, presented his ideas to Henry Stimson, the Secretary of War.<sup>8</sup> Stimson, in turn, did much with it to persuade President Roosevelt to ensure that a trial of 'Major War Criminals' (rather than 'summary justice' or a purely

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<sup>7</sup> Justin Miller, *Criminal Law*, (1934), p. 108, cited in: Brendan F. Brown, Benjamin F. Pollack & Norah C. Taranto, 'The Crime of Conspiracy', (memorandum to Joseph B. Keenan, 23/May/1946), cited in: R. John Pritchard, (ed.), *The Tokyo major war crimes trial: the records of the International Military Tribunal for the Far East*, Vol. 123-A, (Lewiston, N.Y.: Edwin Mellen Press, 1998-2004), p. 5.

<sup>8</sup> Jackson referred to the 'Bernays Plan' on 10/May/1945: RHJ, Diary, 10/May/1945, LoC/RHJP/95/'Diary'. Smith, *The Road to Nuremberg*, pp. 51-62.

'political solution', i.e. killings without legal proceedings of any kind) would become the policy of the United States.<sup>9</sup> On 22<sup>nd</sup> January 1945, Roosevelt was advised, in a memorandum co-authored by Stimson, that 'We are satisfied that these atrocities were perpetrated in pursuance of a premeditated criminal plan or enterprise which either contemplated or necessarily involved their commission.'<sup>10</sup> Little more needs to be reiterated here, other than the fact that, within Bernay's plan, conspiracy was conceived as the most effective method of finding the Nazi leadership responsible (along with the numerous members of organisations they represented) for their *pre-war* victimization of the Jews (and others). In regard to 'atrocities' no definite requirement for a direct link to war appeared to be deemed necessary at this stage:

The allegation of the criminal enterprise would be so couched as to permit full proof of the entire Nazi plan from its inception and the means used in its furtherance and execution, including the prewar atrocities and those committed against their own nationals, neutrals, and stateless persons, as well as the waging of an illegal war of aggression with ruthless disregard for international law and the rules of war.<sup>11</sup>

The intent behind Bernay's original vision – to criminalise 'prewar atrocities' – was, as we shall see, to be thwarted.<sup>12</sup>

### 3.2. The London Charter

Despite the mid-century resurgence of natural law that Nuremberg represents, the 'Four Powers' saw fit to explicitly posit their laws – to an extent – in an agreement and constitution intended to outline the scope of the IMT's jurisdiction.<sup>13</sup> But the London Charter, signed on 8<sup>th</sup> August, 1945, contained inherent ambiguities – most particularly in the manner in which it conflated individual leadership culpability with the Anglo-American legal doctrine of 'conspiracy'. In contrast to what one prosecutor subsequently deemed to be a well-crafted document, one of its most significant articles is very poorly drafted.<sup>14</sup> Although much ink has been spent reproducing and

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<sup>9</sup> Ibid., pp. 64-151.

<sup>10</sup> Henry L. Stimson Edward R. Stettinius & Francis Biddle, *Memorandum for the President*, 22/Jan/1945, repr. in: Jackson, (ed.), *Conference*, p. 5.

<sup>11</sup> Ibid., p. 6. (Emphasis added).

<sup>12</sup> Taylor, *Anatomy*, p. 637.

<sup>13</sup> See Michael Biddiss, 'The Nuremberg Trial: Two Exercises in Judgement,' *Journal of Contemporary History*, Vol. 16, No. 3 (1981), p. 611. The Four Powers were Britain, France, the USA and the USSR; Stefan Glaser, 'The Charter of the Nuremberg Tribunal and New Principles of International Law', (1947), repr. in: Guénaél Mettraux, (ed.), *Perspectives on the Nuremberg Trial*, (Oxford; New York: Oxford University Press, 2008), pp. 55-71.

<sup>14</sup> Telford Taylor, in his admirable personal memoirs of the major trial, rather generously stated that 'The London Conferees are entitled to great credit for drawing up and reaching agreement on a document which was well organized, coherent, and a generally sensible basis for the anticipated trial or trials':

analysing it since its inception, it is worth re-examining Article 6 once again to throw, I believe, some new and problematic light on the legality of the Nuremberg IMT judgement in its application of the charter (for Article 6 of the charter, see Appendix 2). This is so significant because, whatever the controversies that have existed over the legality of the London Charter in relation to pre-existent international law, if it can be demonstrated that the Tribunal itself fundamentally misapplied its (own) laws, this renders not only the issue of the court's validity in pre-existent international law less significant, it also diminishes the moral weight of law itself at Nuremberg as a significant factor in rendering justice. Ultimately (if such a problem can be demonstrated), only the issue of *justice* – through other means – remains. This is an altogether different, although related (non-legal) issue. Yet in order to reach this point, we must first consider the laws applied at Nuremberg.

Article 6 appears to set out three substantive crimes, namely: (a) Crimes Against Peace, (b) War Crimes, and (c) Crimes Against Humanity. The reality, however, is a little more complex. Crimes Against Peace, unlike (b) and (c) also includes mention of 'conspiracy' so that subsection (a) itself specifies both *the act* of a 'war of aggression' (or a 'war in violation of international treaties, agreements or assurances'<sup>15</sup>), as well as the *conspiracy* or *common plan* to act. Therefore, when considering only the three subsections (a-c) – in isolation from the rest of Article 6 – we are already presented with four discrete<sup>16</sup> crimes, one of which includes the doctrine of conspiracy:

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| <ul style="list-style-type: none"> <li>(a-1) Crimes Against Peace</li> <li>(a-2) Conspiracy to commit Crimes Against Peace</li> <li>(b) War Crimes</li> <li>(c) Crimes Against Humanity</li> </ul> |
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**FIGURE 1:** Four discrete crimes posited in sections (a) to (c) of Article 6.

The first of these crimes (a-1) was directly applicable to some of the highest leaders of

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Taylor, *Anatomy*, p. 75.

<sup>15</sup> There is, to complicate matters further, a difference between a 'war of aggression' (which was not defined) and a war 'in violation of international treaties, agreements or assurances'. For present purposes, however, these will be treated as a single 'crime against peace'. See: Smith, *Reaching Judgment*, p. 16.

<sup>16</sup> The use of the word 'discrete' is being used in place of what lawyers might denote as 'substantive' in order to avoid unnecessary discussion over whether or not crime a-2 (Conspiracy to commit Crimes Against Peace) constitutes a 'substantive' crime of the charter. Much of the point of this discussion is that, in contrast to the opinions expressed by the tribunal itself, no distinct dividing line can be drawn between 'substantive' and conspiracy charges (including a-2) that have been posited in the charter – at least not, as will be explained, without discounting the relevance to the defendants of the charges of War Crimes and, to a lesser extent, Crimes Against Humanity. Hence the word 'substantive' is occasionally used in quotes throughout this text.

the Nazi state. The second (a-2) would have rendered indictable those individuals involved in any tacit or explicit agreement to pursue Crimes Against Peace – even, in theory, if no war(s) had ever taken place. Although the conception of a Crime Against Peace (or a conspiracy to commit one) was, and remains, highly controversial among legal scholars – in that critics denounced it, and continue to denounce it, as *ex post facto* law – there was little doubt that within the terms of the charter itself, it applied directly to the particular defendants on trial. Crimes Against Peace were inherently *leadership* crimes. To some extent, the same can be said of another innovation of the charter that also specified a controversial discrete crime: Crimes Against Humanity. Although this crime listed ‘murder’ as an element more appropriately applicable to perpetrators directly, or perhaps only secondarily, in contact with their victims, it also listed ‘extermination’, a noun implying some measure of *leadership* administration, direction or involvement.

In contrast to these innovations, the laws (and charges) of War Crimes (b) were, and remain, the least controversial. Such crimes undoubtedly already existed in international law.<sup>17</sup> Yet, more than Crimes Against Peace, an indictment of War Crimes would require a new formula in order to apply culpability to the particular kind of defendants on trial. Paragraph *i* (as I have labelled it in Appendix II) stated that ‘The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility’. The matter not explicitly addressed in this wording, however, was *which particular types of individual* were to be held responsible in international law for the perpetration of such (war) crimes. The matter was also not resolved by Article 7 of the charter:

*Article 7.* The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.<sup>18</sup>

State leaders rarely, if at all, were involved in the *direct* acts of War Crimes as defined as a discrete crime in the charter. Significantly, many of these crimes were committed without any direct orders, or immediate encouragement or incitement from the particular defendants on trial.<sup>19</sup> (Yet it would be ludicrous to suggest that, as leaders of the Nazi regime, they were not in some way – and indeed in a greater respect – responsible for such crimes in some particular manner since they were committed on a vast scale under the regime that they led). Individual instances of such transgres-

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<sup>17</sup> As we shall see, the Tribunal referred to the Hague Conventions of 1907 and the Geneva Conventions of 1929.

<sup>18</sup> IMT, Vol. I, p. 12.

<sup>19</sup> Ian Kershaw characterised this tendency as ‘working towards the Fuehrer’: Kershaw, *Hitler: 1889-1936 - Hubris*, pp. 527-591.

sions, rather, were perpetrated directly by subordinates or completely unrelated individuals (professionally) at particular (and usually distant) locations. Traditionally, it would be such subordinates and, given the (limited) development of doctrine of Command Responsibility before 1945, their *more immediate* superiors (ie military commanders in the field) who would find themselves arraigned for such crimes within military tribunals.<sup>20</sup> But there is little doubt that the very reasoning behind the IMT trial was to reach even further: to those individuals who had traditionally evaded accountability. Such intent was expressed in the final words of the Moscow Declaration which promised punishment (not necessarily through legal means) for the *Major Criminals* 'whose offenses [had] no particular geographical localization'.<sup>21</sup> The chief American prosecutor at the IMT trial, Robert Jackson, stressed this issue in his opening speech at Nuremberg:

These defendants were men of a station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war.<sup>22</sup>

In Anglo-American (domestic) criminal law, where some form of commission (or omission) could be attached to a defendant (analogous, for example, to an order given by a military commander), individual culpability for a crime could be applied without any need for resorting to the doctrine of conspiracy. For example, the following statement would have been applicable, in Anglo-American (domestic) jurisdictions, in 1945 and elucidates the point that one who, in the words of Jackson, 'does not soil his own hands with blood', can still be found guilty of murder:

It must be proved that D [the defendant], by his own act or unlawful omission, caused death. For this purpose, D, who, for example, procures E to murder D's wife, does not cause her death. D does not kill; E does. *D is guilty of murder but as a secondary party.*<sup>23</sup>

In this example, 'D', as 'a secondary party', could, in Anglo-American domestic criminal law, be found guilty of murder as an accomplice since to 'aid, abet, counsel or procure' the perpetration of a crime renders criminal liability for the act.<sup>24</sup> If further parties involved in the case were, although indifferent to the fate of D's wife, aware

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<sup>20</sup> After the First World War, the Allies had initiated plans to indict such holders of high office as the son of the Kaiser, Count Bismarck, and Marshalls Von Hindenburg and Ludendorff but this was soon dropped in favour of German prosecutions of less highly placed individuals at Leipzig. See Major William H. Parks, 'Command Responsibility for War Crimes,' *Military Law Review*, Vol. 62 (1973), pp. 11-13.

<sup>21</sup> Mettraux, (ed.), *Perspectives*, p. 733.

<sup>22</sup> IMT, 21/Nov/1945, Vol. II, pp. 104-5.

<sup>23</sup> This is not to be confused with the US crime of murder in the second degree. J. C. Smith & Brian Hogan, *Criminal law* (10th ed.) (Croydon: Butterworths Tolley, 2002), p. 357. (Emphasis added).

<sup>24</sup> This is according to the UK Accessories and Abettors Act 1861. Cited in: *Ibid.*, p. 140.



of D's plan and in some way complicit with it (for example, by supplying a weapon), they also might be prosecuted as *accessories* to the crime. However, if they were aware of, and agreed upon, the definite plan (of the murder of D's wife) and agreed to assist in either its committal or any act in furtherance of its committal, then they might be arraigned on a charge of conspiracy to commit murder (whether or not the murder had taken place). Such circumstances in the case of murder tried under municipal law, and directed against a quite limited number of individuals, would be relatively simple in comparison to a murderous litany of crimes committed in the course of a war and under the aegis of an obviously murderous state/regime. For a military administrator stationed in Berlin during the 1940s, such a direct individual connection might still be provable, but even then, his guilt would have remained beyond the reaches of traditional *international* law that was applicable before 1945. The analogy to municipal law, therefore, ultimately remains insufficient because it does not account for the responsibility of a vast number of crimes where, nevertheless, no *direct* link might be made between an individual high leader of state (particularly in the case of civilian leaders) and any number of individual war crimes.

Perhaps the best example of the type of individual to which this might apply is that of a banker, who might have had no *direct* connection to atrocities committed in war (or peace) but who would have assisted a criminal regime in some significant way – whilst in the knowledge of its murderous methods or designs. A probably exasperated Robert Jackson explained to the delegates drafting the London Charter:

[I]f you take the banker as an example – for instance, Schacht, who is our prisoner at the moment – he is either a big war criminal or nothing. [...] Nothing except the common-plan or conspiracy theory will reach that type of man, and, therefore, if you [...] shove him out of this Tribunal, you have shoved him out of the possibility of being tried anywhere because you have no law to try him except under this agreement [and charter].<sup>25</sup>

Jackson's example, Hjalmar Schacht, was a particularly apt case in stressing the value of the doctrine of conspiracy. Yet this statement was an inadvertent admission of the novelty of the *law* that would be required (rather than, as was later claimed by Jackson, merely a matter of newly *applying* already-existing laws).<sup>26</sup> The banker was to be accused in the indictment of assisting the accession and consolidation of Hitler's power as well as promoting preparations for war.<sup>27</sup> The main problem for the prosecution would be, however, that Schacht had been dismissed by Hitler before

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<sup>25</sup> Jackson, (ed.), *Conference*, p. 254.

<sup>26</sup> IMT, 21/Nov/1945, Vol. III, p. 146.

<sup>27</sup> IMT, Vol. I, p. 74.

the war began.<sup>28</sup> Thus serious doubts about the wisdom of arraigning him were expressed by the librarian of the (British) Foreign Office:

Whatever the views of our American and Russian allies I should regard it as most inadvisable to indict Schacht [...]. He is, I believe, in many ways an unpleasant and unreliable character. But, in my considered view, he is not a war criminal in the sense of the prosecution. His defence would be so strong that, if it did not secure an acquittal, the authority of the Tribunal would be seriously reduced.<sup>29</sup>

With Schacht's eventual acquittal, these turned out to have been prophetic words. 'Conspiracy', however, appeared to provide the only answer for the American delegates. Without it, the problem of leadership culpability remained even in the (apparently more clear-cut) case of the banker that took Schacht's place and stood as head of the Reichsbank throughout the war. Before the trial commenced there was enough evidence to demonstrate that Walther Funk could be found directly responsible for 'persecution' of the Jews before the outbreak of war.<sup>30</sup> For example, his active participation in a meeting with Göring, designed to appropriate Jewish property as 'compensation' after *Kristallnacht* was recorded in a document of unchallenged authenticity.<sup>31</sup> Yet the legal problem of leadership culpability for War Crimes remained and there appeared to be only one answer to the Chair of Jurisprudence at Oxford as the trial was underway:

How, it has been asked, can a financial or economic expert sitting in Berlin be held liable for the shooting of hostages in a remote Russian village? The answer is that under the law each of the parties, by deliberately entering into the conspiracy, adopts all his confederates as agents to assist him in carrying it out, and consequently any act done subsequently for that purpose by any of them will be admissible as evidence against him, unless before the act was done he has withdrawn from the conspiracy. Such withdrawal may, however, be too late if the course of the conspiracy, which he has helped to bring into being, cannot be stayed.<sup>32</sup>

Arthur L. Goodhart's final remarks in this section of his lecture, delivered before the Edinburgh University Law Faculty on 5<sup>th</sup> February 1946, suggested that he felt the doctrine of conspiracy was useful in finding defendants like Schacht and Funk culpable for criminal acts committed by others during the war (and, specifically for the example he cited: War Crimes). His statement merely reflected the *fait accompli* laid down by the American delegation during the London negotiations that *only*

<sup>28</sup> Schacht was accused of the overall conspiracy (Count 1 of the indictment) as well as Crimes Against Peace (Count 2) but found innocent on both Counts and acquitted by the Tribunal.

<sup>29</sup> E. J. Passant memorandum, 15/Aug/1945, cited in: Taylor, *Anatomy*, p. 88.

<sup>30</sup> Funk was indicted on all four counts and found guilty of all except, ironically, the overall conspiracy count (Count 1). Such mixed results reflect the variations of interpretations of the counts (in particular, Count 1 and the doctrine of conspiracy) and the method outlined in the charter of deriving individual culpability.

<sup>31</sup> See document PS-1816, IMT, Vol. XXVIII, p. 499; NCA, Vol. IV, p. 425.

<sup>32</sup> Arthur L. Goodhart, 'The Legality of the Nuremberg Trials', (Lecture, 5/Feb/1946), repr. in: Mettraux, (ed.), *Perspectives*, p. 632.

through the use of the doctrine of conspiracy could the 'substantive' crimes of the charter attach individual culpability to defendants like Schacht or Funk. No other law, Jackson had insisted, was available to reach a man like Schacht.<sup>33</sup>

The single section of the charter expressing explicitly the fundamental linkage between (non-localized) 'Leaders, organizers, instigators and accomplices' and localized (war) crimes (perpetrated by subordinates or others) – is to be found in what I have labelled paragraph *x* of Article 6 (see Appendix 2).<sup>34</sup> That the framers of the charter did not label this paragraph subsection '(d)' suggests that it was not intended to constitute a discrete crime (like those of a-c). That it is the only section explicitly linking leaders (etc) to responsibility for crimes committed by subordinates or others, suggest that it applied to *each and every* 'substantive' crime.<sup>35</sup> Thus, if War Crimes were to hold any legal relevance to the particular defendants on trial, they could *only* do so (legally, within the confines of the charter) through the application of paragraph *x*. Since this paragraph specified that leaders (etc) would be held accountable for 'acts performed by any persons' (ie subordinates) through participation in 'the formulation or execution of a common plan or conspiracy', leadership responsibility for War Crimes was thus – at least in a positivist legal sense – irrevocably conflated with the doctrine of conspiracy. This might have been avoided by dealing more explicitly with leadership responsibility in paragraph *i*. In fact, this approach had been attempted during the negotiations and had appeared in several drafts of the Charter's definition of 'Crimes', including the penultimate American draft of 30<sup>th</sup> July 1945: 'The following acts, *designs*, or attempts at any of them, shall be deemed to be crimes coming within its jurisdiction: [...]'.<sup>36</sup> The single word *designs* would have gone some way in holding leaders responsible for the direct actions of others whilst maintaining conspiracy as a potentially discrete, separate, charge.<sup>37</sup> This, potentially, would have permitted the Tribunal to reject or ignore paragraph *x* as separate conspiracy clause (if it so wished), whilst still finding defendants responsible for the design of crimes they themselves were not *directly* implicated in. Yet it is still questionable as to whether this, or similar wording, would

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<sup>33</sup> See above, note 25.

<sup>34</sup> The reverse relationship of responsibility – subordinates being held responsible for carrying out the orders of their superiors – was addressed by Article 8.

<sup>35</sup> It should be noted that the form of indentation in the text of Article 6 also implies that paragraph *x* applied equally to all (indented) 'substantive' crimes listed above it. However, explicit mention of conspiracy within Crimes Against Peace without similar mention in sections (b) and (c) has led others to suggest that this implied War Crimes and Crimes Against Humanity were to be treated differently – i.e. without embracing the doctrine of conspiracy. See, for example: Smith, *Reaching Judgment*, p. 59.

<sup>36</sup> Jackson, (ed.), *Conference*, p. 393. (Emphasis added).

<sup>37</sup> This single word constituted a significant reduction of the expression of general leadership responsibility that had been posited in earlier drafts at the point before 'substantive' crimes were listed.

have formed a suitable basis to make clear the culpability of men like Schacht and, to a lesser extent, Funk.

Alternatively, paragraph *x* could have addressed the issue of leadership responsibility by omitting mention of conspiracy altogether, shown as follows (with the conspiracy phrase struck out, and the word 'crimes' substituted for 'plan'):

Leaders, organizers, instigators and accomplices participating in the formulation or execution of ~~a common plan or conspiracy to commit~~ any of the foregoing crimes are responsible for all acts performed by any persons in execution of such ~~plan~~ [crimes].<sup>38</sup>

Yet still, could Schacht or Funk, as presidents of the Reichsbank, be reasonably found guilty of the 'formulation' or 'execution' of any particular War Crimes (or Crimes Against Humanity) perpetrated, for example, on the eastern front?<sup>39</sup> As this seems not to be the case, the utility of the doctrine of conspiracy is clear. But 'conspiracy' crimes might have been better placed as discretely enumerated crimes beneath those already listed in a-c (together with the amended paragraph *x* above, this would have clearly posited conspiracy crimes as separate, whilst expressing leadership culpability on its own so that it could be applied to both conspiracy and non-conspiracy crimes).<sup>40</sup>

At the close of the London conference, the final draft of the charter omitted any separate, discrete expression of leadership responsibility in relation to War Crimes or Crimes Against Humanity, consigning it solely within paragraph *x* of Article 6 and thus making it entirely dependent on the judicial acceptance of the doctrine of conspiracy. Thus, according to the charter, leaders could be held responsible for either i) *conspiracy* to commit War Crimes and/or *conspiracy* to commit Crimes Against Humanity or otherwise ii) only the actual *direct acts* of, or closely related acts to, these crimes (which, as already noted, they were unlikely to have committed).

Assuming the validity of conspiracy as a doctrine in international law, and realizing that paragraph *x* is the essential text in making crimes (b) and (c) relate to the particular defendants in any meaningful way, we are confronted with the following (partly ludicrous) collection of eight crimes defined by the London Charter:

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<sup>38</sup> See Appendix II.

<sup>39</sup> Funk was found guilty of all crimes except the overall conspiracy (Count 1). But it is arguable that his darkest guilt – accepting deliveries from the SS – was that of *omission* rather than 'formulation' or 'execution' (see Chapter 6).

<sup>40</sup> This had been attempted in several drafts during the London conference, but for a variety of reasons, such drafts could not be agreed upon by all four parties. Jackson, (ed.), *Conference*.

- (a-1) Crimes Against Peace
- (a-2) Conspiracy to commit Crimes Against Peace
- (b) War Crimes
- (c) Crimes Against Humanity
- (x-1) Conspiracy to commit Crimes Against Peace
- (x-2) Conspiracy to commit Conspiracy to commit Crimes Against Peace
- (x-3) Conspiracy to commit War Crimes
- (x-4) Conspiracy to commit Crimes Against Humanity

**FIGURE 2:** The eight crimes posited in Article 6 of the London Charter – when crediting paragraph *x* with applicability to all 'substantive' crimes.

Although it seems certain that nobody at the negotiations in London intended to create the crime of 'Conspiracy to commit Conspiracy to commit Crimes Against Peace' (x-2), this is, if we are to give paragraph *x* its due, a law that can be derived from article 6 of the charter. Logic however, seems to be the price that was paid at London in order to reach agreement. So adamant were the American delegation in stressing that conspiracy to wage aggressive war was the heart of the case, that they insisted 'conspiracy' be mentioned explicitly within subsection (a), the 'substantive' law of Crimes Against Peace – despite its applicability as further expressed in paragraph *x*.<sup>41</sup> As Jackson put it during the London negotiations, a 'war connection' (for *connection*, read *conspiracy to commit Crimes Against Peace*) was the only way to proceed in justifying the expansion of law into the traditionally immunised confines of state-sovereignty:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.<sup>42</sup>

What right, such a statement suggested, did any foreign state have to probe into the American treatment of its own minorities unless that treatment was cause for, or part of, an illegally pursued international conflict? It was only aggressive war, for Jackson, that constituted the supreme crime and exclusively contingent element that

<sup>41</sup> That conspiracy to wage aggressive war was deemed to be the heart of Nazi criminality was reiterated during the presentation of the American case by Sidney S. Alderman. IMT, 23/Nov/1945, Vol. II, p. 241.

<sup>42</sup> Jackson, (ed.), *Conference*, p. 331.

permitted supremacy of international law over the otherwise (still) sacred tradition of state-sovereignty. This was markedly different to the French delegation's attitude at the conference:

Professor Gros: [...] I should think that [...] our differences are more or less this: the Americans want to win the trial on the ground that the Nazi war was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits. It is not very difficult to show.<sup>43</sup>

Jackson agreed that this was an accurate description of the difference between the aims of the French and Americans but viewed the unjustified starting of a war (rather than unjustified *means* in conducting it) as the supreme crime. His explanation admitted frankly that such differing perspectives derived from differing experiences of the war (i.e. French occupation versus American embroilment).<sup>44</sup> Although there may be something to be said for the proposition that initiating war in an industrial age must, by necessity, contemplate the injustice of killing innocent civilians, Jackson's particular form of reasoning encouraged a potentially dubious interpretation of history – in that what we now refer to as the Holocaust might said to have been considered by the Nazis as merely the necessary pre-requisite, by-product, or 'offshoot', of preparing and waging an aggressive war.<sup>45</sup> An overwhelming majority of historians (including myself) would, today, favour the reverse interpretation: that only total war provided the means (or at least, environment) to carry out the Nazis' 'Final Solution'.<sup>46</sup> Furthermore, such a view implied that future humanitarian intervention (as we would now call it) would be illegal without the existence of an 'aggressive' (i.e. illegal) war between states.<sup>47</sup> A war started legally would preclude humanitarian intervention.

As far as negotiating the charter was concerned, the obsession with 'aggressive war' served to reinforce the American insistence on the use of the doctrine of conspiracy: viewing aggressive war itself as a 'conspiracy' contemplating all crimes associated with its fruition (War Crimes and Crimes Against Humanity). But the duplication of 'conspiracy' within Article 6 of the charter, driven by this insistence, would ironically serve to make it appear to be less relevant – or, indeed, *irrelevant* – in regard to the other two 'substantive' crimes (b & c). This was an essential factor in shaping the judgement as we shall see.

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<sup>43</sup> Ibid., pp. 381-382.

<sup>44</sup> Ibid., pp. 383-384.

<sup>45</sup> Bloxham, *Genocide on Trial*, p. 72.

<sup>46</sup> See, for example, Konrad Hugo Jarausch & Michael Geyer, *Shattered Past: Reconstructing German Histories* (Princeton, N.J.: Princeton University Press, 2003), pp. 117-119.

<sup>47</sup> The most obvious example that highlights the flaw in this method – to a 21<sup>st</sup> century being – is that of the Rwandan genocide.

### 3.3. Indictment

From most – if not all – subsequent narrative accounts of the IMT trial, one might assume that the conspiracy doctrine was applied only in Count 1 of the indictment. This is the case even with those accounts that concern themselves predominantly with the legal aspects of the trial.<sup>48</sup> Figure 3 reflects what is usually described in such accounts:

Count 1	-	Conspiracy to commit Crimes Against Peace, War Crimes and Crimes Against Humanity
Count 2	-	Crimes Against Peace
Count 3	-	War Crimes
Count 4	-	Crimes Against Humanity

**FIGURE 3:** The inaccurate reflection of crimes charged in most narrative accounts of the Nuremberg IMT trial.

However, before specifying the charges in further detail, both counts 3 and 4 mentioned conspiracy in the second and third paragraphs of each 'statement of offence'. Count 3 opened as follows:

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<sup>48</sup> See for example: Robert K. Woetzel, *The Nuremberg Trials in International Law: With a Postlude on the Eichmann Case*, (2nd ed.), (London: Stevens & Sons Ltd., 1962) and Peter Calvocoressi, *Nuremberg: the facts, the law and the consequences* (London: Chatto & Windus, 1947).

### COUNT THREE – WAR CRIMES

(Charter, Article 6, especially 6 (b) )

#### VIII. Statement of the Offense

All the defendants<sup>49</sup> committed War Crimes between 1 September 1939 and 8 May 1945 [...]

All the defendants, acting in concert with others, formulated and executed a *Common Plan or Conspiracy* to commit War Crimes as defined in Article 6 (b) of the Charter. [...]

The said War Crimes were committed by the defendants and by other persons for whose acts the defendants are responsible (under Article 6 of the charter) as such other persons when committing the said War Crimes performed their acts in execution of a *common plan and conspiracy* to commit the said War Crimes, in the formulation and execution of which *plan and conspiracy* all the defendants participated as leaders, organizers, instigators, and accomplices.<sup>50</sup>

The first three paragraphs of Count 4 were very similar, other than the fact that Crimes Against Humanity were specified as having been committed 'during a period of years preceding 8 May 1945'.<sup>51</sup> Thus doubts as to the temporal scope of 'conspiracy' were not resolved by any legalistic generalities within the indictment (but rather by the specific historical details of crimes cited beneath the opening paragraphs of each count – in particular, Count 4 specified the establishment of concentration camps and that Jews were 'persecuted' from 1933<sup>52</sup>). But what is clear from paragraphs two and three of both the War Crimes & Crimes Against Humanity counts of the indictment is that the understanding of individual responsibility as being dependant upon the doctrine of conspiracy was expressed and entirely consistent with such an interpretation of paragraph *x* in Article 6 of the London Charter. Indeed, both these paragraphs reiterated the very wording of paragraph *x* reinforcing the dependence of the individual culpability of 'Leaders, organizers, instigators, and accomplices' in the 'formulation or execution' of War Crimes/Crimes Against Humanity upon use of the doctrine of conspiracy.

A more accurate reflection of the indictment than those provided in most narrative accounts, therefore, is shown in Figure 4, with the essential differences underlined:

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<sup>49</sup> Not all the defendants at the IMT were charged under Count 3, so this must be read as applying only to those who were. (Schacht, for example, was only indicted on counts 1 and 2, whereas Funk was indicted on all four counts).

<sup>50</sup> IMT, Vol. I, pp. 42-3. (Emphasis added).

<sup>51</sup> Ibid, p. 65. A further anomaly was evident in the use of the words 'war crimes' where one might have expected 'Crimes Against Humanity', thus conflating the two at this stage before the trial had begun. The specifics of Count 3 were much more comprehensive than Count 4, including mention of 'genocide' which is generally understood today as the worst type of Crime Against Humanity rather than a War Crime.

<sup>52</sup> IMT, Vol I, pp. 66-7. The word 'persecuted' is used in quotations here to as it is insufficient to describe Nazi victimization of Jews – a point admitted by the prosecution although it used the same word (see Chapter 6, p. 157).



Count 1 -	Conspiracy to commit Crimes Against Peace, War Crimes and Crimes Against Humanity
Count 2 -	Crimes Against Peace
Count 3 -	War Crimes <u>&amp; conspiracy to commit War Crimes</u>
Count 4 -	Crimes Against Humanity <u>&amp; conspiracy to commit Crimes Against Humanity</u>

**FIGURE 4:** The indictment – including conspiracy in counts 3 and 4.

The indictment, therefore, reflected the overlap of counts 1, 3, and 4 to a greater degree than has been noted in most (if not all) narrative accounts of the IMT trial. This reinforces the view which seemed obvious at the time and *has* been expressed in various accounts since: that the American case, and in particular, the evidence submitted, in dealing with Count 1 covered much of the ground that was to be covered by the French and Soviets in counts 3 and 4. If this was not admitted entirely by Jackson, it could be inferred from his words spoken during the trial:

Count One of the Indictment is a conspiracy count [...] It is impossible, trying a conspiracy case, to keep from mentioning the fact that the act, which was the object of the conspiracy, was performed. In fact, that is a part of the evidence of the conspiracy.<sup>53</sup> [...] [T]he other prosecutors, if they feel their field is being trespassed upon, or the judges, if they feel that we are exceeding, [should] raise [an] objection specifically; because I don't know how we can separate, particularly on a moment's notice, Count One [conspiracy] from the other ['substantive'] Counts.<sup>54</sup>

This statement was made in relation to the calling of witnesses that might be useful in the prosecution of various counts of the indictment. Yet the same principle applied to the use of all forms of evidence. The use of the doctrine of conspiracy – in both the London Charter and the indictment – served the very practical American aim of taking control of the bulk of the entire case against the defendants. This left the problem of covering similar ground to the French and Soviet prosecutors. The duplication in presenting cases in general, as well as specific documents, caused some consternation on the Bench:

<sup>53</sup> This is not necessarily true in the case of Anglo-American conspiracy: the *object* of a conspiracy is treated as a separate 'substantive' crime and need not be carried out.

<sup>54</sup> IMT, 30/Nov/1945, Vol. II, pp. 436-7.

6 February. This day, which is the 100<sup>th</sup> session of the Tribunal, the French counsel with a voice so toneless as to be without any meaning presents a completely useless exposé of the looting of art treasures in France.

The work has been done completely by the Americans, and even then was a work of supererogation.

[...]

7 February. I regret to say that all matters dealt with today have been largely repetition of matters already discussed by the other delegations. It is difficult to remain patient, but the prestige of France is somehow involved. [...]<sup>55</sup>

Linking individual responsibility for all crimes within the charter to the doctrine of conspiracy served to justify the overlap between the prosecutorial cases covering counts 1, 3 and 4. The only charge of the indictment that made no mention of conspiracy whatsoever was Count 2, Crimes Against Peace. This, the most straightforward prosecution case, became the responsibility of the British War Crimes Executive.

### 3.4. Judgement

In comparison to the Prosecution's indictment, the Tribunal's judgement provoked considerably greater comment from contemporary reporters and lawyers and, subsequently, from historians. This is hardly surprising since the reading of the judgement in court, combined with the sentencing of the defendants, constituted the climax of the trial as an international event – just as the defendant's pleas as well as Robert Jackson's celebrated speech (rather than the reading of the indictment) represented the most dramatic opening moments of the trial.<sup>56</sup> Furthermore, in keeping with an analogy to common law in Anglo-American domestic jurisdictions, the judgement represented – to some, including President Truman – a *legal* 'precedent': a view that Hans Kelsen, as the consummate 20<sup>th</sup> century legal positivist, felt was worth refuting.<sup>57</sup> Nevertheless, the view has persisted that when speaking of the legal legacy of 'Nuremberg' one must not only consider the London Charter, but also give considerable weight to the judgement too: in this (legal) sense, there has been said to be two 'Nurembergs'.<sup>58</sup> More recently it has been maintained as a general principle that judgements in international courts can constitute laws

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<sup>55</sup> H. Montgomery Hyde, *Norman Birkett: the life of Lord Birkett of Ulverston* (London: H. Hamilton, 1964), pp. 505-506. During the French prosecution case on 6<sup>th</sup> February 1946, the President of the Tribunal pointed out that a specific document, PS-141, had already been presented by the American prosecution. See: IMT, 6/Feb/1945, Vol. VII, p. 55-6.

<sup>56</sup> See Chapter 4, p. 111. For the text of Jackson's opening speech, see: IMT, 21/Nov/1945, Vol. II, pp. 98-155.

<sup>57</sup> Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?.'

<sup>58</sup> Richard Wasserstrom, 'The Relevance of Nuremberg,' *Philosophy and Public Affairs*, Vol. 1, No. 1 (1971), p. 28.

themselves.<sup>59</sup> However, the international Tribunal at Nuremberg, whilst being no bastion of legal positivism, understood its own function, not as a law or precedent-making body, but to merely render judgements and sentences upon the defendants within the scope of the laws posited – to the extent that they were – in the text of the London Charter. One need not, therefore, adhere to a strictly positivist jurisprudence in any assessment of the judgement, but merely seek to assess its value as measured by the Tribunal's own declared objective. Criticism, however, should be tempered by the fact that, as has been noted by several commentators, due to inherent ambiguities in the charter itself, it was possible to interpret its various parts in various ways. Nevertheless, it is with regard to the nexus between individual culpability and the doctrine of conspiracy, as expressed in the charter, that a crucial flaw in the judgement becomes evident.

In contrast to the American Prosecution, Francis Biddle, the voting – as opposed to the advisory 'alternate' – American judge of the Tribunal, held the doctrine of conspiracy in a particularly low regard and made this clear to his peers on the bench:

I had learned to distrust conspiracy indictments, which in our country were used too often by the government to catch anyone however remotely connected with the substantive crime. [...]

[John J.] Parker [the American 'alternate' judge,] thought that the conspiracy had been proved "beyond all peradventure" – he liked such old-fashioned phrases, which, when he used them, sounded like the crack of a long whip, tearing all the other arguments to shreds. The British were upset by my stand – it was as if I had deserted them. The heart would be taken out, Birkett [the alternate British judge] believed, if we rejected conspiracy.<sup>60</sup>

The French judges were even more distrusting of what, to them, was an alien (non-) legal theory. In spite of the existence of the London Charter, therefore, the validity of the doctrine in International Law was still something to be debated (in private) by the judges. Since the British were supporters in principle, and since the Soviets were amenable on purely pragmatic grounds – as it would assist in finding defendants like Fritzsche and Schacht guilty – the bench was, numerically, evenly split amongst the four voting judges and so compromise was required.<sup>61</sup>

The final judgement, therefore, did not reject the doctrine but, as Jackson later put it:

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<sup>59</sup> Bing Bing Jia, 'Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict' in Sienho Yee & Wang Tieya (eds.), *International Law in the Post-Cold War World* (London, New York: Routledge, 2001), pp. 77-95.

<sup>60</sup> Francis Biddle, *In Brief Authority* (Garden City: Doubleday, 1962), p. 468. See also: Hyde, *Norman Birkett*, pp. 522-523.

<sup>61</sup> Biddle, *Brief Authority*, pp. 466-469.

[...] the language which expressed [the London] agreement seems not to have conveyed to the minds of the judges the intention clearly expressed by the framers of the charter in conference, for, while the legal concept of conspiracy was accepted by the Tribunal, it was given a very limited construction in the judgment.<sup>62</sup>

There was good reason for Jackson to avoid any further and comprehensive criticism of the judgement – i.e. in pointing out the link between conspiracy and individual responsibility – since his instinct was to defend the Nuremberg project as a whole, including his own involvement in framing the charter. Too much criticism of the Tribunal's interpretation of the charter would only serve to highlight flaws in the charter itself.

In conflict with the aims of the Prosecution (and the delegates to the London conference), the judgement expressed the opinion that, according to the London Charter, charges of War Crimes or Crimes Against Humanity were simply not valid in Count 1:

Count One [of the indictment ...] charges not only the conspiracy to commit aggressive war, but also to commit War Crimes and Crimes against Humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides [in paragraph x]:

"Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war.<sup>63</sup>

That the charter did not 'define as a *separate* crime any conspiracy except the one to commit acts of aggressive war' was true insofar as this statement went. But what the Tribunal did not admit, or chose to ignore, was that conspiracy – and the individual responsibility of the particular defendants on trial – was relevant to *each and every* crime in Article 6 (a-c) through the application of paragraph x. To state that '[t]he words [of paragraph x] are designed to establish the responsibility of persons participating in a common plan' was only *half* correct: they were also expressly devoted to invoking the culpability of the defendants – 'leaders, organizers, instigators and accomplices' – for War Crimes and Crimes Against Humanity that they

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<sup>62</sup> Jackson, (ed.), *Conference*, p. vii.

<sup>63</sup> IMT, Vol. I, p. 226; NCA, *Opinion and Judgment*, p. 56. Partly as a result of this interpretation, the tribunal could and did also hold that counts 1 and 2 were 'in substance the same' and could be considered together. IMT, Vol. I, p. 224; NCA, *Opinion and Judgment*, p. 54.

would not otherwise be held accountable for. By quoting and subsequently commenting on paragraph *x*, the judgement explicitly rejected its relevance.

The original meaning of the London Charter (reflected in Figure 2 on page 59) was now considerably altered by the 'limited construction' of conspiracy as outlined in Figure 5:

- |   |
|---|
| <ul style="list-style-type: none"> <li>(a) Crimes Against Peace &amp; Conspiracy to commit Crimes Against Peace</li> <li>(b) War Crimes</li> <li>(c) Crimes Against Humanity [only during the war]</li> <li><del>(x-1) Conspiracy to commit Crimes Against Peace</del></li> <li><del>(x-2) Conspiracy to commit Conspiracy to commit Crimes Against Peace</del></li> <li><del>(x-3) Conspiracy to commit War Crimes</del></li> <li><del>(x-4) Conspiracy to commit Crimes Against Humanity</del></li> </ul> |
|---|

**FIGURE 5:** The tribunal's interpretation of Article 6 of the London Charter: discounting the relevance of paragraph *x* and treating Crimes Against Peace and the conspiracy to do so as 'in substance the same' charge. The charge of Crimes Against Humanity was restricted to war-time acts only.<sup>64</sup>

War Crimes and Crimes Against Humanity were now deemed irrelevant in the Tribunal's interpretation of Count 1 of the indictment. Furthermore, the Tribunal deemed 'conspiracy' as irrelevant to counts 3 and 4. So confident was it that individual responsibility was already established in international law before 1945 that the Tribunal felt it need not rely on the charter (and specifically, paragraph *x*) to find the defendants culpable:

The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes against Humanity. With respect to War Crimes, however, [...] the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 the Geneva Convention of 1929. *That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.*<sup>65</sup>

The distinction not made in this observation was the difference between the undoubted pre-existence of these laws (and sanctions) and *to whom* such laws were applicable. It was not in the Hague Conventions of 1907, the Geneva Conventions of 1929, or even the Versailles treaty of 1919, but only in the London Charter of 1945 that – exclusively via the doctrine of conspiracy – such crimes were applicable to the particular types of defendants that now happened to be on trial (that is, military and

<sup>64</sup> Note the similarity of figure 5 to figure 1, the latter of which considers the 'substantive' crimes a-c in isolation from the rest of Article 6.

<sup>65</sup> IMT, Vol. I, p. 253. (Emphasis added).

civilian holders of high office, besides the official Head of State).<sup>66</sup>

The Tribunal's 'restrictive' interpretation of the Charter meant that the indictment itself was considerably revised by the judges, as shown in Figure 6:

Count 1	-	Conspiracy to commit Crimes Against Peace, <del>War Crimes and Crimes Against Humanity</del>
Count 2	-	Crimes Against Peace
Count 3	-	War Crimes & <del>conspiracy to commit War Crimes</del>
Count 4	-	Crimes Against Humanity & <del>conspiracy to commit Crimes Against Humanity</del> [only during the war]

**FIGURE 6:** The Tribunal's revision of the indictment derived from its interpretation of the London Charter.

As a result of dismissing the relevance of paragraph *x*, the Tribunal, if it is to be assessed with its own legalist logic – inadvertently reverted to judging the defendants for some crimes they simply could not have committed. In particular, it judged the defendants for only the *direct* perpetration of War Crimes which were, in fact, actually committed many thousands of times over by many thousands of their subordinates. In choosing to dismiss the applicability of conspiracy to the 'substantive' definitions of War Crimes and Crimes Against Humanity, the Tribunal had forfeited a novel legal method of encapsulating the vast scale of injustice for which only leaders could be held responsible. The Tribunal had reached beyond its remit (its jurisdiction) in effectively re-writing the laws of the London Charter.

It is, therefore, fair to state that the heart of the American Prosecution's *legal* case was compromised severely. No consensus among the American Prosecution and the Tribunal existed in regard to the central legal framework underpinning the entire American case against the defendants. Indeed, as we have seen, little consensus on the meaning or value of conspiracy existed within the Tribunal itself. Thus, if the trial

<sup>66</sup> Articles 227-230 of the Versailles treaty concerned 'penalties'. Article 227 did extend juridical culpability to an ex Head of State (specifically, the ex-Kaiser) but only for the vaguely specified 'supreme offence against international morality and the sanctity of treaties' (this would have provided precedent for arraigning Hitler, had he remained alive). The reason for this vagueness was partly due to American dissent within the 'Commission for the Responsibility for the Authors of the War and on Enforcement of Penalties' – the body instituted at the Paris Peace Conference in order to formulate articles of the Versailles treaty in relation to 'penalties'. American dissent within the Commission focused on the rejection of extending culpability to transgressions of the 'laws of humanity' as well as extending the reach of Command Responsibility to a (negative) culpability for 'having abstained from preventing [...] illegal acts'. The majority report rejected the idea of prosecutions for planning or waging aggressive war. Article 228 outlined the right of the 'Allied and Associate Powers' to bring before military tribunals those accused of (direct participation in) traditional war crimes only. See: Commission of Responsibilities, *Violation of the Laws and Customs of War*, (Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32), (Oxford: The Clarendon Press, 1919).

were to be judged on its legal merits alone or, more specifically, on the merits of the Tribunal's interpretation of the laws of the London Charter, justice was not seen clearly to be done. The judges, however, were not solely responsible for this fog of legal retribution: the framers of the Charter and, specifically, Robert Jackson, had not striven sufficiently to build a consensus amongst the negotiators in London so that clarity might have existed from the outset. Instead, ambiguity in law was the price to be paid for ensuring that political differences between the Four Powers might not derail the process of bringing the Nazi defendants to stand trial in an international court. But that the law applied in the courtroom had happened to be imperfect from the outset should not lead us to conclude that no justice was achieved at Nuremberg. Instead, it simply means that we need to look elsewhere – beyond the realms of law – if we wish to find the most visible manifestations of justice at Nuremberg.

## CHAPTER 4

# AN AMERICAN SHOW

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*I agree with you that all this smacks of the swaggering conqueror and that the trials should be conducted with Spartan simplicity. But that's not the way of the Americans. [...] The Russians, British and French actually have small parts here. Probably 80% of the trials staff is American. And in our youthful exuberant way we're turning Nuremberg into Coney Island. The trial isn't going to be a farce, but it's going to be a damned good show, no question of that.*

Stuart Schulberg (19/Oct/1945)<sup>1</sup>

*You Americans do things on such a vast scale!*

Sir David Maxwell-Fyfe, (Jun/1945)<sup>2</sup>

The major Nuremberg trial was more than a legal process. As this chapter will demonstrate, it was also a piece of theatre designed by American planners to impart political and moral lessons. The evidence cited in the following pages suggests that this production was designed for an American, as much as for a German, audience. There were high expectations within the American Prosecution that the trial would entertain that audience with a good measure of drama throughout the proceedings. I examine some of the important elements of this production, beginning with the physical arrangements in the courtroom – arrangements that included provision for capturing the drama on sound and film. I then assess the dramatic impact of various forms of 'performance' with an examination of Robert Jackson's opening speech as well as the provision of evidence in the form of witnesses and documents. This will prepare the ground for examining the relative effectiveness of film in the following chapter. Given that legal imperfections hampered the progress of justice at the IMT, the central question I will address here is whether some of the theatrical aspects of the trial fared any better in achieving justice at Nuremberg.

In a work devoted to the theme of what some academics now refer to as 'transitional justice',<sup>3</sup> Otto Kirchheimer, the renowned constitutional theorist, engaged in a critically qualified defence of the Nuremberg IMT trial. Considering some of its 'anomalies', he posed a rhetorical question:

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<sup>1</sup> Stuart Schulberg to Barbara Schulberg, 19/Oct/1945. SSP.

<sup>2</sup> Maxwell-Fyfe addressed these words to Robert Jackson. Cited in: Taylor, *Anatomy*, p. 58.

<sup>3</sup> See Introduction, p. 3, note 4.



[W]hen compared with any homegrown variety of law and procedure, the [IMT] case will show any number of anomalies. If these anomalies are stated cumulatively, the proceeding might give the impression of gross irregularity, allowing the trial itself to be put on trial. *What would remain but a kind of morality play* which, being refuted immediately thereafter by the course of history, would have nothing to teach?<sup>4</sup>

We have already discovered some of the legal anomalies in Chapter 3. Yet rather than being merely a 'morality play', Kirchheimer's answer was that the trial distinguished itself favourably from other forms of 'successor trials' due to the fact that the outcome – the question of guilt and punishment of each of the defendants – was not pre-determined but rather entailed an element of risk for the powers that had submitted them to juridical proceedings. Also in its favour, the attempt to do justice to the victims of Nazi Germany using 'the language of the charnel houses' meant that, for Kirchheimer, some justice as well as politics – or rather justice *via* politics – figured at Nuremberg.<sup>5</sup>

His 'rejoinders' to some of the more common critiques of the trial included countering the accusation of 'victor's justice'. This dilemma was one that Robert H. Jackson himself framed in moral terms:

The danger, so far as the moral judgement of the world is concerned which will beset these trials, is that they come to be regarded as merely political trials in which the victor wreaks vengeance upon the vanquished.<sup>6</sup>

The point stressed by Kirchheimer, and several others since, is that any judicial process instigated after the defeat of a particular regime cannot but reflect the political values of the 'successor[s]' who are engaged in replacing a vanquished legal authority with one deemed more legitimate.<sup>7</sup> Despite the presence of Soviet judges on the bench, there is some consensus among legal and other historians that the trial succeeded, at least partially, as a 'liberal' (political) endeavour.<sup>8</sup> Although often viewed by liberals as an embarrassment, Soviet inclusion served to demonstrate some of the differences between a trial run on Stalinist grounds and one run along 'liberal' lines.<sup>9</sup> Paradoxically, the presence of the Soviets served to strengthen the trial's 'liberal' credentials: the *dissenting* opinion submitted at the end of the trial by Judge

<sup>4</sup> Otto Kirchheimer, *Political Justice: The use of Legal Procedure for Political Ends* (Princeton, NJ: Princeton University Press, 1968), pp. 338-339. (Emphasis added).

<sup>5</sup> Ibid., pp. 339-340.

<sup>6</sup> RHJ, 'Statement of Robert H. Jackson Representing the United States', 7/Aug/1945, LoC/RHJP/95/'London Conference'.

<sup>7</sup> Kirchheimer, *Political Justice*, p. 332. See also: Teitel, *Transitional Justice*, pp. 11-15. For concurring assessments see: Osiel, 'In Defense of Liberal Show Trials - Nuremberg and Beyond'; Geoffrey Best, *Nuremberg and After: The Continuing History of War Crimes and Crimes Against Humanity* (Reading: University of Reading, 1984); Bass, *Stay the Hand of Vengeance*.

<sup>8</sup> For a discussion of Nuremberg framed by its American authors as a liberal and democratic project, see Chapter 2.

<sup>9</sup> For Anglo-American 'embarrassment' with Soviet inclusion see: Hirsch, 'The Soviets at Nuremberg,' p. 701.

Nikitchenko bemoaned the fact that not all defendants were found guilty and that more of them were not sent to the gallows.<sup>10</sup> Thus, a considerably harsher alternative to the justice that actually transpired was – and is – available for all to see. Soviet justice was seen to be outvoted by the more liberal majority on the bench (that acquitted three defendants and chose not to hang Rudolf Hess) so that Jackson could fairly claim that no defendant ‘was found guilty or punished because of Soviet participation’.<sup>11</sup>

The trial’s liberal credentials, for Kirchheimer and several others, were based primarily upon Nuremberg’s procedural methods – characterised as ‘due process’ or, in layman’s terms, ‘fair play’. Thus, even if its advocates permit themselves the characterization of Nuremberg as a ‘show trial’, it is prefaced and qualified with the adjective ‘liberal’ to denote an adherence – based exclusively upon political ideology – to ‘due process’ which other ‘show trials’ lack.<sup>12</sup> This over-arching political characterisation, whilst being entirely valid, tends to permit and encourage neglect in concern with Nuremberg as an effort in *moral* judgement and education: something that most advocates of liberal internationalism would admit but see as so fundamental that it hardly warrants further investigation. As a result, it has been possible for Thane Rosenbaum to state, some 60 years after the IMT trial, that the moral dimension of Nuremberg has been overlooked:

Many things can be said about the Nuremberg Tribunals and their legacy as a force for human rights and an inspiration for international law. But what you do not hear much about is the way in which Nuremberg, perhaps inadvertently, represented the essential values and broad vision for moral justice.<sup>13</sup>

What is so remarkable about this statement is that, after more than six decades and thousands of books and articles concerned with the IMT trial, Rosenbaum believes that the moral aspects of Nuremberg remain neglected. At the same time, Nuremberg is held by jurists to mark the point at which Natural Law thinking – which, in opposition to Positivism, explicitly stresses a link between law and morality – was revived, not only to shape Nuremberg, but also to affect American, as well as international, jurisprudence.<sup>14</sup> Yet, to take one example of a jurist concerned with the morality of law and procedure, so ‘political’ an event did Judith Shklar view the

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<sup>10</sup> IMT, Vol. I, pp. 324-364.

<sup>11</sup> RHJ cited in: Jeffrey D. Hockett, ‘Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial,’ *The Supreme Court Review*, Vol. 1990 (1990), p. 262.

<sup>12</sup> Osiel, ‘In Defense of Liberal Show Trials - Nuremberg and Beyond’.

<sup>13</sup> Thane Rosenbaum, ‘The Romance of Nuremberg and the Tease of Moral Justice,’ *Cardozo Law Review*, Vol. 27, No. 4 (2006), p. 1732.

<sup>14</sup> Rodger D. Citron, ‘The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, The Revival of Natural Law, and the Development of Legal Process Theory,’ *Michigan State Law Review*, No. 2 (2006).

Nuremberg IMT that she chose to write about it in Part II of *Legalism*, her influential (and, at the time, controversial) book divided between 'Law and Morals' (Part I) and 'Law and Politics' (Part II).<sup>15</sup> The 'politics' of Nuremberg has left its 'moral' dimensions in the shade partly due to the fact that the contrast between Nazi and liberal ethics is considered to be so wide and obvious that it is hardly worthy of discussion: put simply, Nazism was 'evil' and the liberal internationalism that transpired at Nuremberg was (and is) 'good'. Such an understanding has been represented in book-titles such as *Nuremberg: Evil on Trial*, and *Nuremberg: Infamy on Trial*, which, in fact, hardly deal with ethics at all.<sup>16</sup> There may be little ethical objection to characterising Nazism as 'evil' but such a description usually does not do much to explain the nature of, and reasons for, such a morally reprehensible 'ism'.<sup>17</sup> To state that Nazism is 'evil', therefore, is to state the obvious without necessarily explaining anything.

The first priority for the American Prosecution at Nuremberg was to prove that the defendants had committed *legal* wrongs. Yet this does not preclude the idea that they were also involved in a process of *moral* judgement – whatever the merits or pitfalls of such judgement might be. Kirchheimer himself – concerned exclusively with the *politics* of 'successor' trials – had made an inadvertent admission of the existence of such a moral aspect to the trial. All that might remain, he stated, if Nuremberg's political and legal justifications were to be dismissed, would be 'a kind of morality play'.<sup>18</sup> The logic of this statement suggests, however, that whether or not the trial were defensible on political, procedural, or legal grounds, it did also function, to some extent, as an endeavour in *moral* judgement and education – despite there being little evidence of any explicitly declared aim to engage in such activity. We can infer from Kirchheimer's statement that he would have taken a dim view towards any trial that was knowingly conducted with moral judgement or lessons in mind. The lawyers involved in the creation of the London Charter were themselves at pains to present their laws as merely the encoding of (legal) custom and positive law already in existence – rather than any effort to bring law into line with universal moral principles.<sup>19</sup> Little acknowledgment of the legitimacy of such an enterprise as the

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<sup>15</sup> Shklar, *Legalism*. Shklar's book is cited in Ruti G. Teitel's groundbreaking *Transitional Justice* as well as Gary J. Bass' *Stay the Hand of Vengeance*. It also makes an appearance in Douglas Lawrence's *The Memory of Judgment*. It appears in the index of each.

<sup>16</sup> James Owen, *Nuremberg: Evil on Trial* (London: Headline Review, 2006); Joseph E. Persico, *Nuremberg: Infamy on Trial* (London: Penguin, 1994).

<sup>17</sup> A notable exception that deals in part with the Nuremberg IMT is Hannah Arendt's *Eichmann in Jerusalem: A Report on the Banality of Evil* (Rev. and enl. ed.) (New York; London: Penguin, 1992).

<sup>18</sup> Kirchheimer, *Political Justice*, p. 339.

<sup>19</sup> Nevertheless, the President of the Tribunal would express his opinion, after the trial, that 'Just as International Law should have supremacy over national law, so the law of God, the law of right and wrong, or of conscience, or whatever you choose to call it, should have supremacy over both'. Cited in: Biddiss, 'The Nuremberg Trial,' p. 611.

Nuremberg IMT would have been forthcoming from contemporaneous jurists were any openly-declared reversion to the laws of universal conscience, morality, or God, expressed in the London Charter.

For evidence of the existence of 'a morality play', therefore, we must rather examine the content of speeches and the way in which evidence was presented during the trial itself. The idea of Nuremberg as a 'morality play' presupposes not only the existence of a moralising impulse, but also an element of theatre with which to impart such lessons. Whether or not attempts to dramatize the trial were successful (occasionally they were, but the trial was often dull<sup>20</sup>), evidence of the *desire* to dramatize events in the courtroom is unmistakably present – most particularly in the words of the American planners and lawyers. This chapter will demonstrate that such a desire for drama served not only to impart political, legal and historical lessons: the theatre of Nuremberg set the stage for a particularly American show that would also serve to facilitate a moralizing impulse.

#### 4.1. Setting the Stage

In the summer of 1945, some American planners already envisaged the trial as a piece of theatre. Gordon Dean, chosen by Robert Jackson as American Public Relations chief, expressed his ambitious aims in a memorandum to his superior:

One of the primary purposes of the trial of the major war criminals is to document and dramatize for contemporary consumption and for history the means and methods employed by the leading Nazis in their plan to dominate the world and to wage an aggressive war. Consequently one of the most important considerations in the preparation for the trial, in the choice of site, and in the conduct of the trial, is that of getting speedily and clearly to the people of the world the record of evidence which is developed there. This means that except for the controlling consideration that the trial must be conducted in a judicial atmosphere, with dignity and dispatch, first attention must be given to those agencies of public dissemination - the press, the radio, and the motion pictures - which will tell the story to the world.<sup>21</sup>

As we have seen in Chapter 2, the American planners deemed it important to convince the American public that the Nuremberg project was a legitimate and worthwhile enterprise. Once the trial was underway, Dean viewed it just as crucial, not only to 'document', but also to 'dramatize' Nazi behaviour. This would justify the huge effort and expense of American justice and would also justify, in moral terms, American involvement in European affairs, both during and after the war. Thus the

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<sup>20</sup> West, *A Train of Powder*, p. 3.

<sup>21</sup> Gordon Dean to RHJ, 'Plan for Public Relations Organization for the Trial of the Major War Criminals', 11/Aug/1945, 'NARA/RG-238/51/27/'Suggestions Re Publicity'.

trial was to be set on the world stage as a grand, historical narrative – not only designed to educate Americans and Germans, but also to carry the moral lessons of aggression and its virtuous defeat to anyone able and willing to convey such a story through sound, picture and/or print. In this way, the production of moral drama made for good foreign policy: the world would be persuaded that, in contrast to Nazi evil, the American conception of justice was righteous.

Mainly due to the fact that Nazis preferred American to Soviet captivity – and therefore did their very best to reach the west of Germany before surrendering themselves – the Americans were in a considerably stronger position than their Allies to shape the way in which Nuremberg would be run. (The British were second to the Americans in holding most of the 'major war-criminals'). So strong was their position, in fact, that Jackson occasionally threatened that the US might 'go it alone' if agreement between the Four Powers could not be reached in London. As one British observer noted in the later stages of negotiation:

[T]he Americans hold most of the major criminals [...] and they are very anxious to be free to try before the International Military Tribunal any person who they consider to be a major criminal, even though the other prosecutors hold the contrary view.

These facts have led the Americans to drive a very hard bargain in the way of establishing the Court and procedure in accordance with Anglo-Saxon ideas.<sup>22</sup>

As a result, the Four Powers had agreed upon a significant 'dramatic' element for the trial during the negotiations at the London Conference. Rather than the continental system of court procedure whereby the lawyers, at the start, would submit all evidence to the judges who would then conduct their own inquest, they adopted – under American pressure – the Anglo-Saxon adversarial system instead.<sup>23</sup> With the inevitable conflict between two 'sides' through the cross-examination of witnesses and defendants, the rebuttal of argument and evidence and discussions of law and procedure, many American planners automatically expected that any legal procedure would be put to great dramatic use.<sup>24</sup>

As Dean continued in his memorandum to Jackson, reporting the story of the trial would require American control from its source:

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<sup>22</sup> Sir A. Cadogan, 'Brief for Mr. Attlee', 1/Aug/1945, repr. in: Butler & Pelly, (eds.), *Documents on British Policy Overseas*, p. 1101.

<sup>23</sup> See: Jackson, (ed.), *Conference*, pp. 76-77.

<sup>24</sup> This is to reverse Richard Harbinger's observation that a criminal adversarial trial is 'a dramatic thing put to legal use'. Richard Harbinger, 'Trial by Drama,' *Judicature*, Vol. 55, No. 3 (1971). An assumption, so fundamental that it can easily be overlooked, is that any drama derived from adversarial procedure depends on pleas of innocence that the prosecution can then counter. Thus it is possible to suggest that, given their expectations of drama, the planners of Nuremberg did not expect – and were correct in their assumptions – that any of the defendants would plead guilty as charged.

The United States should proceed on the assumption that since the trial is to be in the American control zone, it must bear the large share of the burden of organizing, staffing and equipping those who will be responsible for the Public Relations phases of the trial.<sup>25</sup>

Although he referred to organizing the trial as 'a burden', the Americans' insistence on hosting it in the American zone of occupation ensured that it also amounted to an opportunity to convey the story of the trial in their own way. Being liberals, legalists, democrats, and winners of what was believed to be a just war against Nazi oppression, the appropriate American method of conveying the story of Nuremberg was to persuade rather than to coerce. What all the American planners seemed agreed upon from the earliest stages was that there should be no censorship of reporting from the courtroom. Apart from security concerns that the Army might have, 'the world should have every bit of the news regarding [the proceedings] - good or bad'.<sup>26</sup> To facilitate this, the 'best possible communications' would be required.<sup>27</sup> With the possibilities for speedy transmittal of both positive and critical reporting, there was, therefore, a need to ensure that what happened in the courtroom would reflect the best ideals of American justice so that 'the world must be convinced that we are right'.<sup>28</sup>

The only qualification to facilitating the reporting of the trial was the desire to maintain what Dean and Jackson referred to as the 'dignity' of the court: to show that Reason, rather than passion, was, in contrast to Nazi – and Soviet – justice, what distinguished a trial run on American (i.e. liberal) grounds. Both Dean and Jackson expressed their wish to ensure the maintenance of 'dignity' on many occasions – most often in regard to just how press reporters and cameramen could be accommodated successfully. Implicit in all such concerns was the belief that, necessary as they were, such trappings of modern public life were, in contrast to the proper functioning of a court, inherently *undignified*. As early as May 1945, Dean had envisaged a solution to what he and Jackson saw as a problem with the issue of press reporters. The solution was to construct a glass screen that would separate them from the court.<sup>29</sup> In this way, the sound of calm and dispassionate proceedings, unhampered by unruly interruption, impulsive reactions, or general chatter, would be relayed to onlooking

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<sup>25</sup> Gordon Dean to RHJ, 'Plan for Public Relations Organization for the Trial of the Major War Criminals', 11/Aug/1945, 'NARA/RG-238/51/27/'Suggestions Re Publicity'.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Gordon Dean to RHJ, 'An Educational Program in Connection with the Prosecution of the Major War Criminals', 30/May/1945, NARA/RG-238/51/26/'Untitled Folder'.

<sup>29</sup> Ibid.

reporters via a speaker system.<sup>30</sup> All such undignified noise generated by the reporters themselves could be isolated to the other side of the glass screen. Francis Shea, one of Jackson's senior aides, agreed strongly with the idea and suggested that it be considered as an important factor in choosing an appropriate venue for the trial.<sup>31</sup>

However, General William J. Donovan, the chief of the Office of Strategic Services (OSS), with public reception foremost in his thoughts, took great exception to the idea of a separate room for reporters:

I have gone over Dean's memorandum to you on "Site of the Trial". It contains one fundamental fallacy which, I believe should be dealt with at once. This is the idea that the Press should be separate from the court. If the Press were to be placed behind a glass partition in a separate balcony, I am afraid they would, in effect, feel themselves separated from the court. If any limitation must be placed on the audience, I do not believe it should be imposed on the Press [...] The Press should be given precedence over all visitors to the court inasmuch as they are the medium through which information on the proceedings of the trials will reach the general public.<sup>32</sup>

The proposal for a glass screen, as Donovan appreciated, was at odds with producing theatre and drama to inspire sustained interest from the 'general public'. It was as though, Donovan implied, press reporters would be representatives of the general public, and to separate them from the court was, in some way, to separate the public itself. There appears to have been no discussion of Donovan's point. Rather, Dean and Jackson simply heeded his objection and resolved, instead of a glass screen, to organize a system of accreditation whereby a representative selection of the world's press would be allocated a total of 250 seats – within the courtroom itself.<sup>33</sup>

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<sup>30</sup> This is, in fact, the method now used in various international courts in the Hague – leading the observer to feel slightly detached from the proceedings on the other side of the bullet-proof glass screen.

<sup>31</sup> Francis M. Shea to Gordon Dean, [memorandum], 31/May/1945, NARA/RG-238/51/26/'Untitled Folder'.

<sup>32</sup> William J. Donovan to RHJ, 'Lt. Dean's Memorandum on the Site of Trial', 28/Jun/1945, NARA/RG-238/51/39/'Untitled Folder'.

<sup>33</sup> Gordon Dean to RHJ, 'Plan for Public Relations Organization for the Trial of the Major War Criminals', 11/Aug/1945, 'NARA/RG-238/51/27/'Suggestions Re Publicity'.



**FIGURE 1:** Journalists in the courtroom at Nuremberg with a direct view of the proceedings, 14/Nov/1945. NARA/RG-226/85/39/653/SC 216217.

Yet just how representative the selection of reporters would be was already apparent in August 1945. The policy was as follows: first priority was given to reporters from the 'Four Powers' represented on the Tribunal; the next was for those from other Allied nations; thirdly came seats for 'neutrals'.<sup>34</sup> It would be left to the Psychological Warfare section of the Army (soon to become the Information Service Division) to determine what news would be made available to German-language newspapers operating with Control Council approval.<sup>35</sup> In the final list, detailing the names and nationalities of 249 correspondents, the numbers of allocated seats for reporters are as follows:

American .....	71
British .....	42
French.....	36
Russian .....	39
Others .....	61 <sup>(36)</sup>

The American planners allocated no seats to any trusted German (anti-Nazi) reporters even though they viewed German reception of the proceedings as important. This mattered to the Americans so much, in fact, that they made an exception to the rule of non-censorship in the case of German reporters. The process of 're-education' could ill afford criticism of the trial or the Allies even from liberal and/or anti-Nazi

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Anonymous [possibly Gordon Dean], 'Correspondents at Nuremberg Trials', c. Nov, 1945, NARA/RG-238/51/26/'Press Coverage'. The 61 other nationals were as follows: Brazil -1, China - 1, Czechoslovakia - 15, Denmark - 5, Italy - 1, Luxembourg - 1, Netherlands - 9, Norway - 4, Poland (including 2 'London Poles') - 14, 'South America' - 1, Spain - 2, Sweden - 4, Switzerland - 2, Turkey - 1.



German sources since it might play into the hands of unrepentant Nazis or Nazi sympathizers. The number of seats allocated to American newspaper reporters suggests that, along with the Germans, it was for domestic consumption that American planners considered the lessons of Nuremberg to be significant. Thus, if the trial might appear as good foreign policy for America, it was the audience at home that seemed to constitute the most immediately important priority.<sup>37</sup> Press reporters were, therefore, well fed and watered and allocated the most grandiose of all billeting throughout Nuremberg in Faber's aptly nicknamed 'Pencil House'. As one American news magazine reported even before the trial had begun, 'No trial in history has had such elaborate press arrangements'.<sup>38</sup>

Also affecting the functioning of the court was Dean and Jackson's desire to ensure that the trial would be filmed 'for historical purposes and for the newsreels [and that] such coverage could be used to great advantage'.<sup>39</sup> By 'historical purposes', Dean meant that once the trial was over, 'documentary and historical films' could be made about the trial.<sup>40</sup> As for the newsreels, in order (once again) to maintain the 'dignity' of the proceedings, the plan to incorporate 'inconspicuous [camera] installations' into the design of the courtroom would allow a single, official, team of (stationary) cameramen to provide a source of footage. This would be pooled for the newsreel companies – avoiding any uncoordinated jockeying for position (both in the sense of procuring permission to film and in the quite literal, physical, sense - within the courtroom itself).<sup>41</sup>

Circumstances suggested that the OSS, with a primed Field Photographic Branch ready for action, seemed the natural choice to film the proceedings.<sup>42</sup> This prompted at least one (anonymous) individual within the OSS to become very excited at the prospect of recording the 'drama' of the trial. The memorandum circulated within the FPB began as follows:

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<sup>37</sup> See Chapter 2, section 2.7.

<sup>38</sup> 'The Press', 'Skiing, Tennis, Tail-Coated Waiters to make War Trials Heaven for Press', *Newsweek*, 1/Oct/1945.

<sup>39</sup> Gordon Dean to RHJ, 'An Educational Program in Connection with the Prosecution of the Major War Criminals', 30/May/1945, NARA/RG-238/51/26/'Untitled Folder'.

<sup>40</sup> Gordon Dean to RHJ, 'Plan for Public Relations Organization for the Trial of the Major War Criminals', 11/Aug/1945, NARA/RG-238/51/27/'Suggestions Re Publicity'.

<sup>41</sup> *Ibid.*; E. R. Kellogg to John A. Stacy, 'War Crimes – Field Photographic Functions', 16/Jul/1945, NARA/RG-226/90/15/196-A ('War Crimes').

<sup>42</sup> See above: Chapter 2, pp. 26-31.

The makers of these films will be recording the greatest and most dramatic trials [sic] the world has ever seen, or probably will ever see. They will have an unequalled opportunity for perpetuating the nemesis that has overtaken the war criminals; but upon them will also rest the responsibility for producing an historic record that will stand as a permanent justification of our democracy as well as serve as a deterrent to the conquered peoples for all time.<sup>43</sup>

What, in hindsight, appears as naive optimism in regard to what the trial could achieve was typical of the attitude of the OSS in general, an organization that had successfully expanded and had achieved so much during the war.<sup>44</sup> Yet the expectations expressed in this passage (and throughout the memorandum) were particularly high. Most obvious is the assumption that the trial would provide unparalleled drama ready to be captured on film. Next, the trial, and the process of filming it, would provide an opportunity for 'perpetuating the nemesis' of the Nazi defendants. Showing images of Nazis being forced to account for their horrible crimes would constitute the final nail in the coffin for Nazism. In contrast to the situation after the First World War, it would now be possible to make a visual record of the enemy's defeat or, as framed in Chapter 2 above, to explode the swastika.<sup>45</sup> Yet another assumption was the belief that filming the trial would provide an opportunity to proselytise the cause of 'our' – that is, American – democracy. What better way was there to convince people around the world that liberal democracy was the best form of social organisation than to picture the dramatic contrast between defeated barbarians and the successful defenders of 'civilization'?<sup>46</sup> Finally, the memorandum contained an expression of faith in the utilitarian, or 'consequentialist' purpose of law: a visual historical record of the trial would serve to deter the Germans 'for all time' (most probably against starting wars of 'aggression', although this was not stated).<sup>47</sup> All these assumptions and expectations resulted from the failures of the First World War and its failed peace. In that case, justice had been delayed and denied and this was

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<sup>43</sup> Anonymous, 'A Note on the film record of the War Crimes Trials', undated [c. Jun-Jul, 1945], NARA/RG-226/90/12/126; NARA/RG-226/148/73/1038; NARA/RG-226/148/76/1087. Although individual authorship cannot be confirmed for this document, there are (at least) three copies of it (in separate locations) within the files of the OSS. During 1945 lawyers and others spoke of trials (i.e. in the plural) in two senses. First, individual defendants were each deemed to constitute a 'trial' even though they would be part of a single procedure in the same courtroom. Later, a second trial of major war criminals was envisaged, but the idea was dropped. See Donald Bloxham, 'The Trial that Never Was': Why there was no Second International Trial of Major War Criminals at Nuremberg, *History*, Vol. 87, No. 285 (2002). To complicate things further, historians occasionally refer to the 'Nuremberg Trials' without distinguishing between the IMT and the 12 'subsequent' trials based on the (international) laws of the London Charter, but run exclusively by Americans.

<sup>44</sup> See: Chapter 2 above; Smith, O.S.S.; Katz, *Foreign Intelligence*; Brown, *The Last Hero*.

<sup>45</sup> See Chapter 2, pp. 19-20.

<sup>46</sup> As we shall see, such terms were used to dramatize the contrast between the defendants and their enemies.

<sup>47</sup> That pacifism amongst the German population is even considered a 'myth' worth refuting implies, at least, an acknowledgment of the existence of a thesis that suggests the Germans have 'learnt lessons' from their history (including those taught by Nuremberg). See, for example: Brian C. Rathbun, 'The Myth of German Pacifism', *German Politics and Society*, Vol. 24., No. 2 (2006), pp. 68-81.

a tragic mistake to be avoided: such mistakes had enabled greater injustices to unfold in a Second conflict.<sup>48</sup> Not only would justice need to be done this time: it would also need to be seen to be done, to be witnessed as a lesson writ large that crime would no longer pay. As a lesson deemed capable of affecting future behaviour, it was not just aimed at the 'vanquished', but also at the 'victors' and 'neutrals' too. Thus, for such a wide audience, careful stage-management of the trial was imperative, requiring, for its foundations, an appropriate setting that would facilitate the production of a visual record, a lesson 'for all time'.

Not only would the court need to be designed to accommodate news and radio reporters as well as a film crew; it would also require facilities for what would now be called multi-media presentation – graphics, photographs and films – so that evidence could be conveyed to the judges and the public in accessible forms. As Jackson was advised, however, there was an initial problem in procuring the very best person available to take charge of graphic design:

Dave Zablodowsky is a top-flight Presentation man who played a major role in the San Francisco conference work. [...] He was coming over here [to London] to head up the work which Presentation Branch will do [for the IMT trial]. He has a left-wing background [and so the] State Department apparently refused passport clearance [for him to leave the United States. Thus,] the importance of your mission [has been stressed] as a ground for having an exception made.<sup>49</sup>

An 'exception' was made and Zablodowsky, an OSS man, did end up in Nuremberg.<sup>50</sup> War-time innovation in turning complex information into digestible graphics for the President and Chiefs of Staff, as well as the experience gained in design and presentation at the San Francisco meeting of the United Nations Organization, meant that Zablodowsky and his fellow OSS presentation men were indispensable – whatever their politics.<sup>51</sup>

The courtroom itself would be engineered to facilitate such presentations and, once again, an OSS Presentation Branch man was given responsibility for this task.<sup>52</sup> The architect, Dan Kiley, was appointed in July and immediately set to work on designs and drawings – some purely conceptual, and others based on real locations (such as his favoured one, the Munich Opera House).<sup>53</sup> Kiley accompanied Justice

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<sup>48</sup> James F. Willis, *Prologue to Nuremberg: the politics and diplomacy of punishing war criminals of the First World War* (Westport, Conn.; London: Greenwood, 1982).

<sup>49</sup> James B. Donovan to RHJ, [Memorandum], LoC/RHJP/106/'OCC Staff, P-Z'.

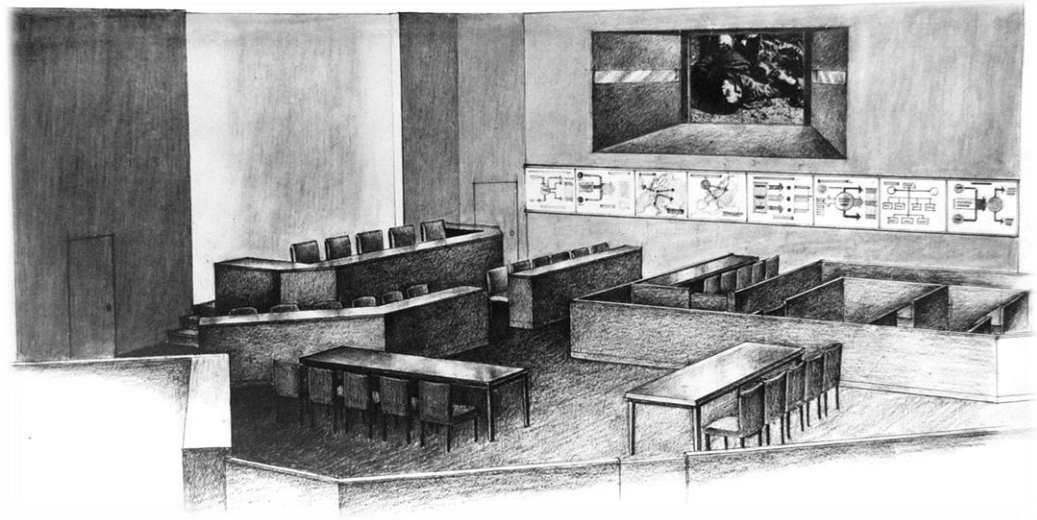
<sup>50</sup> Zablodowsky's 'left wing background' would lead him to become 'Case Number 103' in Joseph McCarthy's Government Operations Committee hearings.

<sup>51</sup> Of course the only politics unacceptable was Nazism. Barry Katz, 'The Arts of War: "Visual Presentation" and National Intelligence,' *Design Issues*, Vol. 12, No. 2 (1996).

<sup>52</sup> Bruce M. Stave, Michele Palmer, & Leslie Frank, *Witnesses to Nuremberg: an oral history of American participants at the war crimes trials* (New York: Twayne Publishers, 1998), pp. 15-36.

<sup>53</sup> *Ibid.*, p. 19.

Jackson, General Donovan, and others on a German reconnaissance trip in order to visit potential locations for the trial. Although advising them of his favoured location (Munich) he later recalled that 'it was [already] in the works to have [it in] Nuremberg.'<sup>54</sup> The sketch below, however, dates from July 1945 – just before Nuremberg was chosen as the site of the trial.



**FIGURE 2:** An early sketched proposal of the layout of the IMT courtroom. The proposed projection screen above the charts shows a scene from an atrocity film. c. 17/Jul/1945, NARA/RG-238/51/39 (declassified, NND 780063).

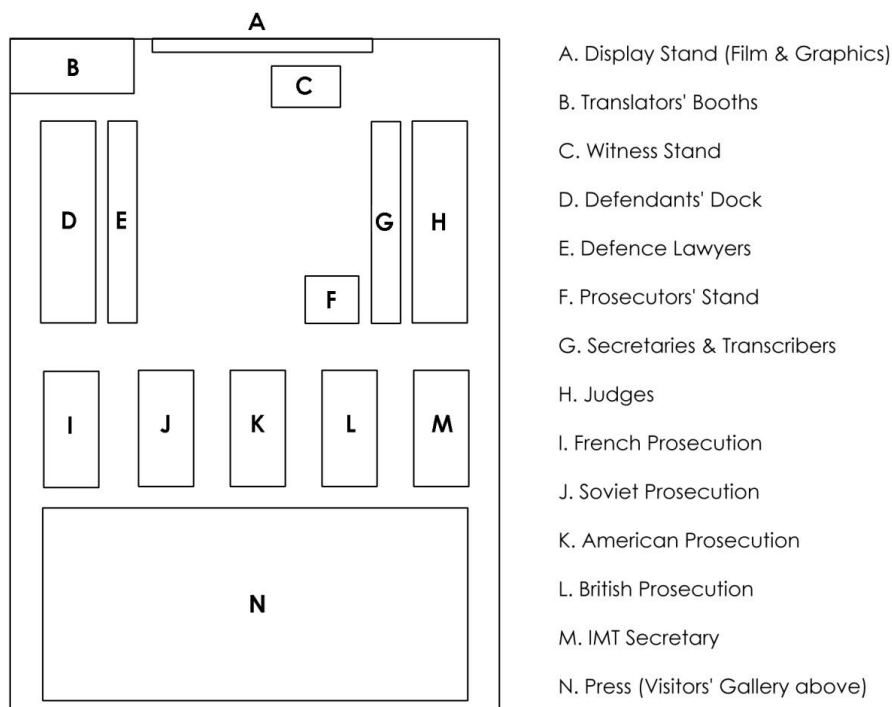
As we can discern from this example – which has not been examined since 1945 – the presentation of charts and films was viewed by the OSS as fundamental to the American case and an essential factor in the design of the courtroom. The projection screen displays a scene from an atrocity film. Well before the court was convened, therefore, the projection of atrocity film shot by Allied 'liberators' of the concentration camps in Western Germany was already envisaged as playing an important role in conveying the crimes of Nazism – even if the supreme crime, according to the American Prosecution, was that of conspiracy to wage 'aggressive war'. The intention to accommodate the presentation of film and graphical evidence into the design of the courtroom, as well as the intention to accommodate the making of a visual record of the proceedings, was entirely new in 1945. As Gordon Dean advised Jackson:

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<sup>54</sup> Ibid.

The attached diagram and sketch prepared by one of the men in the Presentation Branch of OSS, suggests a novel, if not intriguing, court room arrangement intended to give audience, witnesses, judges, attorneys, etc., each a better view of the other and afford at the same time a concentration of the "functioning" personnel. Such an arrangement also affords better opportunity for showing evidentiary film, charts, diagrams, and standing exhibits. It also gives better angles for the cameramen who are making the official movies of the trial. At least it is worth thinking over.<sup>55</sup>

Dean's comments – that the sketch suggested something 'novel, if not intriguing,' but worth 'at least [...] thinking over' – implies that he suspected that the layout might be a little unconventional for Jackson's tastes. Yet the final layout of the courtroom, in the Nuremberg Palace of Justice, was even more unorthodox. Unlike the common setup of Allied nations' domestic courts, the judges' bench would not be positioned as the central point of focus for the other participants and observers in the room.



**FIGURE 3:** A simplified plan of the IMT courtroom in the Palace of Justice, Nuremberg, 1945-6. [Based on a (more complex) plan within a pamphlet given to visitors of the court. IWM/Docs/Cat 5706/Ger Misc 11 (55)].

Instead, the judges' bench was set to one side, opposing the defendants' dock on the other. The four Prosecution teams, as well as all non-participating observers, directly faced the wall on which charts, other graphics, and films, would be presented. Sitting to one side of this wall was positioned the witness-stand so that witnesses would also face directly the onlooking observers in court (i.e. the Press and visitors in the balcony above them). Thus visual evidence, and witness-testimony, would take centre stage, and the defendants and their judges, whilst being clearly

<sup>55</sup> Gordon Dean to RHJ, 17/Jul/1945, NARA/RG-238/51/39.

visible, would appear at each side of the scene, facing each other. The American Prosecution would be positioned centrally among the rows of the other prosecutors and the IMT Secretary. All the Prosecution teams would sit and present evidence with the Press and visitors directly behind them: as though to confirm the effect of accusing and presenting evidence on their behalf. A few days into the trial, James B. Donovan, working in the OSS Presentation Branch on behalf of the OCC (not to be confused with General William J. Donovan, the chief of the OSS), wrote home with much enthusiasm regarding the results of this courtroom design:

Everyone imaginable is here. Hundreds of newspapers, all over the world, have correspondents. The courtroom is very ingeniously designed – we did it (Presentation Branch) you know. It looks like an ordinary courtroom but in every wall are hidden broadcasting booths, photographers, etc. Talk about your historic occasions.<sup>56</sup>

#### 4.2. Theatrical Words

The trial opened with three days of preliminary hearings and motions followed by an opening statement by the presiding judge. Originally, it had seemed likely that the President of the Tribunal would be Francis Biddle, the senior American judge. Yet, as Jackson noted in his diary, if Biddle were to become President, the entire process might appear to be (even) more of an American, rather than international, trial:

I became convinced that the British were intending to offer the chairmanship of the Tribunal to Biddle [who] has indicated that he would desire it.

[...] It now looks as if the whole responsibility of these trials will be pushed onto the Americans [who will be held] responsible in the eyes of the world for anything that goes wrong. [...]

The Americans are hosts at Nuremberg and have all the responsibility for physical arrangements. They have the leading part in the prosecution. If they are also to have complete responsibility for the Court, it does not seem that the United States is being placed in its proper relationship to European affairs. I have agreed to present this matter to Biddle myself and try to persuade him to decline the chairmanship...<sup>57</sup>

Given America's embroilment in two European wars during his lifetime, it seems difficult to imagine that Jackson would have been much concerned with overreaching America's 'proper' relation to European affairs. What seems far more probable is that this was merely a way to avoid reiterating his anxious concern that Americans would be held exclusively responsible for anything that might go wrong during the trial. Biddle was persuaded to relinquish his coveted position (although it is not entirely clear how much choice he had in the end) and, bitterly disappointed,

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<sup>56</sup> James B. to Mary Donovan, Personal Letter, Friday [23/Nov/1945], Hoover/JBDP/34/20.

<sup>57</sup> RHJ, Diary, 8/Oct/1945, LoC/RHJP/95/'Diary'.

saw the Presidency go to Lord Justice Lawrence.<sup>58</sup> Thus, inadvertently, the trial began with an aristocratic British voice slowly delivering an opening address that, whilst mostly dealing with simple matters of procedure, provided an air of ancient, Old World, predictability and adherence to long-established principles of justice. It concluded with a rather elevated sense of occasion:

The Trial which is now about to begin is unique in the history of the jurisprudence of the world and it is of supreme importance to millions of people all over the globe. For these reasons, there is laid upon everybody who takes any part in this Trial a solemn responsibility to discharge their duties without fear or favour, in accordance with the sacred principles of law and justice.<sup>59</sup>

This statement, reminding the audience of solemnity of an occasion to be based on 'the sacred principles of law and justice,' was followed by the reading of the indictment which served as a historical narrative of the Nazi Party and its leaders as much as a legal document.

The courtroom drama began on 21<sup>st</sup> November 1945 when the defendants' pleas (of "nicht schuldig") were heard and followed by Robert H. Jackson's eloquent opening speech.<sup>60</sup> He viewed the occasion (he told his wife in a letter) as the 'opportunity of a lifetime to say something worthwhile on international law'.<sup>61</sup> His words reached well beyond the technicalities of the legal innovations and negotiations that had preceded the opening of the international court. As Norman Birkett, the 'associate' British judge on the bench, later recalled: 'Here was a man who had read Blackstone and was obviously a man of law; but here also was a man who had read and loved King James's Bible, and was also a man of letters'.<sup>62</sup> As another observer, Telford Taylor, later recalled, 'I know of nothing else in modern juristic literature that equally projects the controlled passion and moral intensity of many passages'.<sup>63</sup> Jackson's style of speech, in general, and at this particular moment, was not typical of a lawyer. He had realised early in his career as a country lawyer that more than just a good command of the right evidence was required in any case: 'A young lawyer that went into [a case] had to take care of himself and put on a good show. If he didn't, he didn't get any more business'.<sup>64</sup> What he had

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<sup>58</sup> Article 4(b) of the London Charter stated that 'The members of the Tribunal shall, before any Trial begins, agree among themselves upon the selection from their number of a President'. IMT, Vol. I, p. 10.

<sup>59</sup> IMT, 20/Nov/1945, Vol. II, p. 30.

<sup>60</sup> IMT, 21/Nov/1945, Vol. II, pp. 97-155.

<sup>61</sup> RHJ to [R]ene Jackson, 15/Oct/1945, LoC/RHJP/2/3.

<sup>62</sup> Norman Birkett, 'Forward' in: Gerhart, *America's Advocate*, p. vi.

<sup>63</sup> Taylor, *Anatomy*, p. 167. Taylor would take over from Jackson as Chief of Counsel responsible for the running of the twelve 'subsequent' Nuremberg Trials.

<sup>64</sup> RHJ cited in: Hockett, *New Deal Justice*, p. 221.

also learned was to appeal "to people's sense of natural justice".<sup>65</sup> This was fortunate, since he was not only addressing the judges, lawyers, and defendants in the room; the court was packed to capacity with press reporters, dignitaries and other guests, and the speech would appear in newsreels of Allied and other nations (including Germany). In addition to millions of contemporaries, Jackson hoped – as did some of his colleagues – that the trial would leave something to 'posterity'.<sup>66</sup> There is little doubt, therefore, that the style of his speech was influenced by his own appreciation of the significance of the occasion. As he later recalled, 'I had a rather strong sense of responsibility about the speech, and recognised that it was probably the most important task of my life'.<sup>67</sup>

It was, furthermore, influenced by his upbringing.<sup>68</sup> As his daughter-in-law would recall (much later), 'He was educated in [...] the two things that were most important, I think - the Bible and Shakespeare – and [educated] well... [but he] never boasted about it'.<sup>69</sup> These two important literary influences – ignored, until now, by legal and other historians (including biographers) – contributed to the moral and theatrical dimensions of his speech which began, not only with (some) mention of law, but with 'wrongs', 'civilization', 'Power' and 'Reason':

The privilege of opening the first trial in history for crimes against the peace of the world imposes a great responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>70</sup>

Already, Shakespeare had made his mark, a point that seems to have remained unnoticed (or, at least, unworthy of mention) by Gary Bass, author of *Stay the Hand of Vengeance*, as well as all other historians of Nuremberg and International Criminal Law.<sup>71</sup> The phrase, 'stay the hand of vengeance', was adapted from *Richard II* and Jackson's notes included other related thoughts derived from Shakespeare.<sup>72</sup> Fair

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<sup>65</sup> Ibid., pp. 220-221.

<sup>66</sup> The following correspondence all stresses the importance of 'posterity': Stuart to Barbara Schulberg, 19/Oct/1945, SSP; Sheldon Glueck to RHJ, 'Historical Record of the War Crimes Enterprise', 24/Jun/1945, NARA/RG-238/51/27/'Suggestions Re Publicity'; William E. Jackson to James B. Donovan, 1/Jun/1945, NARA/RG-238/51/18/'Colonel Bernays'.

<sup>67</sup> RHJ, Phillips Oral History, p. 1,392. LoC/RHJP/259/4.

<sup>68</sup> For biographies of Jackson, see Chapter 4, note 15.

<sup>69</sup> Nancy Roosevelt Jackson, *Jackson Center Video and Audio Archive*, <http://preview.roberthjackson.org/Center/videolist>, (last access: 04/May/2010).

<sup>70</sup> IMT, 21/Nov/1945, Vol. II, pp. 98-99.

<sup>71</sup> Bass, *Stay the Hand of Vengeance*.

<sup>72</sup> Shakespeare, *Richard II*, V, III ('Stay thy revengeful hand'); LoC/RHJP/103/'Notes'.



play was his general theme. Alongside the theatrical eloquence of such words – adapted, borrowed, and invented – emerged hints of the moral judgement of the Prosecution that became more explicit further on in the speech: the defendants were guilty, contended Jackson, of ‘planned and intended conduct that involves moral as well as legal wrong’.<sup>73</sup>

As though to express consciousness of the fragility of *Allied* virtue – in the self-appointed role of political, legal and moral judgement – Jackson made clear that ‘the record on which we judge these defendants today is the record on which history will judge us tomorrow’.<sup>74</sup> In other words, if the proceedings were characterised by unfairness or hypocrisy, or if the laws now applied were not, in the future, deemed equally applicable to the Allies now sitting in judgement, International Criminal Law would lose any moral validity it might have. Herbert Wechsler, advisor to the American judges, repeatedly stressed to Judge Biddle the importance of this point – what he later expounded upon in print as the ‘Neutral Principles’ in law: judging others only by standards that judges would be happy to be judged by themselves.<sup>75</sup> Such a concern had led Jackson to drop any idea of holding the defendants criminally responsible for the bombing of civilians from the air – despite the fact that the aerial bombing of Rotterdam or Coventry (to name only two examples) were clear breaches of well-established International Law. As he explained to the other delegations at the London Conference:

[W]e left out of our [American] draft [of the Charter] the destruction of villages and towns, because I have seen the villages and towns of Germany. I think that you will have great difficulty distinguishing between the military necessity for that kind of destruction as distinguished from some done by the Germans [...] It seems to me those subjects invite recriminations that would not be useful in the trial.<sup>76</sup>

Such recriminations would have possibly related to the Allied bombing of Dresden or Berlin. But the (Allied) destruction of the city in which the trial itself was to be held was perhaps what constituted the most obvious moral case for dropping such charges against the defendants. The man in charge of all American visual evidence at the trial, James B. Donovan, described Nuremberg in particularly graphic terms in a letter to his wife:

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<sup>73</sup> IMT, 21/Nov/1945, Vol. II, p. 102.

<sup>74</sup> Ibid, p. 101.

<sup>75</sup> Citron, ‘The Nuremberg Trials and American Jurisprudence,’ p. 407; Herbert Wechsler, ‘Toward Neutral Principles of Constitutional Law,’ *Harvard Law Review*, Vol. 62 (1959).

<sup>76</sup> ‘Minutes of Conference Session of July 25, 1945’, Jackson, (ed.), *Conference*, p. 380.

It is the most complete picture of devastation that could be conceived. You stand in the "Grand Hotel" (about 50% of which is intact but frightfully damaged) and so far as you can see it looks like the ruins of Carthage. You can drive for ten minutes in any direction and cannot see a building standing. The damage to London is negligible compared with this. The [ancient] walled city is simply a huge mass (for several miles in every direction) of rubble, twisted steel and great concrete slabs. Parts of the wall can still be seen in places, but very little of it. I cannot believe that this city could be re-built in anything less than a century.<sup>77</sup>

Only twelve days after Jackson had expressed his concerns at the London Conference, an American B-29 bomber dropped a nuclear bomb on Hiroshima, killing 70-80,000 civilians in an instant. On the day after the London Charter was signed, Nagasaki was also bombed with a nuclear weapon. For the Allies to indict any other nation's leaders – even Nazi leaders – for the bombing of civilians would have aided considerably any scepticism towards their aims to shape the future of international relations based on the rule of law. As Jackson had implied rather cautiously, the Allies – in regard to the bombing of civilians – did not inhabit the moral high-ground. This partly explains why, for him, the supreme international crime was to start an unjust, or 'aggressive', war. This sincerely held belief that 'aggressive war' was the greatest crime, entailing within it the responsibility for all others (i.e. War Crimes and Crimes Against Humanity), helped to deflect qualms about any (criminal) Allied behaviour.<sup>78</sup> Jackson addressed the Allied bombing of Nuremberg within his speech, but only in the context of 'Aggressive War' unleashed by the Nazis:

It is not necessary among the ruins of this ancient and beautiful city with untold members of its civilian inhabitants still buried in its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes.<sup>79</sup>

As Wechsler put it, 'To be sure, the depravity of our enemies and *the fact that theirs was the aggression* accord us such large leeway in this connection that our relative moral position is secure'.<sup>80</sup>

Jackson had intended to stress further the importance of 'neutral principles' (as Wechsler framed it) in the Allied legal case during his opening speech. But it appears that only as he spoke did he decide to omit another Shakespearean flourish (this time it came from *Hamlet*). 'To pass these defendants a poisoned chalice,' he had intended to say, 'is to put it to our own lips as well'.<sup>81</sup> No one who has published on

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<sup>77</sup> James B. to Mary Donovan, Personal Letter, 24/Sep/1945, Hoover/JBDP/34/20.

<sup>78</sup> See p. 59 above for Jackson's view, expressed at the London Conference, that only countering aggression justified interfering in other countries internal affairs (in order to counter, for example, persecution or the violation of human rights).

<sup>79</sup> IMT, 21/Nov/1945, Vol. II, p. 155.

<sup>80</sup> Herbert Wechsler, 'The Issues of the Nuremberg Trial,' *Political Science Quarterly*, Vol. 62, No. 1 (1947), p. 26. (Emphasis added).

<sup>81</sup> IMT, 21/Nov/1945, Vol. II, p. 101.

the trial since, it seems, appears to have noticed that these words were not actually spoken in the courtroom.<sup>82</sup> Although his personal secretary was asked by James B. Donovan (a year after the trial) why he omitted them, there appears to be have been no explanation from Jackson. Was it the case, wondered Donovan, that he had simply made a mistake?<sup>83</sup> This seems unlikely since – due to the (not quite) 'simultaneous' translation system – he was required to speak very slowly. He later recalled that the red warning light at the prosecutor's stand – signifying that the translators wished he would speak more slowly – seemed to be lit 'a good deal of the time'.<sup>84</sup> Another possibility is that Soviet inclusion in the trial grated with Jackson and this particular line – he may have considered – might come back to haunt the entire enterprise. Even though Jackson had decided to make little mention of German aerial bombardment, the Soviets had insisted on holding the Nazi leaders responsible for the massacre of 11,000 Polish officers at Katyn in 1943.<sup>85</sup> Jackson, along with the other leading prosecutors – including the Soviets – knew that this crime had been committed by the Soviets themselves.<sup>86</sup> He had been warned by General Donovan that Soviet insistence on prosecuting the Nazis for a crime they had committed themselves 'would present a difficulty in the trial' and that the Defence might produce witnesses who would testify that this murder was 'done by the Russians'.<sup>87</sup> The Soviets were already putting it to their own lips as well: using the trial to airbrush their own (criminal) record of the war, something entirely at odds with the point of 'neutral principles' that Jackson had already made in his speech.

Whatever the reason for Jackson's omission, however, the 'poisoned chalice' line was deemed significant enough to be retained, both in the official record published by the Tribunal as well as the separate, official publication of the American Prosecution.<sup>88</sup> In this way, an effective piece of dramatic language was officially reinstated after the event. The line was also deemed significant by Paramount filmmakers who hoped that Jackson would agree to re-record his speech for use in

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<sup>82</sup> IWM/Sound/3202/8. Telford Taylor – who was at Nuremberg – mistakenly quotes Jackson using this line: *Taylor, Anatomy*, p. 168. The appearance of the line in the official transcript volumes of the IMT has caused others to replicate the mistake. For example, see: Lawrence Rockwood, *Walking Away From Nuremberg: Just War and the Doctrine of Command Responsibility* (Amherst: University of Massachusetts Press, 2007), p. 1.

<sup>83</sup> Gordon Dean to Elsie Douglas, 31/Jan/1947, LoC/RHJP/11/12.

<sup>84</sup> RHJ, Phillips Oral History, p. 1,396. LoC/RHJP/259/4.

<sup>85</sup> This did not include the entire number of those murdered in the Katyn forest: approximately 20,000 captured Polish citizens. IMT, 20/Nov/1945, Vol. II, p. 65.

<sup>86</sup> See Jackson's folder on the subject: LoC/RHJP/115/'Katyn massacre'. What Jackson may not have know, specifically, was that the NKVD was responsible.

<sup>87</sup> William J. Donovan to RHJ, [c. Oct-Nov 1945], LoC/RHJP/103/'Katyn Forest Massacre'.

<sup>88</sup> IMT, 21/Nov/1945, Vol. II, p. 101; NCA, Vol. I, p. 116.

Lewis Allen's *Sealed Verdict*, an early dramatisation of post-war justice.<sup>89</sup> The filmmakers wanted to do this, not only to achieve a better quality of audio than had been recorded at the trial, but also, specifically, to capture the 'poisoned chalice' line.<sup>90</sup> The line has been used more recently to condemn American military behaviour and the failure to apply the international legal standards first applied by America and its allies at Nuremberg.<sup>91</sup>

As for the Germans, perhaps nothing better represented the failure to live by long-established and publicly-proclaimed moral standards than the actions (or most often, the inaction) of senior figures within the German Christian Churches during the Nazi period. Heroic Christian leaders were few and far between: only Bishop Sproll and Pastor Niemöller made an appearance in the part of Jackson's speech devoted to 'The Battle Against the Churches'.<sup>92</sup> The American Prosecution viewed the churches as nothing other than victims of Nazi persecution – Christian collaboration or acquiescence had no part in proving Nazi guilt – and it devoted time to proving this in court (the man responsible with preparing the brief on 'Suppression of the Christian Churches' was Father Edmund A. Walsh, a Jesuit from Georgetown University).<sup>93</sup> In his opening speech, Jackson presented the churches (just like Jews<sup>94</sup>) as simply *opponents* of the Nazis, as though any Christian dissent would automatically lead to persecution.<sup>95</sup> In particular, Jackson stated, a 'most intense drive was directed against the Roman Catholic Church'.<sup>96</sup> After outlining some details of 'suppression', he continued:

We will present to you from the files of the Vatican the earnest protest made by the Vatican to Ribbentrop, summarising the persecutions to which the priesthood and the Church had been subjected in this Twentieth Century under the Nazi regime. Ribbentrop never answered them. He could not deny. He dared not justify'.<sup>97</sup>

That such things could happen 'in this Twentieth Century' suggested an almost inexplicable reversion to barbarism and evil, out of all keeping with the progress and nature of modern 'civilization' ('evil,' 'sinister' and 'civilization' were words that Jackson employed repeatedly throughout his opening speech; 'barbarism' appeared

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<sup>89</sup> L. S. B. Shapiro, *Sealed Verdict* (Garden City, N.Y.: Doubleday, 1947).

<sup>90</sup> Gordon Dean to Elsie Douglas, 31/Jan/1947, LoC/RHJP/11/12.

<sup>91</sup> A concluding chapter entitled 'Drinking from the Poisoned Chalice' can be found in: Rockwood, *Walking Away From Nuremberg*.

<sup>92</sup> IMT, 21/Nov/1945, Vol. II, pp. 115-117.

<sup>93</sup> RHJ to [I]Rene Jackson, 15/Jul/1945, LoC/RHJP/2/3.

<sup>94</sup> See Chapter 2, p. 66.

<sup>95</sup> IMT, 21/Nov/1945, Vol. II, p. 117.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

less frequently but several words and phrases were used to suggest that Nazism was essentially atavistic<sup>98</sup>). Jackson had already implied what he had meant by 'Civilization': the defendants had endangered *Christian-era* civilization: 'Against their opponents, including Jews, Catholics, and free labour, the Nazis directed such a campaign of arrogance, brutality, and annihilation as the world has not witnessed since the *pre-Christian ages*'.<sup>99</sup> The Nazis' 'despotism' was equalled only by 'the dynasties of the ancient East'.<sup>100</sup> The defendants were not only 'criminals' but men who had 'set in motion evils which [left] no home in the world untouched'; now, however, their 'capacity for evil' was forever past.<sup>101</sup>

According to Jackson, however, the Nazis were not quite barbarians since, although their 'bestiality and bad faith [had] reached such excess that they aroused the sleeping strength of imperilled Civilization,' they had always been aware, he implied, that what they were doing was immoral.<sup>102</sup> The exposition of their horrors, he later recalled, appeared to have some effect on the defendants:

At times, surprise was plainly registered on their faces. At times when they thought I was being too severe with them, an attitude of resentment showed up. The men in the dock were an interesting study during the speech, particularly Goering whose spirits were quite deflated by the recital.<sup>103</sup>

Yet, if only 'surprise' and 'resentment' showed on their faces – rather than any signs of remorse or acknowledgment of their guilt, Jackson believed that they were nevertheless aware of it. That Ribbentrop 'could not deny' and, more tellingly, '*dared not justify*' Nazi behaviour suggested that the Nazis shared – at least in some degree – the same moral codes as the rest of modern 'civilization'. Jackson and his team of prosecutors would have found it difficult to accept the idea of a particular 'Nazi conscience', as Claudia Koonz has characterised it.<sup>104</sup> Instead, the defendants, sharing at least some measure of morality with their (civilized) accusers, were men of 'troubled conscience' who had taken from their own people 'all those dignities and freedoms that we hold [to be] natural and inalienable rights in every human being'.<sup>105</sup> Their only hope had been that 'International Law will lag so far behind the moral

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<sup>98</sup> On the prosecution's consistent characterization of Nazism as an atavistic phenomenon – opposed to the progress of 'civilization' – see: Douglas, *Memory of Judgment*, pp. 84-89.

<sup>99</sup> IMT, 21/Nov/1945, Vol. II, p. 100. (Emphasis added).

<sup>100</sup> Ibid., pp. 99-100.

<sup>101</sup> Ibid., p. 99.

<sup>102</sup> Ibid.

<sup>103</sup> RHJ, Phillips Oral History, p. 1,398. LoC/RHJP/259/3.

<sup>104</sup> This is only to contend that what the American prosecutors of 1945 believed would not have tallied with the idea of a 'Nazi conscience'. In conflict with their (universalistic) views, see: Koonz, *The Nazi Conscience*.

<sup>105</sup> IMT, 21/Nov/1945, Vol. II, p. 100.

sense of mankind that conduct which is a crime in the moral sense must be regarded as innocent in law'.<sup>106</sup> Here was expressed not only the view that the Nazis were aware of their own immorality; so too can be inferred Jackson's understanding of the relationship between morality and law: the job of legislators (such as himself and others who defined Nuremberg's laws at the London Conference) was to strive in aligning law to 'the moral sense of mankind'.<sup>107</sup> Jackson did not explain, however, from where any such standards of morality (that were universally 'sensed') ultimately derived.

His personal notes provide a clue. Alongside Shakespearian quotations and various thoughts on aspects of the trial can be found quotations from Bishop Konrad Graf von Preysing, whose actions during the Nazi period were more admirable than most of his peers.<sup>108</sup> Preysing had repeatedly written to Pope Pius XII to request that the head of the Catholic Church make some statement against the persecution of 'these unfortunate people,' as he put it in 1941, the Jews in Germany and neighbouring countries. The replies Preysing received were only concerned with the other topics he had mentioned in his letters: he received praise for his public stand against euthanasia and answers to other issues that usually related only to the fate of fellow Christians.<sup>109</sup> Yet Preysing did not require guidance from any earthly power in his understanding of what was right and wrong:

Right is not a free creation of man. Right is not subject to man's caprice, nor to the power of the community, even though the codes of law naturally developed differently among various peoples. Right can not be determined by considering whether an action brings forfeit or not... there is an eternal law outside of all human will, guaranteed by God, a clear and permanent appreciation between good and evil, between what is permissible and what is not permissible.<sup>110</sup>

Preysing's view of the source of morality was fairly predictable but, nonetheless, Jackson wrote it down (this was not the only citation of Preysing's views in Jackson's notes). It is relatively easy to contend that this reflected Jackson's thinking, not merely because he had made a point of noting it, or had strongly implied that the job of legislators was to adapt human law to reflect human morality. Jackson had learnt his trade on a 'steady diet of readings from the oracle of the common law, Black-

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<sup>106</sup> Ibid., pp. 102, 155.

<sup>107</sup> IMT, 21/Nov/1945, Vol. II, p. 155.

<sup>108</sup> Preysing had made contact with the Kreisau Circle, the collection of dissenters who were concerned more with assisting the defeat of Nazism and preparing the moral and political principles required once it was defeated - rather than instigating rebellion as with the more celebrated plotters of 20<sup>th</sup> July 1944. See: Michael Burleigh, *The Third Reich: A New History* (London: Macmillan, 2000), p. 700.

<sup>109</sup> Saul Friedländer, *The Years of Extermination: Nazi Germany and the Jews, 1939-1945* (London: Phoenix, 2008), pp. 185-186.

<sup>110</sup> RHJ, [no date], LoC/RHJP/103/'Notes'.

stone'.<sup>111</sup> Preysing's statement closely echoed Blackstone's views on 'the nature of laws in general':

Considering the Creator only as a being of infinite power, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But, as he is also a being of infinite wisdom, he has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the eternal immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.<sup>112</sup>

Blackstone went further than Preysing in being explicit about immoral human laws:

This law of nature, being coeval with mankind, and dictated by God himself is of course superior in obligation to any other. *It is binding over all the globe*, in all countries, and at all times: *no human laws are of any validity, if contrary to this*; and such of them as are valid derive all their force and all their authority mediately or immediately, from this original.<sup>113</sup>

For Jackson, and the American Prosecution, therefore, the positivist dilemma with how to deal with Nazi Law was no dilemma at all.<sup>114</sup> If Nazi law had been immoral, then it had simply not deserved the name of 'law'.<sup>115</sup> As for the laws posited in the London Charter, these were not 'new' but eternal, applicable to all humanity, and discovered by mankind through the application of Reason. All that was new was the effort to encode and apply them.

In Jackson's view, therefore, there was only one universal morality, discoverable through the application of human reason. As he had told the American Bar Association in April 1945, on the subject of War Crimes Trials:

We may go forward on the assumption that reason has power to summon force to its support, confident that moral standards embodied in law for the governance of nations will so appeal to the better natures of men that somehow they will ultimately vouchsafe the force to make them prevail.<sup>116</sup>

His view of the moral consciousness of the defendants, and the Party they had led, can be summed up by quoting a single line that stands by itself in his notes: 'Dachau – [they] knew it was wrong but thought [Germany] was winning.'<sup>117</sup> This statement reached well beyond the necessary concerns of a Prosecution lawyer, since

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<sup>111</sup> Hockett, *New Deal Justice*, p. 219.

<sup>112</sup> Sir William Blackstone, *Commentaries on the Laws of England*, 2 Vols. (Philadelphia: J.B. Lippincott Company, 1893), Vol. 1, p. 39.

<sup>113</sup> *Ibid.*, p. 41. (Emphasis added).

<sup>114</sup> For an influential positivist expression of the dilemma with Nazi law and retroactivity, see: H.L.A. Hart, 'Positivism and the Separation of Law and Morals,' *Harvard Law Review*, Vol. 71, No. 4 (1958).

<sup>115</sup> This is the argument in favour of Natural Law put forward in: Lon L. Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart,' *Harvard Law Review*, Vol. 71, No. 4 (1958).

<sup>116</sup> Jackson, 'The Rule of Law among Nations,' pp. 293-294.

<sup>117</sup> RHJ, [no date], LoC/RHJP/103/'Notes'.

perpetrators' ignorance of either legal or moral codes – or, more broadly, whether or not the defendants had known their actions to be illegal or 'wrong' – was irrelevant to a strictly *legal* case. Yet Jackson's concern with the defendants' conscious transgression of universal *moral* standards made it to his opening speech. Allegiance to the Party by the defendants and their followers had amounted to an 'abdication' of 'moral responsibility' rather than a shift in moral values.<sup>118</sup>

In short, the defendants were guilty and had been aware of their guilt since the first days of their 'conspiracy'. This was, naturally, a theme Jackson returned to when delivering his final speech – after the Defence had completed its own case. The defendants' guilt was, he implied, a matter of 'common sense', a phrase he used in both his opening and final speech:

These men saw no evil, spoke none, and none was uttered in their presence. This claim might sound very plausible if made by one defendant. But when we put all their stories together, the impression which emerges of the Third Reich, which was to last a thousand years, is ludicrous.<sup>119</sup>

To all the defendants' claims of ignorance of criminal behaviour, Jackson proclaimed – using, once again, some words of his favourite bard – 'They do protest too much. They deny knowing what was common knowledge...'.<sup>120</sup> But, he suggested, the very nature of Nazism entailed a habit for lying: with such a litany of 'false statements and double talk' during the trial, and with a pre-trial history of continual 'broken vows and false words', Jackson asked, '[w]hen for years they have deceived the world, and masked falsehood with plausibilities, can anyone be surprised that they continue their habits of a lifetime in this dock?'.<sup>121</sup> The very last words of his closing speech – his last words of the trial – developed this theme with yet more help from Shakespeare:

It is against such a background that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of this Trial as bloodstained Gloucester stood by the body of his slain king. He begged of the widow, as they beg of you: "Say I slew them not". And the Queen replied, "Then say that they were not slain. But dead they are..." If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.<sup>122</sup>

That the defendants had committed crimes *and* wrongs demonstrates that, just as he had been concerned with the morality of the defendants in his opening speech, so

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<sup>118</sup> IMT, 21/Nov/1945, Vol. II, p. 102; p. 107.

<sup>119</sup> IMT, 26/Jul/1946, Vol. XIX, p. 427.

<sup>120</sup> *Ibid.* This first line was adapted from *Hamlet*. III, 2.

<sup>121</sup> *Ibid.*, p. 431; p. 432.

<sup>122</sup> *Ibid.*, p. 432. It is evident from Jackson's notes that he had originally recalled the *Richard III* line, 'Say that I slew them not', from memory – i.e. without the original text to hand. *Richard III*, I, 2; RHJ, [personal notes], [no date], LoC/RHJP/103/'Notes'.



too were Jackson's closing words of the trial concerned with moral as well as legal transgressions. The character of Richard III conformed to – and perhaps even influenced – his view of the defendants: wrong-doers fully conscious of their own evil. His analogy permits us to discern an unstated desire in the Prosecution, expressed in *Richard III*:

If heaven have any grievous plague in store  
Exceeding those that I can wish on thee,  
O let them keep it till thy sins be ripe,  
And hurl down their indignation  
On thee, the troubler of the world's peace!  
The worm of conscience still be – gnaw thy soul!<sup>123</sup>

As Jackson had jotted in his personal notes, such was the enormity of their crimes, the defendants could never pay enough for what they had done - even if they could be killed 'a hundred thousand times' over.<sup>124</sup> Although he was, in principle, against the death penalty, this was not a punishment that troubled Jackson in the case of the Nazi defendants.<sup>125</sup> The best that he could hope for (in addition to the punishments handed down by the Tribunal) was that the 'worm of conscience', as Shakespeare had it, might 'gnaw' at their 'souls'. To realise the extent of their crimes – to appreciate themselves the evil they had done – was not only possible, but what they deserved.

#### 4.3. The Trouble with Witnesses

Once Jackson had delivered his opening speech, the American Prosecution began presenting evidence which appeared mostly in the form of original German documents. Jackson and his closest colleagues were not, however, against the use of witnesses *per se*. When, for example, less than a month before the trial began, the British expressed their view that none should be used, Francis Shea – acting as Jackson's negotiator with the British in planning matters – pointed out that the Americans still intended to use some.<sup>126</sup> They used seven as part of their Prosecution case (others were used later on during the trial). The use of witnesses had appeared

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<sup>123</sup> Shakespeare, *Richard III*, I, 3.

<sup>124</sup> Jackson's notes related to Richard III read in part: 'lead us to the 5 million [...] give back our young – restore our burned and shattered dwellings - Then - and only then shall we say - you slew them not. If each a hundred thousand [times] had to give [?] on gallows not pay life for life'. Although the exact meaning is difficult to decipher, an obvious theme was that it was impossible to dispense commensurate punishment or commensurate recompense for the murder and destruction for which the defendants were responsible. RHJ, [no date], LoC/RHJP/103/'Notes'.

<sup>125</sup> RHJ, Phillips Oral History, pp. 1,292-1,293. LoC/RHJP/259/3.

<sup>126</sup> Anonymous, Minutes of 24/Oct/1945 'Meeting between Mr. Shea, Mr. Dean, and Col. Phillimore', 26/Oct/1945, NA(UK)/FO-1919/90.

to General Donovan and others in the OSS and OCC to offer the best chance of generating the most dramatic proof of Nazi crimes. This seemed to suggest the most effective way to generate public interest in the trial. There were many more than seven available to the Prosecution. The choice of emphasis on either witnesses or documents, however, was only one of a number of points of disagreement between Jackson (who came to favour basing the case on documents) and General Donovan (who continued to prefer the use of witnesses). Their disagreement related to the way in which witnesses should be used – as well as how much the case would rely upon their testimony. Donovan, for example, hoped to use some of the defendants to testify as witnesses against their fellow-defendants. The irreconcilable differences that led to Donovan leaving Nuremberg – just as the trial was underway – was, therefore, more complicated than a clash between a general preference for witnesses versus documents. Since Michael Salter has, relatively recently, investigated thoroughly the many disagreements between the two personalities, there is little point in revisiting them here.<sup>127</sup> It is, however, worth examining the more fundamental issues surrounding the use of witnesses – including those who were very successful in incriminating some of the defendants – in order to appreciate the differences to other forms of evidence, such as documents and film.

It was even before the end of the war that the discovery of a variety of evidence had materialised most dramatically from witnesses. A particularly important (and now, well known) case was that of Jan Karski, working for the Polish underground (and, subsequently, for the London-Polish government in exile). Karski had managed to slip in and out of the Warsaw ghetto (twice) and visit what he believed at the time to be the Belzec death camp before escaping Nazi-occupied territory with the knowledge of (and some help from) the OSS (which would play a significant part in evidence-gathering for Nuremberg).<sup>128</sup> Among other things, he reported his observances of the treatment of the Jews in Poland to prominent individuals in the UK and then in the US. However, many of those who listened to his horrific reports of mass-murder and cruelty found them hard to believe. It was not, as Supreme Court Justice Felix Frankfurter explained, that he thought Karski was lying: rather, such horrific descriptions seemed,

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<sup>127</sup> Salter, *Nazi War Crimes*, pp. 376-444.

<sup>128</sup> Karski was picked up by the OSS in Barcelona on his route to London. See: Walter Laqueur, *The Terrible Secret: An Investigation into the Suppression of Information about Hitler's 'Final Solution'* (London: Weidenfeld and Nicolson, 1980), p. 230; Maciej Kozłowski, *The Emissary: The Story of Jan Karski*, (trans. Joanna Maria Kwiatowska) (Warsaw: The Ministry of Foreign Affairs, 2007), p. 49. General Donovan expressed pride in the help his OSS "boys" had given to Karski in reaching the west. See: E. Thomas Wood & Stanisław Jankowski, *Karski: How One Man Tried to stop the Holocaust* (New York: Wiley, 1994), p. 213. On Karski's confusion of Belzec with Izbica Lubelska (a 'sorting camp' satellite of Belzec), see: Wood & Jankowski, *Karski*, pp. 128-130.

to him, literally unbelievable.<sup>129</sup> With the memories of the atrocity-propaganda of the First World War, such horrors, it seems, needed to be seen to be believed.<sup>130</sup> Disheartened by such reactions, and constrained by the politics of the Polish government in London, Karski therefore often censored his experiences of the 'final solution' from his reports when meeting other individuals such as President Roosevelt, Francis Biddle (then Attorney General, and later a judge at Nuremberg), and several members of the OSS in Washington - including General Donovan himself.<sup>131</sup> Donovan appeared to be most interested in the details of escape from occupied Europe.<sup>132</sup>

In addition to disbelief, there were other issues with Karski's testimony that would be problematic for American prosecutors by the end of the war. As an early witness to the Holocaust (as it would later be known), and a living example of just how informed the Allies had been of the mass-murder of Jews during the war, Karski was, in fact, an embarrassment to the Allies: nothing had been done to stop the genocide. Yet another political problem existed: Karski shared the bitter disappointment that other Polish representatives felt towards war-time British and American acquiescence in the ceding of Polish territory east of the 'Curzon Line' and, subsequently, in what amounted to a Soviet annexation of Poland.<sup>133</sup> Furthermore, his testimony proved incompatible with the legal aims of the American Prosecution at Nuremberg, asserting as he did that the murder of Jews had no utilitarian purpose for the Nazis in regard to war but was, rather, an end in itself:

The unprecedented destruction of the entire Jewish population is *not* motivated by Germany's *military* requirements. Hitler and his subordinates aim at the total destruction of the Jews *before* the war ends and *regardless* of its outcome. The Allied governments cannot disregard this reality. The Jews in Poland are helpless.<sup>134</sup>

Such a view would have been damaging (in courtroom testimony) to Jackson's contention that 'aggressive war' (Crimes Against Peace) was the supreme crime of the Nazis, of which all other crimes were merely derivative. Karski was not even considered as a potential witness for the IMT trial at Nuremberg.<sup>135</sup>

There were, however, other individuals that appeared to offer more 'reliable'

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<sup>129</sup> Laqueur, *The Terrible Secret*, p. 237.

<sup>130</sup> See chapters 5 and 6 in: John N. Horne & Alan Kramer, *German Atrocities, 1914: A History of Denial* (New Haven, CT: Yale University Press, 2001).

<sup>131</sup> Laqueur, *The Terrible Secret*, pp. 229-232; Wood & Jankowski, *Karski*, p. 213.

<sup>132</sup> Wood & Jankowski, *Karski*, p. 213.

<sup>133</sup> *Ibid.*, p. 163.

<sup>134</sup> Laqueur, *The Terrible Secret*, p. 232. (Emphasis in original).

<sup>135</sup> Of those who have criticised the Nuremberg IMT and subsequent trials for the lack of witnesses, and in particular, holocaust survivor testimony, Donald Bloxham's book is, perhaps, one of the most critical. See: Bloxham, *Genocide on Trial*.

testimony that might fit the legal and political constraints of the American Prosecution. In a list of thirty-seven potential witnesses drawn up by Colonel John Harlan Amen, the head of interrogations at Nuremberg, the first to appear was General Erwin Lahousen.<sup>136</sup> Lahousen had been an Austrian intelligence officer who had come to work for German Military Intelligence after the Anschluss of 1938. He had never joined the Nazi Party and had worked under Admiral Canaris who was murdered after the failed 20<sup>th</sup> July (1944) plot to assassinate Hitler and take control of the German state. Lahousen's testimony – the facts that he related in court – would do much to directly incriminate Keitel and Ribbentrop. Historians have repeatedly recounted this without taking account of the broader reasons why the American Prosecution deemed him to be so suitable as a witness.<sup>137</sup> Their decision to use him had almost as much to do with their perceptions of his character as it did with the 'facts' he could relate. The existence of a virtuous German who had witnessed Nazi criminality from its centre in Berlin served to demonstrate that moral integrity had remained possible in the Third Reich, a proposition that served to reinforce their condemnation of the defendants for their 'moral abdication'. As though to distinguish a 'good' German from most others, Colonel Amen recognised noble American features in the ex-General of the Military Intelligence branch:

General Erwin Lahousen is one of the best witnesses available on the subject of aggressive warfare from 1938 to the end of the war. This is so not only because of the testimony which he can give, but because of the fact that his appearance and manner are those of a blunt, honest, sincere Abraham Lincoln type of person and also because he will be practically invulnerable on cross examination.<sup>138</sup>

As the first witness to be called in support of the American case, Lahousen fulfilled both the legal and political requirements of the American Prosecution. Speaking of the circle of intelligence men around Admiral Canaris (that, including himself, was disdainful of Nazi aims and methods), Lahousen adopted the legal terminology of the American Prosecution without immediate prompting. He paraphrased the 'inner attitude' of his superior, Admiral Canaris, as follows: 'We did not succeed in preventing this war of aggression.[...]'<sup>139</sup> He also made a good case against the defence of following 'superior orders' when stating that he, a 'subordinate', was occasionally sent to meetings with Keitel, Ribbentrop, and others – instead of Canaris – to protest against terroristic Nazi methods:

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<sup>136</sup> Col. Amen to Board of Review, 'Witnesses Competent to Testify at Trial', 8/Nov/1945. Cornell/WJDP/XIX/61.01.

<sup>137</sup> Taylor, *Anatomy*, pp. 187-191; Tusa & Tusa, *The Nuremberg Trial*, pp. 163-166.

<sup>138</sup> Col. Amen to Board of Review, 'Witnesses Competent to Testify at Trial', 8/Nov/1945, p. 1. Cornell/WJDP/XIX/61.01.

<sup>139</sup> IMT, 30/Nov/1945, Vol. II, p.444.

[Admiral Canaris] selected me for tactical reasons since he, as department chief, could by no means be as outspoken as I, whom thanks to my subordinate position, could use much stronger language.<sup>140</sup>

Lahousen mentioned a specific example of his own (and others') openly expressed dissent. When informed in late 1940, by a representative of the Armed Forces, of Keitel's order to have (the French) Marshal Weygand assassinated, he had, according to his testimony, no hesitation in rejecting it:

I, myself, as the person most involved, since my division was expected to carry out this task, indicated flatly before all present that I had not the slightest intention of executing this order. My division and my officers [Lahousen recalled stating], are prepared to fight but they are neither a murderer's organization nor murderers.<sup>141</sup>

He could not, however, express such dissent directly to Keitel who subsequently contacted him to inquire as to how the matter was proceeding. Lahousen stalled with excuses and, as a result, Weygand was never murdered.<sup>142</sup> Lahousen's story reinforced the impression that blind obedience was not always necessary for survival within the Third Reich – and that moral courage could have an effect. Jackson was very pleased with the Prosecution's use of Lahousen. As he explained in a letter home to his wife, '[w]e just had a dramatic day. General Lahousen testified all day and certainly hung the Nazi crowd [...].'<sup>143</sup>

The Defence made little impact on Lahousen's testimony against Keitel and Ribbentrop when it came to cross-examine him the following day. In some cases, they made blunders that helped the Prosecution. They could do little to deny that Keitel, Ribbentrop, and others were implicated in a systematic plan of terrorism and cruelty that was adopted as part of the strategy for conducting war on the eastern front. Instead, for the most part, the best Defence lawyers could do was to attempt to discredit Lahousen by characterizing him as an untrustworthy witness. Yet this only backfired. When accused by Dr. Otto Nelte, Keitel's counsel, of acting as a mere mouthpiece for Admiral Canaris – as though, like the Nazis, he was compelled to obedience without thinking for himself – Lahousen dismissed the suggestion outright, strongly implying that, unlike the defendants; he had enough moral integrity to retain his own thoughts and actions:

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<sup>140</sup> Ibid., p. 454.

<sup>141</sup> Ibid., p. 452.

<sup>142</sup> Ibid.

<sup>143</sup> RHJ to [I]Rene Jackson, 30/Nov/1945, LoC/RHJP/2/3.

The impression is completely fallacious. I am not a mouthpiece, and am now, as I was then, completely independent inwardly in what I say. I have never allowed myself, nor shall I ever allow myself, to become the mouthpiece *for any conception*, or to make any statements that are contrary to my inner convictions and to my conscience.<sup>144</sup>

That Lahousen had retained the ability to maintain his own 'inner convictions' throughout the war and up to the present at Nuremberg in 1945, suggested that it must have been possible for other Germans to retain at least an 'inner' independence from external pressures – be they from dissenters such as Canaris, or criminals such as the Nazis. Lahousen had retained a 'civilized' conscience throughout the Nazi years, demonstrating that it had been possible to be a 'good' German who shared moral values with the rest of the 'civilized' world. Through his questioning of the witness, Dr. Nelte had done little other than to demonstrate the Prosecution's view that Lahousen stood as a noble example of how acceptance of Nazi beliefs and actions were not inevitable in a system albeit frequently described by the prosecutors as 'totalitarian'.

However, the greatest blunder made by the Defence, was during Dr. Fritz Sauter's advocacy for Ribbentrop. After asking whether his defendant had 'really talked of killing Jews' – to which Lahousen answered that indeed he had – Sauter switched from his focus on Ribbentrop to the character of the witness himself.<sup>145</sup> Without stating the exact words, Sauter accused Lahousen of criminal negligence:

- DR. SAUTER: [...] You have told us about murderous designs on which you or your department or other officers were employed or which you were charged to carry out. Did you report these to any police station as the law required? May I point out that according to German law failure to report intended crimes is punishable with imprisonment or in serious cases with death.
- LAHOUSEN: Well, when you talk about German law, I cannot follow you. I am not a lawyer, but just an ordinary man.
- DR. SAUTER: As far as I know, that is also punishable according to Austrian law.
- LAHOUSEN: At that time Austrian law, as far as I know, was no longer valid.
- DR. SAUTER: In other words, you never reported the intended crime, either as a private person or as an official?
- LAHOUSEN: I should have had to make a great many reports - about 100,000 projected murders, of which I knew and could not help but know. You can read about them in the records - and about shootings and the like - of which of necessity I had knowledge, whether I wanted to know or not, because, unfortunately, I was in the midst of it.<sup>146</sup>

This was widely seen, as Telford Taylor has pointed out, as a ridiculous approach for Sauter to adopt – causing consternation in the defendants who wished they had

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<sup>144</sup> IMT, 1/Dec/1945, Vol. III, pp. 5-6. (Emphasis Added).

<sup>145</sup> IMT, 1/Dec/1945, Vol. III, pp. 22-23.

<sup>146</sup> Ibid.

been permitted to ask the questions themselves.<sup>147</sup> But this exchange was significant for another reason that has not been commented on. It represented as good an argument as any other the Prosecution lawyers might have made in favour of the proposition that law under Nazi rule had had no validity whatsoever. Not only had Nazi 'law' been invalid; such was the reach of Nazi rule and its corruption of law that it had made pre-existing laws meaningless too.

Of all (seven) witnesses used by the American Prosecution in the presentation of their case, Lahousen proved to be, as Colonel Amen had originally stated, 'the best [witness] available on the subject of aggressive warfare'.<sup>148</sup> Not only had examination by the Prosecution directly incriminated some of the defendants; the Defence's cross-examination led to their further incrimination. Yet even Lahousen caused some problems for the Prosecution. The very nature of cross-examination permitted the Defence some control over the issues that could be discussed in the courtroom. For example, as we have already seen, Jackson wished to avoid emphasising German aerial bombardment of civilians because of his concern that the Allies had engaged in the bombing of German civilians.<sup>149</sup> But the cross-examination temporarily brought this subject to the fore with the suggestion that Keitel had, in fact, been sensitive to the issue of protecting civilians – a galling proposition for the Prosecution that could not be disproved by the witness:

DR. NELTE: The Defendant Keitel is anxious that I should put the question to you, whether, when this order for the bombing of Warsaw was made known he did not stress the fact that this was to be put into effect only if the fortress of Warsaw did not surrender after the demand made by the bearer of the flag of truce, and even then only after an opportunity to evacuate the city had been given to the civilian population and the diplomats.

LAHOUSEN: I cannot recall the precise words he used but according to my knowledge of the situation at that time it is quite possible, indeed probable, that the Chief of the OKW, Keitel, did make this remark.<sup>150</sup>

As well as being able to highlight issues that the Prosecution might wish to avoid, each witness they used provided another type of opportunity for the Defence. Although the Prosecution might use a witness to incriminate a limited number of specific individuals in the dock (in this case, Lahousen was used against Keitel and Ribbentrop<sup>151</sup>), putting

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<sup>147</sup> Taylor, *Anatomy*, p. 190.

<sup>148</sup> Col. Amen to Board of Review, 'Witnesses Competent to Testify at Trial', 8/Nov/1945, p. 1. Cornell/WJDP/XIX/61.01.

<sup>149</sup> This would have encouraged a defence of *tu quoque* (i.e. 'you [committed the same crime] too'), which the chief British prosecutor, Sir David Maxwell-Fyfe, repeatedly stressed was no legitimate defence at all. For example, see: IMT, 23/Feb/1946, Vol. VIII, pp. 178-179. The *tu quoque* claim, however, did affect Francis Biddle when it came to judging and sentencing Admiral Dönitz. See: Tusa & Tusa, *The Nuremberg Trial*, pp. 461-462.

<sup>150</sup> IMT, 01/Dec/1945, Vol. III, pp. 7-8.

<sup>151</sup> To be precise, Göring and Jodl were also mentioned by the witness in an unfavourable light, but this

a witness on the stand gave *all* Defence lawyers – whoever they might be representing – the opportunity to ask questions on anything they thought relevant to their own case. Again, this allowed for topics and questions that the Prosecution might wish to avoid. The very first Defence lawyer to cross-examine Lahousen was not concerned with Keitel or Ribbentrop at all. Instead, Dr. Egon Kubuschock managed to establish that his defendant, Franz Von Papen, had shared and expressed a 'negative' attitude towards 'Hitler's war policies' and 'violent methods'.<sup>152</sup> Lahousen admitted that his superior, Canaris, believed that Von Papen continued to hold office in order to exercise a 'mitigating influence' on Hitler's regime.<sup>153</sup> As a result, the use of Lahousen to incriminate Keitel and Ribbentrop did something to boost von Papen's defence (he would, in fact, be one of the three defendants acquitted by the Tribunal). With twenty-one individual defendants sitting in the dock, and seven organizations indicted, the use of any witness by the Prosecution risked losing control to the Defence – not only of the topics to be investigated; it would also mean that, in the interests of fair play, the time each witness would take to be cross-examined would be unpredictable and controlled by the Defence who had very good incentives to prolong the trial as much as possible.<sup>154</sup> After a day of Lahousen's cross-examination, Wheeler concluded that:

[...] any idea of offering many witnesses must be dropped, [otherwise] the trial will be indefinitely lengthened. [...] I never heard of such a wandering and irrelevant series of questions [as posed by the Defence lawyers], or so long and verbose and complicated. [...]<sup>155</sup>

Jackson complained to the court that Lahousen's testimony, which had taken nearly two full days, could have been submitted to the court in an affidavit which would have taken only fifteen minutes of the Tribunal's time.<sup>156</sup>

There would only be another six witnesses called by the American Prosecution. They would need to provide testimony that focused sharply on a limited number of incriminated defendants, so that Defence lawyers had little excuse to waste time in relation to other defendants. The next was Otto Ohlendorf, head of Office III (the SD) within the Reich Security Main Office (RSHA). As the office charged with 'internal security' within the Reich, it competed for authority with the Military Intelligence of the

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hardly amounted to any prosecution case against these individuals.

<sup>152</sup> IMT, 01/Dec/1945, Vol. III, p. 2.

<sup>153</sup> Ibid., p. 3.

<sup>154</sup> Such incentives included the lawyers' desire to maintain gainful employment in a destroyed economy and the desire of the defendants – many of whom expected the death sentence – to prolong their lives. See: West, *A Train of Powder*, p. 4. The seven indicted organizations were: the Reichs Cabinet, the Leadership Corps of the NSDAP, the SS, the SD, the Gestapo, the SA and the General Staff & High Command of the Armed Forces.

<sup>155</sup> Leonard to Mrs. Wheeler, 2/Dec/1945. Harvard/LWP/4/3.

<sup>156</sup> IMT, 14/Dec/1945, Vol. III, p. 544.



Army run by Admiral Canaris. Ohlendorf and the organization he had worked for, therefore, represented a dramatic contrast to the previous witness, Lahousen, who had worked under Canaris in the Abwehr. Ohlendorf, provided evidence against Keitel, Kaltenbrunner, and the SS/SD as organizations, which included testimony of his estimation of 90,000 murders of Jews (and some Soviet political commissars) reported by his own 'Einsatzgruppe D'.<sup>157</sup> As might have been expected, he was cross-examined by Dr. Otto Nelte for Keitel, Dr. Kurt Kauffmann for Kaltenbrunner, and Ludwig Babel for the SS/SD. But he was also cross-examined by the following: Dr. Egon Kubuschok for the Reich Cabinet, and then on behalf of Dr. Hans Flächsner for defendant Speer; Dr. Rudolf Merkel for the Gestapo; Dr. Franz Exner for the General Staff & High Command of the German Armed Forces; Dr. Herbert Kraus for Schacht; Dr. Otto Stahmer for Göring; Otto Kranzbuhler on behalf of Dr. Walter Siemers for Raeder; Dr. Robert Servatius for the Leadership Corps of Nazi Party and then for Sauckel. Most of the remaining five witnesses called by the American Prosecution were used to testify to very particular events so that the Defence would be given as little opportunity to prolong the proceedings. But this limited the value of what the American Prosecution could gain from its own use of witnesses.

In addition to these practical disadvantages from the perspective of the American Prosecution, there were more fundamental concerns with the very nature of witness testimony even before the trial had begun. As a British observer had noted during the Charter negotiations in London, Jackson was 'very afraid of Soviet methods being adopted at the trials, thus bringing them into discredit'.<sup>158</sup> What he probably had in mind was the dubious testimony that had been on display during the purge-trials at Moscow during the 1930s. But Jackson did not need to look back to the 1930s for examples of dubious testimony procured by the Soviets. The OCC had a very up-to-date example in the Soviet interrogation of defendant Fritzsche before he had been brought to Nuremberg from Russia. The very first question and answer of a Soviet pre-trial interrogation suggests either a threatening atmosphere or an unimaginative post-interrogation job of editing and fabrication (and probably a mixture of both):

- Q: You were arrested as one of those guilty of the war begun by Hitler in Europe. Do you admit that you are guilty of this?
- A: Yes, I admit it. For a considerable time I was one of the directors of German propaganda and I took a direct part in the preparation of the second imperialistic war begun by Hitler.<sup>159</sup>

To the unlikely admission by Fritzsche of being 'guilty of the war' was added the

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<sup>157</sup> IMT, 3/Jan/1945, Vol. IV, p. 319.

<sup>158</sup> Sir A. Cadogan, 'Brief for Mr. Attlee', 1/Aug/1945, repr. in: Butler & Pelly, (eds.), *Documents on British Policy Overseas*, p. 1101.

<sup>159</sup> 'Interrogation of Fritzsche [sic] by Russians', 12/Sep/1945, Donovan Papers, Vol. XIII, 33.01.

utterly implausible characterisation of that conflict as 'the second imperialistic war', a description that sounded as though it had come from the ghost of Lenin rather than a living Nazi 'major war-criminal'. Yet, in a certain regard, what was more obvious with Soviet methods was still true of any witness that might be used by the Americans against Nazi defendants in the dock: such witnesses were easily defined politically in relation to the defendants and their defeated system. In short, witnesses could be perceived by the defendants and others as either Nazis or anti-Nazis. The evidence they gave, therefore, could always be defined in political terms regardless of the reliability of the testimony itself. Thus, even though evidence from Lahousen, an anti-Nazi, might appear to be truthful to the members of the Tribunal, his testimony would be viewed by the Nazis in the dock as a politically motivated and treacherous betrayal. Such evidence, therefore, would never be the best way to induce remorse – to 'gnaw the souls' of defendants that were naturally inclined to avoid taking responsibility. Instead, Lahousen's testimony only prompted Göring to regret that Nazi terror had not been even more widespread after Hitler had ordered the assassinations of his enemies after the failed plot to kill him in 1944: "That Traitor! That's one we forgot on the 20<sup>th</sup> July [...] *What good is the testimony of a traitor?*".<sup>160</sup> Göring would later react to another Prosecution witness by calling him a treacherous swine in the courtroom (as punishment, he would only be fed bread and water for the weekend).<sup>161</sup>

Conversely, even though the testimony of a Nazi witness might be truthful – for example, Ohlendorf's admission that 90,000 Jews (and some Soviet commissars) had been murdered under his watch – those who might wish to deny such evidence (or responsibility) would feel able to question the potential motivation for such a confession. Once again, of all the defendants, Göring expressed most succinctly the Nazi route to avoiding responsibility: "Ach, there goes another one selling his soul to the enemy! *What does the swine expect to gain by it?* He'll hang anyway".<sup>162</sup> Suspicions could always be manufactured: was the witness trying to save his own neck and, for that or some other reason, was he simply saying what the Prosecution wanted to hear? (Ohlendorf himself did not appear to show any remorse for his own part in mass-murder and merely reverted to the common justification of having had to carry out the orders issued by his superiors).<sup>163</sup> Why, if the Soviets could not be trusted with any testimony they procured, could the Americans – who were just as

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<sup>160</sup> G. M. Gilbert, *Nuremberg Diary* (London: Eyre & Spottiswoode, 1948), p. 33. (Emphasis added).

<sup>161</sup> Burton C. Andrus, *The Infamous of Nuremberg* (London: Frewin, 1969), p. 136.

<sup>162</sup> Gilbert, *Nuremberg Diary*, p. 62. (Emphasis added).

<sup>163</sup> Tusa & Tusa, *The Nuremberg Trial*, p. 171; Taylor, *Anatomy*, p. 248.

committed to destroying Nazism – be trusted either? Such a Nazi perspective resisted the route to contrition from any witness-testimony. Whilst it did not affect the Prosecution's case in a legal sense of proving a case beyond reasonable doubt, the use of testimony could never force the defendants themselves to examine their own consciences. As the first Holocaust deniers of the post-war period, the men in the dock would always have the option and incentive to ask themselves 'is this testimony really truthful?' – no matter how truthful it actually might appear to the Tribunal.

Jackson would recall appreciating the impossibility of attaining 'objectivity' in the use of witness testimony. He identified the moment of his decision to base the bulk of the case on documents instead to an initial brief period spent in Europe interrogating individuals who had been opposed to Hitler's regime. These individuals had been in contact with, or discovered by, the OSS.<sup>164</sup> With General Donovan and Allen Dulles (the latter having been chief of OSS war-time operations based in Switzerland) he had spent the afternoon of 7<sup>th</sup> July 1945 'interrogating' them at an OSS base in Wiesbaden, Germany.<sup>165</sup> Whilst all of these interrogations had 'pointed to other sources of information', Jackson later recalled:

The interrogations revealed that the use of witnesses would have serious weaknesses. Sometimes these witnesses differed in their recollection of events. They saw events from different observation points. They had different personal relations to different people. They had a strong bias against the Hitler regime [–] strong enough so that they risked their lives in plots to assassinate and murder [Hitler and other Nazi leaders]. We could not vouch for them as unbiased witnesses, even though we believed them to be credible witnesses. Their stories, on their own admissions of their activities, would be self-serving statements of highly interested persons trying to vindicate their own past.<sup>166</sup>

As a Supreme Court judge, who had climbed his way up from working as a country lawyer in upstate New York, this characterization of witnesses appears a little naive in its acknowledgment of what must have been very obvious to him for years: that witnesses each have their own perspectives and motivations. Perhaps Jackson sensed that 'politics' – something he wished to leave outside the courtroom – was inherently involved in using witnesses against the Nazis in particular. But Jackson's recollection itself was not 'unbiased,' since he would have been concerned to portray his formulation of trial-strategy as consistent – based on matters of long-standing principle and planning rather than, for example, affected by any passionate disagreements with "Wild Bill" Donovan who, because he believed that the Nuremberg project "was a lawsuit plus something else," insisted that it required "an

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<sup>164</sup> RHJ, Phillips Oral History, pp. 1,290-1,293. LoC/RHJP/259/3.

<sup>165</sup> They included Fabian von Schlabrendorff, Hans Bernd Gisevius, an unnamed 'Lutheran minister who had been arrested and persecuted for his opposition to the Nazis', and an unnamed 'employee in the German Foreign Office'.

<sup>166</sup> RHJ, Phillips Oral History, pp. 1,292-1,293. LoC/RHJP/259/3.

affirmative human aspect with German as well as foreign witnesses".<sup>167</sup> Whilst Jackson noted the more factual circumstances of these 'interrogations' in his diary in July 1945, the specific timing of his *attitude* towards the use of witnesses appeared only in hindsight, as part of an oral history project in 1953.<sup>168</sup> The impression he left at this later stage is that his decision to base the case primarily on documents, and to do so at the expense of using witness-testimony, dated from early July 1945:

The contrast between the weakness in their stories and the very indisputable character of the documents, of which we saw only a couple on that day, set going in my mind the question of whether we shouldn't concentrate on documentary proof rather than oral proof from witnesses.<sup>169</sup>

It is more of an acknowledgment of the way human memory functions – than any implication that the Justice intentionally misled his own 'interrogator' – to suggest that Jackson probably thought of witnesses in this way only considerably later – after it became increasingly clear that a case based predominantly on documents was possible. What helped Jackson most to develop his preferences in the development of trial-strategy was the requirement to work on an indictment that, as had been agreed at the London negotiations, would entail considerably more detail than Anglo-Saxon lawyers were accustomed to.<sup>170</sup> As Telford Taylor recalled, the building of a 'narrative' required by the indictment forced an assessment of the evidentiary material that had accumulated into the autumn of 1945:

The conspiracy charge [Count 1] required a narrative of the conspiracy's origin and course and a showing of its criminality, for which evidence had to be available. Such evidence *began* to accumulate in July, and the flow continued throughout the summer and fall. Jackson's sense that the evidentiary basis for final drafting [of the indictment] had not been laid until mid-September was sound [...]<sup>171</sup>

It seems fair to assume, therefore, that Jackson's personal predilection for using documents was only *confirmed* in September 1945. Furthermore, this did not yet preclude the use of significantly more witness-testimony than was eventually used by the American Prosecution during the trial. Only a month before the American case began, Leonard Wheeler, Deputy Chief of the Documents Division, wrote home that '[W]e don't know yet what our policy will be as to oral testimony'.<sup>172</sup> It was as late as

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<sup>167</sup> Robert E. Conot, *Justice at Nuremberg* (London: Weidenfeld and Nicolson, 1983), p. 150.

<sup>168</sup> Some of the details in the 'Oral history' are, in fact, taken verbatim from the Diary notes Jackson made in 1945. What is not in his diary, but appears in the 'oral history' is the proposition that from this moment Jackson had in his mind to base the case against the Nazis on documentary evidence and to minimise reliance on witness-testimony.

<sup>169</sup> RHJ, Phillips Oral History, p. 1,293. LoC/RHJP/259/3.

<sup>170</sup> Jackson, (ed.), *Conference*, p. xi.

<sup>171</sup> Taylor, *Anatomy*, p. 98. (Emphasis added).

<sup>172</sup> Leonard Wheeler to Mrs. Wheeler, 21/Oct/1945, Harvard/LWP/4/3.

7<sup>th</sup> November – the very month that the trial began – that Colonel Amen, head of interrogations, submitted his list of thirty-seven potential witnesses for the American case.<sup>173</sup> Nine days after that – only four days before the American case began in court – a revision was made by Amen distinguishing between nine witnesses who were 'unqualifiedly recommended' and another fourteen 'who would be useful'.<sup>174</sup> And whilst, as we have seen, there were important legal and political factors that would limit the choice of *which* witnesses the Prosecution might deem suitable, Jackson's growing confidence in the accumulated documentation was not the only factor in the eventual restriction of witness-testimony.

It was not long before the preliminary hearings began that there emerged an entirely practical problem which came as a late, unexpected, and unpleasant surprise to the Prosecution. A number of courtroom rehearsals were staged, primarily in order to test the use of the 'simultaneous' translating system that had been installed free of charge by the International Business Machines Corporation.<sup>175</sup> This rehearsal was not just to test the skills of each team of twelve translators; it was also a chance for the users of the system – the lawyers and judges – to familiarise themselves with its workings: with wearing headphones and speaking into microphones.<sup>176</sup> The only players missing from the scene were the defendants (and any of the proposed witnesses). Instead, a number of soldiers sat in the dock and one sat at the witness stand. To Wheeler, it looked like a big game of bingo.<sup>177</sup>

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<sup>173</sup> Col. Amen to Board of Review, 'Witnesses Competent to Testify at Trial', 8/Nov/1945. Cornell/WJDP/XIX/61.01. See above, p. 141.

<sup>174</sup> Col. Amen, 'Potential Witnesses for Trial', 17/Nov/1945. Cornell/WJDP/XIX/61.01.

<sup>175</sup> H. O. Anderson (IBM-ITR Sales Dept.), to William E. Jackson, 8/Aug/1945. NARA/RG-238/51/39; Francesca Gaiba, *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (Ottawa: Ottawa University Press, 1998), p. 50.

<sup>176</sup> Ibid.

<sup>177</sup> Leonard Wheeler to Mrs Wheeler, 8/Nov/1945, Harvard/LWP/4/3. Wheeler used the term 'Beano'.



**FIGURE 4:** A court rehearsal held the day before preliminary hearings begin. American soldiers take the defendant's places on the left. A soldier also acts as a witness seated to the right of the film screen. The rehearsal is held primarily to test the use of the translation system. (Signal Corps, 13/Nov/1945. NARA/RG-226/85/39/653/SC 216343).

But Wheeler made the more disturbing observation that the translation system only appeared to be 'simultaneous' to its users if they spoke very slowly:

So far, the rate of speaking has to be kept down to about 50 [words] a minute - much slower than ordinary speech, and slower than most dictation. [...] The necessary result is that we are going to have to concentrate mostly on documentary evidence, and to confine our oral witnesses to the minimum. [...] Consequently, there may be less drama about the trial than many people are hopefully expecting.<sup>178</sup>

There was already a fundamental problem with translation: even a fast translation – perhaps, for example, conducted by one of the best translators, 'the Passionate Haystack' (nicknamed for her gesticulations and hair-style) – would inevitably tend to lose any of the colour or drama in the original speech.<sup>179</sup> To this was added the more particular circumstances of Nuremberg: the potential for several Defence-lawyers to engage in prolonged cross-examination of each Prosecution witness; and the newly-discovered problem of a particularly slow rate of translation. It appeared as though the use of witnesses – and, in particular, the cross-examination of German-speaking witnesses by German-speaking lawyers – might be very dull for monolingual Anglo-Saxons within and beyond the courtroom – even though the speed of translation

<sup>178</sup> Leonard Wheeler to Mrs Wheeler, 8/Nov/1945, Harvard/LWP/4/3.

<sup>179</sup> On the 'Passionate Haystack', see: West, *A Train of Powder*, p. 13.

would improve.<sup>180</sup> In particular, most English-language newsreels and radio reports would most likely only have the time (and inclination) to replace slowly delivered and translated German with voice-over narration in English: narrators such as Ed Herlihy (for Universal Newsreels) would do a better job of instilling drama into their reports by creating dramatic narratives themselves.

#### 4.4. The Banality of Documents

Just before the trial began, therefore, it appeared that the only way to run it 'expeditiously' was to rely almost entirely upon documents. Whilst this was bound to lessen the potential for dramatic effect, the 'citadel of boredom' that would materialise was by no means inevitable as the American Prosecution began its case (this oft-quoted phrase of Rebecca West's was, in fact, coined in relation to the closing months of the trial – after the Defence lawyers had dragged out their cases with the help – in contrast to all the Prosecution teams – of numerous witnesses).<sup>181</sup> Whilst Jackson had already demonstrated the power of words, many of the words in 'captured' German documents were penned by some of the defendants and their subordinate bureaucrats who preferred banal euphemisms to words such as 'murder' and 'persecution' or any others that might clarify too well (to themselves as much as to others) what exactly they were engaged in. As it was later put by Jackson's son, William E. Jackson, 'the language of National Socialists was often merely a turgid and mystical aggregation of words signifying nothing, to which the German language easily lends itself'.<sup>182</sup> Whilst there was Shakespeare, Kipling, and more to be found in the words of the Anglo-Saxon prosecutors, there was no Goethe or other classics to be found in official German documents.<sup>183</sup> Furthermore, there was a very basic problem with original German documents, so obvious that scholars seem to have ignored the issue: the very process of translation would only serve to remove any colour that might have existed in the original. By the time the trial had begun, there was no shortage of documents that, although they contained such 'turgid' language, nevertheless stood as evidence that Robert Jackson proclaimed was more reliable than the words of any Prosecution lawyer or witness:

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<sup>180</sup> Gaiba, *Origins*, p. 78. Gaiba cites various reports citing speeds between 60 and 'peaks' of 200 words per minute with an average of 130.

<sup>181</sup> West, *A Train of Powder*, p. 3.

<sup>182</sup> NCA, Vol. I, p. xiii.

<sup>183</sup> Goethe, however, was popular reading for the defendants whilst imprisoned in the jail connected to the Nuremberg Palace of Justice. See: Andrus, *The Infamous of Nuremberg*, p. 131.

If I should recite these horrors in words of my own, you would think me intemperate and unreliable. Fortunately, we need not take the word of any witness but the Germans themselves.<sup>184</sup>

By this, he meant the documents that the defendants had penned themselves. Jackson's faith in the use of documents as the most reliable source of history reflected a classical Rankean approach: the most reliable traces of the past as it had 'actually happened' were to be found in the official documents of diplomats and leaders of state (an approach which tended to exclude substantially the wider social and cultural context of the events of the previous twelve years).<sup>185</sup> Fortunately for Jackson, the Nazi state was particularly suited to this historical methodology which complemented the emphasis on leadership responsibility:

We will not ask you to convict these men on the testimony of their foes. There is no count in the Indictment that cannot be proved by books and records. The Germans were always meticulous record keepers, and these defendants had their share of the Teutonic passion for thoroughness in putting things on paper.<sup>186</sup>

Of the thousands of documents that were sent to Nuremberg, by far the most numerous were those numbered by the American Prosecution with the prefix 'PS', signifying 'Paris-Storey'.<sup>187</sup> Although usually having been discovered in Germany, these documents had found their way to Paris to be screened and selected by a team headed by Colonel Robert G. Storey. It was therefore appropriate that Jackson chose Storey to summarize for the Tribunal the Prosecution's work in retrieving and selecting documents. 'The Germans,' Storey told the judges, had 'kept accurate and voluminous records' found 'in Army headquarters, Government buildings and elsewhere' such as 'in salt mines, buried in the ground, behind false walls, and many other places believed secure by the Germans'. He mentioned, as an example, the large collection of Rosenberg's personal correspondence found behind a false wall in an old Bavarian castle.<sup>188</sup> The impression given was that the leading Nazis had a lot to hide from the invaders, but that they had been unsuccessful: 'Literally hundreds of tons of enemy documents and records were screened and examined and those selected were forwarded to Nuremberg for processing'.<sup>189</sup> The Americans, Storey continued, had selected more than 2,500 documents to be kept at Nuremberg, and

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<sup>184</sup> IMT, 21/Nov/1945, Vol. II, p. 123.

<sup>185</sup> Georg G. Iggers, *New Directions in European Historiography* (Rev. ed.) (London: Methuen, 1985), p. 17.

<sup>186</sup> IM T, 21/Nov/1945, Vol. II, p. 102.

<sup>187</sup> For the prosecution's explanation of this and other 'cryptic categories' of document classification, see: NCA, Vol. I, pp. xiv-xv.

<sup>188</sup> IMT, 22/Nov/1945, Vol. II, p. 157.

<sup>189</sup> Ibid.



'at least several hundred' would be offered in evidence.<sup>190</sup> The scale of documentation had already astonished the other Prosecution teams upon arrival at Nuremberg. Jackson appeared to relish the memory of this when he later recalled the pre-trial preparations:

[The arrival of the British prosecutors to Nuremberg] was preceded by a request that all of the documents be gotten out so they could look them over before meeting with us. Little did they know that our documents were a roomful and they were considerably surprised at the extent of the exhibit. Finally on Friday, October 8<sup>th</sup>, the Russians appeared with a team who wanted to go to work at once interrogating [the defendants and imprisoned witnesses]. They asked that the documents be given to them so they could look them over during the evening before interrogating the following morning. They too were astonished to find the accumulation of evidence.<sup>191</sup>

So vast was the collection that, as the trial began, the American Prosecution did not intend to read, verbatim, all the documents it wished to be considered as evidence. Instead, Jackson's opening speech can be viewed as the introduction to a number of subsequent narratives – or 'briefs' – that would, just like that speech, only quote the most interesting, shocking, and relevant passages from documents whilst referring to many more as one would cite a document in a scholarly text. The prosecutors realized that basing their case on documents would be less dramatic than witnesses, but sought, through the presentation of these 'self-proving briefs,' to provide an engaging, coherent and comprehensible exposition of Nazi criminality. Although the prosecutors had originally intended to read directly from the briefs in court, a last-minute decision was made to merely summarize them before submitting them in full to the Tribunal for 'judicial notice' – together with an accompanying 'document book' containing all the cited and relevant documents.<sup>192</sup> This would, the prosecutors believed, speed up the trial and facilitate the presentation of more engaging presentations in the courtroom so that the Press and other observers would only hear the most interesting arguments and evidence. Storey expressed his hope that by this method, 'the usual laborious and tedious method of introducing documentary evidence may be expedited'.<sup>193</sup> In this way, the judges could be left to read the briefs in full or to the extent they themselves deemed necessary – outside of the courtroom and in their own time.

The Tribunal accepted this method and took the Defence's silence to signify that there were no objections.<sup>194</sup> But with the rapid submission of briefs and documents it

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<sup>190</sup> Ibid., p. 160.

<sup>191</sup> RHJ, Diary, 18/Sep/1945 - 5/Oct/1945, LoC/RHJP/95/'Diary'.

<sup>192</sup> IMT, 22/Nov/1945, Vol. II, p. 178; 190-191.

<sup>193</sup> Ibid., pp. 160-161.

<sup>194</sup> Ibid., p. 161.

became clear during the first day of these presentations (Thursday, 22/Nov/1945) that too much was being asked of the Tribunal and of the Defence. In the afternoon, two problems emerged that should have been avoided by the Prosecution: all the briefs submitted to the Tribunal were only in English and, therefore, useless to the French and Russian judges. To make matters worse, only six English-language copies had been made for the Defence who, due to a 'misunderstanding' – i.e. a mistake of the Prosecution – did not have possession of them in the courtroom.<sup>195</sup> Storey assured the court that the Defence would get the briefs (which were being fetched from the document room) and, although no German translations were yet available, he reported that a Prosecution lawyer had 'approached some of the distinguished counsel for the Defence, and learned that a great many of them not only speak English, but understand it when they read it'.<sup>196</sup>

After a recess, during which Prosecution and Defence lawyers discussed the problems of translation, the Defence – remarkably – agreed to proceed with German versions of the documents, but only English copies of the briefs.<sup>197</sup> The first day had been confusing for Defence counsel who, it seems, were temporarily willing to permit teething problems. Perhaps by the weekend, as the Prosecution implied, translation and duplication problems would be resolved and things would become more comprehensible to the Defence.

But the following day, Friday, Dr. Dix, on behalf of the Defence, asked for clarification: was everything in the documents (by which he also meant the briefs) viewed by the Tribunal as a basis for judgement of the defendants – even though portions of argument or documents might not be made in court?<sup>198</sup> When the President of the Tribunal answered in the affirmative, it became clear that the Defence would need to read everything and contest anything incriminating contained within the briefs or documents even if they had not been read in the court. With only English-language briefs, therefore, they would need to contest arguments made in a language that many of the defendants, and some of the lawyers, did not understand.

Matters became worse from the Defence's perspective, when Sidney S. Alderman, for the Prosecution, could only offer one copy of a document book to the Defence in court. Dr. Dix, for the Defence, politely refused to accept it. It would be unfair to all the other defendants, he said, and implied that he did not wish to submit to such a precedent that might permanently disable the Defence as a whole. Besides, he

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<sup>195</sup> Ibid., p. 190.

<sup>196</sup> Ibid., pp. 190-191.

<sup>197</sup> Ibid., p. 195.

<sup>198</sup> IMT, 23/Nov/1945, Vol. II, p. 204.

continued, the Prosecution and Defence would meet at the weekend to resolve the problem. But how many copies of the current document book, wondered the President, would materialise by Monday? Alderman admitted that he couldn't say, and proceeded to suggest a solution to the current problem with his own presentation:

I think many of us have underestimated the contribution of this interpreting system to this Trial. [...] I expect to read the pertinent parts of the documents into the system so that they will go into the transcript of record. Counsel for the German defendants will get their transcripts in German; our French and Russian Allies will get their transcripts in their language, and it seems to me that that is the most helpful way to overcome this language barrier.<sup>199</sup>

Without realising it, Alderman had lodged in the minds of the judges an idea that would be viewed as disastrous by the Prosecution. Soon after further discussion of whether or not sufficient copies of documents would be produced in the right languages by Monday, the Tribunal adjourned the proceedings. When the court convened after the weekend, Justice Lawrence (the President) made a ruling that would inevitably result in boredom:

[I]n the future, only such parts of documents as are read in court by the Prosecution shall in the first instance be part of the record. In that way those parts of the documents will be conveyed to defendants' counsel through the earphones in German.<sup>200</sup>

From that point onwards (until the ruling was revoked on 17<sup>th</sup> December<sup>201</sup>) the Prosecution would no longer be allowed to proceed at a pace that, while designed to maintain interest in the outside world, simply overwhelmed everyone in the courtroom. Still to be presented by the American Prosecution were phases such as aggression against Austria, Czechoslovakia and the U.S.S.R., Collaboration with Japan, Exploitation of Forced Labour, Concentration Camps, and The Persecution of the Jews. To engage in laborious readings of voluminous and lengthy documents would drain pathos from even the most horrible crimes. The defendants were pleased. As a result, Jackson later recalled that there were undoubtedly problems that needed to be resolved:

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<sup>199</sup> IMT, 23/Nov/1945, Vol. II, p. 249.

<sup>200</sup> IMT, 23/Nov/1945, Vol. II, pp. 255.

<sup>201</sup> IMT, 17/Dec/1945, Vol. IV, p. 2.

The trial was dragging. That couldn't be denied. The defendants were becoming more confident and arrogant. The trial badly needed a shot in the arm to pep up our own staff, as well as to give the correspondents something to write about. The remedy that we sought to use was to show, rather out of order, and rather before we had expected to, the films, both those taken by the Americans and captured German film, of the concentration camps.<sup>202</sup>

By using film, Jackson hoped to revive public interest in the trial. He also wished to see the defendants feeling less comfortable. By the time the first film was shown, the use of documents had not, on the whole, seemed to trouble the defendants. They appeared rather comfortable with the way the proceedings were progressing, viewing their trial-by-document with 'mixed glee and disdain'.<sup>203</sup>

We can, therefore, conclude that the American Prosecutions' staging of a morality play had failed in one significant regard. The defendants had not appeared to feel or express any sorrow for the crimes that had been described in the courtroom. As a result, they still appeared to inhabit an entirely alien moral universe to their captors – a situation that did not reflect Jackson's belief in their consciousness of wrong-doing. Furthermore, the Prosecution had only partially succeeded in delivering to its audience a sufficiently dramatic and engaging narrative of Nazi criminality. Prosecutors' expectations for a dramatic trial had been dashed soon after Jackson's opening speech. Protracted cross-examination and slow translation had drained witness-testimony of the drama that Americans had expected before the trial had begun. This problem was only compounded by the slow pace of delivering evidence to the Tribunal through the use of original German documents. Jackson was aware that the credibility of the trial was now in danger: to host up to 71 potentially bored American reporters in the courtroom would do little to advocate the value of such an enormous investment of manpower and expense in extending the principle of the rule of law beyond the borders of the United States. Much hope rested, therefore, in his decision to show some films somewhat earlier than had been planned.

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<sup>202</sup>RHJ, Phillips Oral History, pp. 1,405-1,408. LoC/RHJP/259/4.

<sup>203</sup> 'JES' to William J. Donovan, Memorandum, no date, Cornell/WJDP/XIX/64.04.

## CHAPTER 5

# THE CELLULOID MOUSETRAP

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*A man can wish to slink away from many things in life, and he may even succeed, so that life's favoured one can say in the last moment, 'I slipped away from all the cares which other men suffered'. But if such a person wishes to bluster out of, to defy, to slink away from remorse, alas, which is indeed the most terrible to say of him, that he failed, or that he succeeded?*

Søren Kierkegaard<sup>1</sup>

*I have heard  
That guilty creatures sitting at a play  
Have by the very cunning of the scene  
Been struck so to the soul that presently  
They have proclaimed their malefactions. [...]   
The play's the thing wherein I'll catch the conscience of the King.*

William Shakespeare<sup>2</sup>

This chapter addresses the particular way in which the American Prosecution used film in the courtroom at the Nuremberg Palace of Justice.<sup>3</sup> As we have seen in the previous chapter, the trial began with Jackson's theatrical words that appeared to offer the prospect of a dramatic trial. Expectations were high amongst the prosecutors themselves that their case would provide an engaging portrayal of Nazi criminality. The proceedings, however, would be characterised by some observers as being very dull.<sup>4</sup> But the subsequent use of witnesses and documents failed in one other very important respect: it appeared to Jackson and others that the defendants, on the whole, were not exhibiting much acknowledgment of the wrongs they were responsible for. Unlike previous historical research on the Americans' use of film at Nuremberg, using the case of the film *Nazi Concentration Camps*, I will show just how film came to be used as an effective theatrical device that was used to impart moral lessons. The historian who already comes closest to explaining this most significant function of film at Nuremberg is Christian Delage who states:

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<sup>1</sup> Søren Kierkegaard, *Purity of Heart is to Will One Thing* (New York and London: Harper & Brothers, 1938), cited in: Antony Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), pp. 66-67.

<sup>2</sup> William Shakespeare, *Hamlet*, II, 2.

<sup>3</sup> For a biographical account of the most significant filmmaker working for the prosecution at Nuremberg, see: Sandra Schulberg, *The Celluloid Noose* (forthcoming, Town??: Publisher???, 2011???).

<sup>4</sup> West, *A Train of Powder*, p. 3.

Far from subjecting the audience of the trial to a complacent show, or assigning the film [*Nazi Concentration Camps*] a simple documentary value, the point was to force the Nazi dignitaries to recognize, before a court, the crimes for which they were responsible. Against their wishes, the defendants had to show themselves, close to the images screened in the courtroom.<sup>5</sup>

Whilst it is true that the audience were not subjected to a *complacent* show, I contend that they were, in fact, made part of a spectacle that constituted an effective form of morality play. Furthermore, whilst it is true that the American Prosecution did not assign a *simple* documentary value to the film, I argue that the American Prosecution understood film to possess considerable 'documentary value'. Finally, I begin from where Delage concludes in explaining exactly how and why the point of showing the film was to attempt to make the Nazi defendants recognize their responsibility for the crimes that could be seen on the screen.

### 5.1. The Celluloid Experiment

During the Charter negotiations at London in August 1945, and during his opening speech at the trial, Robert Jackson had suggested that the particular identities of the individuals in the dock would hardly matter: it was the 'social forces' and crimes they represented that, most importantly, had to be condemned.<sup>6</sup> Yet the very novelty in applying international *criminal* law at Nuremberg was that individuals were to be held accountable for what they themselves preferred to classify as 'acts of state'. Jackson observed that, combined with the excuse of (only 'following') 'superior orders', treating wrongful behaviour as 'acts of state' provided immunity to guilty individuals: 'Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons'.<sup>7</sup>

Once those particular persons were imprisoned at the Palace of Justice in Nuremberg, concerns with principles of law and procedure were eclipsed by a fascination with the defendants. It was principally Americans and Britons who were fascinated. Reporters, visitors, and members of the Prosecution commented on various aspects of their appearance – the clothes they wore, the way they walked, the colour of their skin, the way they groomed, and the mannerisms they exhibited. Perhaps the most graphic portrayals were provided by Rebecca West who thought that

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<sup>5</sup> Delage, 'Image as Evidence', p. 503.

<sup>6</sup> IMT, 21/Nov/1945, Vol. II, p. 99. See above, p. 45.

<sup>7</sup> IMT, Vol. II, 21/Nov/1945, p. 150.

Most of them, except Schacht, who was white haired, and Speer, who was black like a monkey, were neither dark nor fair anymore; and there was amongst them no leanness that did not sag and no plumpness that seemed more than inflation by some thin gas.<sup>8</sup>

A concern with showing the world the faces of the defendants had already been envisaged at a very early stage in planning the trial. A visual record of the proceedings, thought one member of the OSS, would be invaluable for the newsreels, and the maker of these films would need to be 'a very good director indeed,' capable of 'translat[ing] on to the screen the great drama evolving before his eyes':

[...] If there are more than one accused, the close up camera should pan across the faces of the various prisoners. If possible, these cameras should be hidden [...] for if the accused know that they are being filmed, they will pose and posture, and it is essential that they should not prejudice the inherent drama of the proceedings by behaving unnaturally.<sup>9</sup>

What was desirable, therefore, was to see their 'natural' reactions to evidence presented in the courtroom. But before reaching this stage, the Americans had ample opportunity to indulge their fascination with 'the mind of the Nazi', as their jailer put it.<sup>10</sup>

Prison-chief Colonel Burton C. Andrus recalled that, even before the defendants arrived at the jail of the Palace of Justice, American psychologists and psychiatrists had already thoroughly examined them:

From almost the first day of capture, the Nazis of Nuremberg had been under constant psychiatric examination. In their prison cells and in interview rooms they were questioned, given tests and asked about their background. There was little in the end that our prison psychiatrists and psychologist did not know about them.<sup>11</sup>

Andrus' use of these professionals was driven by a well-founded concern that some of the prisoners might consider suicide.<sup>12</sup> For Andrus, therefore, it was essential to monitor their morale. The psychologists and psychiatrists themselves, however, viewed the chance to examine the remnants of the Third Reich's leadership as a once-in-a-lifetime opportunity to develop their professional talents with unique and fascinating subjects. As Dr. Douglas Kelley, a psychiatrist, put it, 'As a scientist, I regarded my duty

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<sup>8</sup> See, for example, West, *A Train of Powder*, p. 4.

<sup>9</sup> Anonymous, 'A Note on the film record of the War Crimes Trials', undated [c. Jun-Jul, 1945], NARA/RG-226/90/12/126. For further explanation of this document see p. 78, note 43.

<sup>10</sup> Andrus, *The Infamous of Nuremberg*, p. 92.

<sup>11</sup> Ibid.

<sup>12</sup> Indeed, Robert Ley, one of the indicted prisoners, killed himself in his Nuremberg cell before the trial began; Rudolf Hess had attempted suicide twice during his war-time captivity in England; Hans Frank attempted suicide when captured by Allied troops. Ibid., pp. 87-91; Douglas M. Kelley, *22 Cells in Nuremberg: A Psychiatrist Examines the Nazi Criminals* (London: W. H. Allen, 1947), p. 22; Gilbert, *Nuremberg Diary*, p. 12. Ley's suicide at Nuremberg followed that of another prisoner's, Dr. Leonardo Conti. Conti was responsible for many inhumane 'medical experiments' conducted in concentration camps and elsewhere. The Americans held him at Nuremberg for interrogation.

in the jail to be not only to guard the health of men facing trial for war crimes but also to study them as a researcher in a laboratory'.<sup>13</sup> Kelley and others used a variety of techniques to examine whether or not there were personality traits that were particular to the prisoners, and whether, as a group, they shared these traits in common. Whilst Dr. Gustave Gilbert, a psychologist, asserted that several of the prisoners exhibited certain 'pathological tendencies' (for example, paranoia or narcissism), both he and Kelley viewed them as legally sane.<sup>14</sup> Kelley believed that they 'differed from the normal chiefly in their lack of conscience' whereas Gilbert perceived in Göring 'the consciousness of guilt [but] the need to escape it while brushing it off with dramatic gestures'.<sup>15</sup> Whether or not their 'scientific' methods were reliable, these observations demonstrated a desire to test the defendants for the presence or absence of feelings of guilt and remorse. 'Two or three of them', thought Gilbert, 'appeared to show some signs of remorse'.<sup>16</sup> The most vocal of them was Hans Frank who had proclaimed his conversion to Catholicism and denounced Hitler as 'evil' and 'a psychopath'.<sup>17</sup> Gilbert's perception of 'abject remorse' in Frank perhaps conveys some wishful thinking on the psychologist's part since, as Raphael Gross has convincingly argued, the prisoner's moral feelings are more accurately characterised as those of shame.<sup>18</sup>

One of the clinicians' methods in examining their unusual subjects was the use of the Rorschach inkblot test, a technique that, although controversial, is still taught and applied in the U.S. today.<sup>19</sup> Kelley administered the test to seven of the Nazi inmates; Gilbert used it with another sixteen.<sup>20</sup> It was conducted by examining prisoners' reactions to ten abstract images which had no particular meaning. As Kelley explained in his book relating to his work at Nuremberg, a Rorschach examiner need not be particularly interested in the content of what a subject deciphered from an ink blot card.<sup>21</sup> What was more important, he explained, was how the subject conveyed his interpretation: he would project some of his own psychological traits via the

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<sup>13</sup> Kelley, *22 Cells*, p. 10.

<sup>14</sup> Jose Brunner, "'Oh Those Crazy Cards Again': A History of the Debate on the Nazi Rorschachs, 1946-2001," *Political Psychology*, Vol. 22, No. 2 (2001), pp. 240-243.

<sup>15</sup> Kelley, *22 Cells*, p. 196; Brunner, "'Oh Those Crazy Cards Again'," pp. 244-245.

<sup>16</sup> Gilbert, *Nuremberg Diary*, p. 12.

<sup>17</sup> *Ibid.*, p. 15.

<sup>18</sup> Gross, 'Relegating Nazism to the Past,' p. 237.

<sup>19</sup> Philip Erdberg, 'Rorschach Assessment' in Gerald Goldstein & Michel Hersen, *Handbook of Psychological Assessment* (3rd ed.) (New York: Pergamon, 1999), p. 447.

<sup>20</sup> Brunner, "'Oh Those Crazy Cards Again'," p. 239.

<sup>21</sup> Kelley, *22 Cells*.



manner in which he behaved whilst interpreting each card.<sup>22</sup>

Yet, as Jose Brunner has pointed out, it was not only the Nazi subjects that 'projected' their own psychological traits upon the cards: Kelley himself began with his own political assumptions which affected, and were shaped by, his own psychological make-up.<sup>23</sup> As Kelley himself recalled:

I shared the opinion of ethnologists and politicians alike that Nazism was a socio-cultural disease which, while it had been epidemic only among our enemies, was endemic in all parts of the world. I shared the fear that sometime in the future it might become epidemic in my own nation.<sup>24</sup>

His 'shared' concerns (he did not mention specific individuals) influenced the manner in which Kelley conducted the Rorschach tests.<sup>25</sup> His work in the 'laboratory' of Nuremberg began – by his own admission – with a fear that individuals with very similar psychological traits to the prisoners could threaten the survival of American democracy. His conclusions suggested that, rather than there being any pathological characteristics particular to his subjects at Nuremberg, all that made them unique, and all that they shared in common, were the historical circumstances under which they had acted.<sup>26</sup> Various observers echoed the conclusion that most of the Nazi leaders were not particularly special – not only during the trial, but also long after it. Years later (in 1972) the British chief prosecutor, Hartley Shawcross, recalled that most of the defendants would not have seemed out of place on the Clapham Omnibus.<sup>27</sup> His point was that most of them were 'average', not particularly impressive.<sup>28</sup> It was also several years after the trial that, more controversially and troubling, Hannah Arendt had described Adolph Eichmann (tried in Israel in 1961) as 'normal', a man who was driven, not by ideology or racism, but only by a desire to succeed in his career by pleasing his superiors.<sup>29</sup> Her observations seemed just as applicable to some of the defendants at the IMT. They reflected Kelley's anxiety at Nuremberg that begged the question: How different are we (Americans) from the Nazis?

There were, however, two or three defendants that would have seemed out of place on any London bus or in almost any setting in the autumn of 1945 – besides the

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<sup>22</sup> Ibid., p. 24.

<sup>23</sup> Brunner, "'Oh Those Crazy Cards Again'", p. 258.

<sup>24</sup> Kelley, *22 Cells*, p. 10.

<sup>25</sup> Brunner, "'Oh Those Crazy Cards Again'", pp. 242-243.

<sup>26</sup> Ibid.

<sup>27</sup> Hartley Shawcross, IWM/Sound/2991/1 (1972).

<sup>28</sup> 'The man on the Clapham Omnibus' is (still) a hypothetical analogy used in a legal context to refer to a standard of ordinarily expected behaviour by the average, reasonable, non-specialist person. Ebenezer Cobham Brewer & Adrian Room, *Brewer's Dictionary of Phrase & Fable* (15th ed.) (London: Cassell, 1996), p. 761.

<sup>29</sup> Arendt, *Eichmann*, p. 26.

Palace of Justice in Nuremberg. The clinicians, lawyers and reporters viewed Hermann Göring as an 'outstanding personality' with a penchant for dramatic gestures.<sup>30</sup> Several of the Nazi prisoners themselves shunned contact with Julius Streicher who, according to Gilbert, had a 'lewd and perverted mentality' despite being legally sane.<sup>31</sup> And many observers thought Rudolf Hess was, indeed, simply 'insane'.<sup>32</sup> An American soldier who had been present during Hess' first interrogation at Nuremberg related to Stuart Schulberg (working for the Documentary Evidence Section) that when his interrogators mentioned Russia 'he leaped from his chair and began screaming incoherently'.<sup>33</sup> As Schulberg wrote home, 'They never calmed him down after that, and he was finally led off to his cell in a condition just short of epilepsy, shrieking about the Russian barbarians'.<sup>34</sup> To Gilbert, Hess was, without doubt, 'the chief candidate for a mental examination'.<sup>35</sup>

In 1941, perhaps feeling a little neglected by his Fuehrer, Hess had flown to Scotland on an unauthorised 'diplomatic mission' hoping to make peace between Germany and Britain (in preparation for an attack on the Soviet Union). Yet he was astonished to discover that the British refused to take his peace plans seriously (or take them to the King) and, instead, sent him to a cell in the Tower of London – where he stayed until he was moved to Nuremberg in October 1945. Hitler and the Allies concurred in one respect: Hess had 'taken leave of his senses'.<sup>36</sup> He did not appear to have regained them by the time he reached Nuremberg. What made his interrogations and examinations difficult for the Allies was that he appeared to have lost his memory. To nearly every question that anyone put to him regarding his past there came the same reply: 'I cannot remember'.<sup>37</sup> There was considerable doubt amongst the lawyers and interrogators as to whether or not Hess was faking his amnesia – and, if he was, how to catch him out. Goering was put into a room with him (they were left alone for hours but their conversation was recorded), and asked him several personal questions. He also attempted to remind Hess of experiences they had shared. But the Reichsmarschall could not revive Hess' memory any better than his

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<sup>30</sup> Hartley Shawcross, IWM/Sound/2991/1 (1972).

<sup>31</sup> Gilbert, *Nuremberg Diary*, pp. 5-6.

<sup>32</sup> Stuart Schulberg wrote to his wife: 'I was talking last night to a G.I. who was in on [Hess'] first interrogation. He said Hess was obviously completely insane'. Stuart to Barbara Schulberg, 10/Oct/1945. SSP.

<sup>33</sup> Stuart to Barbara Schulberg, 10/Oct/1945. SSP.

<sup>34</sup> Ibid.

<sup>35</sup> Gilbert, *Nuremberg Diary*, p. 6.

<sup>36</sup> Louis L. Snyder, *Encyclopedia of the Third Reich* (Ware, Herts.: Wordsworth, 1998), pp. 142-144.

<sup>37</sup> Kelley, *22 Cells*, p. 23.

jailers could – Hess behaved as though he had never met Goering before.<sup>38</sup>

Kelley felt, without offering much explanation, that 'with people like Hess' the Rorschach test was particularly useful. Luckily, for Kelley, the prisoner was 'quite cooperative'.<sup>39</sup> After conducting the test, Kelley diagnosed Hess as suffering from 'a true psychoneurosis, primarily of the hysterical type, engrafted on a basic paranoid and schizoid personality, with an amnesia, partly genuine and partly feigned'.<sup>40</sup> He informed Jackson of the results, stating that Hess was partially 'malingering'.<sup>41</sup> Three other American psychiatrists, together with three Russian, a French, and three British clinicians subsequently examined Hess and confirmed Kelley's diagnosis.<sup>42</sup> Kelley sought Jackson's permission to administer certain drugs that would assist hypnosis in his attempt to break the amnesia. But Jackson demurred, concerned that such a procedure might later be used by Hess or any sympathisers as an explanation for any decline in the health of the 'balmy exhibitionist'.<sup>43</sup> Yet the problem remained as to what to do to break Hess' (genuine and/or fake) amnesia. 'We finally decided,' recalled Jackson, 'on another experiment to see if we could bring back his memory'.<sup>44</sup>

On Thursday 8<sup>th</sup> November 1945, Hess was brought to a film-projection room in the Palace of Justice and seated towards the back, facing the screen. There were approximately twenty other people present: psychiatrists, psychologists, medical doctors and members of the American Prosecution – including senior figures such as Jackson and William Donovan.<sup>45</sup> Hess would be shown some of Leni Riefenstahl's *Triumph of the Will*, including a scene in which the Rudolf Hess of 1934, opening the proceedings, screamed praise and allegiance to his Fuehrer.<sup>46</sup>

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<sup>38</sup> Tusa & Tusa, *The Nuremberg Trial*, p. 131; RHJ, Phillips Oral History, pp. 1,409-1,410. LoC/RHJP/259/4; Leonard Wheeler to Mrs. Wheeler, 9/Oct/1945, Harvard/LWP/4/3.

<sup>39</sup> Kelley, *22 Cells*, pp. 24-25.

<sup>40</sup> *Ibid.*, p. 25.

<sup>41</sup> *Ibid.*, p. 26.

<sup>42</sup> *Ibid.*, p. 27.

<sup>43</sup> The British, recalled Jackson, described Hess' condition as being 'a little balmy'. The word can be used as a variant of 'barmy' but it may be that Jackson deciphered 'balmy' from the British use of 'barmy'. Either way, the latter is quite obviously the originally intended (British) meaning conveyed to Jackson. RHJ, Phillips Oral History, p. 1,410. LoC/RHJP/259/4; IMT, 30/Nov/1945, Vol. II, p. 493.

<sup>44</sup> RHJ, Phillips Oral History, pp. 1,410. LoC/RHJP/259/4.

<sup>45</sup> *Ibid.*

<sup>46</sup> Stuart to Barbara Schulberg, 9/Nov/1945. SSP.



**FIGURE 1, A/B:** A window on a past that Hess would rather everyone forgot: The American team of lawyers, psychiatrists and psychologist show Hess, the Nuremberg 'Major War Criminal' of November 1945, scenes from *Triumph of the Will* (Dir: Leni Riefenstahl, 1935). As the Deputy of the Third Reich, Hess can be seen opening the 6<sup>th</sup> Nazi Party Congress at Nuremberg in 1934.

But before the film was shown, arrangements were made - 'by the psychiatrists', according to Jackson - to ensure that when the main lights were switched off (so that the film would be viewable on the screen) Hess would be lit from below.<sup>47</sup> He was, therefore, visible to all observers in the room. There was considerable excitement as to how he would react to eleven-year-old images and sounds of himself. As Lt. James B. Donovan put it: 'I wonder what will go through his mind when he sees [the film]. [... I] am going to sit there and just watch his reactions'.<sup>48</sup> Lt. Donovan felt sure, beforehand, that Hess was faking his amnesia and, without stating exactly how, hoped the film would unravel his act.<sup>49</sup> As Jackson recalled, it appeared, at first, to work, but only before disappointing the observers in the room:

Rudol[f] Hess watched Rudol[f] Hess [in the] Sportspalast where the proceeding [of the Nazi Party Congress] was in session. At first we thought that the picture had awakened his memories. He leaned forward and looked at it intently. The martial music seemed to stir him. Then in a minute he settled back and took no more notice of the film. It finished and then the psychiatrists [and psychologists] attempted to talk to him about what he had seen. He claimed that he didn't remember anything about it. Our experiment produced no changed attitude whatever.<sup>50</sup>

Nevertheless, Lt. Donovan described it as the most fascinating event he had ever attended. Looking back and forth between the screen and the prisoner was a 'terrific' experience. But he was no longer so sure that Hess was faking his amnesia - that was 'terribly difficult to figure out'.<sup>51</sup> As Stuart Schulberg noted:

<sup>47</sup> RHJ, Phillips Oral History, pp. 1,410. LoC/RHJP/259/4.

<sup>48</sup> James B. to Mary Donovan, [7/Nov/1945], Hoover/JBDP/34/20.

<sup>49</sup> Ibid.

<sup>50</sup> RHJ, Phillips Oral History, pp. 1,410-1,411. LoC/RHJP/259/4.

<sup>51</sup> James B. to Mary Donovan, [9/Nov/1945], Hoover/JBDP/34/20.

Col. Amen, [...] and the psychiatrists [and psychologists] who are working with Hess, hoped he would give himself away under the shock of seeing himself in action. They hoped he would give some clue that his amnesia is a fraud by which he hopes to escape heavy punishment. The experiment was a failure. Hess performed brilliantly – if he is faking – and gave a perfect imitation of a man who has truly lost his memory.<sup>52</sup>

The 'performance' continued when the trial was under way. On the 30<sup>th</sup> November, the court was cleared of visitors and all other defendants in order to discuss Hess' mental state so that the Tribunal could judge whether or not he was fit to stand trial. Dr. Von Rohrscheidt, his defence counsel, claimed that he was not.<sup>53</sup> But Jackson, basing his arguments on psychiatric reports already quoted to the Tribunal, asserted that '[h]e is in the volunteer class with his amnesia'.<sup>54</sup> When Hess' chance finally came to address the court directly, he resolved the Tribunal's dilemma:

Henceforth my memory will again respond to the outside world. The reasons for simulating loss of memory were of a tactical nature. Only my ability to concentrate is, in fact, somewhat reduced. My capacity to follow the trial, to defend myself, to put questions to witnesses, or to answer questions myself is not affected thereby.<sup>55</sup>

Despite the dramatic courtroom confession, Kelley still believed that Hess' amnesia had not been *entirely* false and that his memory, in some respects, was still cloudy. Contrary to Hess' reasoning, Kelley felt, there had been little to gain from any pretence. As Kelley recalled, it only made the preparation of his defence much more difficult.<sup>56</sup> He viewed Hess' admission in court as a 'dramatic, hysterical gesture' designed to disguise from others the deficiencies of his mind.<sup>57</sup> He also believed that showing Hess the film, an experiment that appeared to have failed at the time it was conducted, had produced some effect on the subject. When he asked Hess if he recalled viewing the film, the prisoner's memory (now) appeared to be working:

Yes, I remember [...] when the pictures were shown. I thought then that you knew I was pretending. All the time you looked only at my hands. It made me very nervous to know you had learned my secret.<sup>58</sup>

Kelley had been convinced that, as Hess watched the screen, he had remembered more than he would admit. Kelley *had* stared at Hess' hands 'in a deliberate effort to

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<sup>52</sup> Stuart to Barbara Schulberg, 9/Nov/1945. SSP.

<sup>53</sup> IMT, 30/Nov/1945, Vol. II, pp. 478-486.

<sup>54</sup> *Ibid.*, pp. 491, 493.

<sup>55</sup> *Ibid.*, p. 496.

<sup>56</sup> However, Kelley's logic only makes sense with hindsight if we view Hess' confession as an inevitability. This does, in fact, border on speculation and it is just as easy to speculate that Hess suddenly changed his mind about faking amnesia when he realised that he might face a very lonely existence (in continued incarceration) if removed from the trial – and from daily contact with his comrades.

<sup>57</sup> Kelley, *22 Cells*, p. 27.

<sup>58</sup> *Ibid.*

make him crack'.<sup>59</sup> Whilst Hess was well practiced in 'keeping a straight face', Kelley believed that he displayed nervousness by tightening his fingers – a symptom that could be observed whilst the film played. When it had finished, Hess had attempted to avoid speaking to Kelley as much as possible.<sup>60</sup> For Kelley, at least in hindsight, this all suggested that there was some value in the experiment. Whether Kelley's belief in the possibility of detecting Hess' nervousness was reliable or not, it is clear that he believed, as with the Rorschach inkblot test, that the form of Hess' reactions were worth noting carefully. Kelley would have an opportunity in court to take part in similar experiments when the American Prosecution would present film as evidence to the Tribunal.

## 5.2. Film as Courtroom Evidence

The use of film in courtroom proceedings was not new for Americans. Most of the first motion pictures presented as evidence in domestic US courts – from approximately 1915 onwards – had been used in personal injury cases.<sup>61</sup> They were particularly useful for plaintiffs who hoped to demonstrate a previous ability to perform activities that were no longer possible, or, more commonly, against 'malingerers' who, professing to be immobilized after a real or invented accident, were shown to be more agile than they claimed.<sup>62</sup> From the earliest of these cases, jurists understood film as a form of witnessing that, once authenticated by a living, breathing witness (preferably the camera operator who would confirm that the film reflected a 'true likeness' to the events seen with his/her own eyes), was usually accepted by a court as being admissible (if having legitimate, relevant and 'probative' value). A standard American legal handbook, updated and republished in 1944, summarized the value of film as evidence for any municipal court:

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<sup>59</sup> Ibid., p. 28.

<sup>60</sup> Ibid.

<sup>61</sup> Pierre R. Paradis, 'The Celluloid Witness,' *University of Colorado Law Review*, Vol. 37 (1965), p. 235.

<sup>62</sup> Ibid., p. 242.

A sound moving picture, if offered in evidence, raise[s] questions somewhat unusual, yet not difficult of solution, if the character of the film [...] as a witness be kept in mind. The human witness describes in his testimony what he has seen or heard, if it be relevant and material. A [...] film performs the same service. In the former case, the record was made on the brain, in the latter on the film. The latter may be even more accurate than the former. Thus subject to competency being first established there is no reason why the film should not be heard as well as seen as to any matters relevant and material to the issues.<sup>63</sup>

That a film could be 'more accurate' than a live witness implied that there was potential for greater 'objectivity' with film than with the subjective human brain.

Nevertheless, as this was not *always* the case, then judges' willingness to admit filmic evidence suggested that they deemed it capable of providing something qualitatively different from oral testimony. To avoid being classed as merely cumulative, filmic evidence would need to provide information that added detail to a process or event that was more difficult (or perhaps impossible) to convey with words alone. If a judge deemed a particular film to be "dramatic" or 'gruesome', this needed to be weighed against its 'probative value' in determining its admissibility. But judges never rejected the use of film simply for the reason of it being film.<sup>64</sup> By 1945, therefore, the use of motion-picture film – primarily viewed as a form of witnessing – was not new to American jurists. All the framers of the London Charter (American or otherwise) saw no need to declare explicitly that it should be admissible at the IMT. Instead, Article 19 of the Charter addressed the issue of accepting various forms of evidence (including film) in a very general manner, handing powers of discretion entirely to the judges of the court:

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.<sup>65</sup>

If the judges themselves viewed any particular filmic evidence as a valid form of witnessing (or, indeed, valid in providing proof of *anything* relevant to the trial) it would be legally valid according to the London Charter.

Jurists since Nuremberg have continued to characterise film, primarily, as a form of witnessing – albeit with a much more critical eye regarding any attribution of 'objectivity' to the camera's lens.<sup>66</sup> This is true of relatively recent scholarship

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<sup>63</sup> John Jay McKelvey, *Handbook of the Law of Evidence* (5th ed.) (St. Paul, Minn.: West Publishing Co., 1944), p. 689. This edition was the first revision to devote an entire chapter to the subject of 'pictorial evidence'.

<sup>64</sup> Paradis, 'The Celluloid Witness,' p. 235.

<sup>65</sup> IMT, Vol. I, p. 15.

<sup>66</sup> Paradis, 'The Celluloid Witness.' The advent of digital photography and video echoes earlier juridical concern with the advent of film used as evidence in court: Christopher J. Buccafusco, 'Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective,' *University of Miami Law Review*, Vol.

concerned with film at Nuremberg and in other international criminal courts. Christian Delage has provided insightful discussions of film used at Nuremberg and credits filmic evidence with a 'double ability to prove and to testify'.<sup>67</sup> Lawrence Douglas has, perhaps, provided the most enlightening treatment of filmic evidence of atrocities at Nuremberg in an article entitled 'Film as Witness' which highlights the manner in which the American Prosecution presented the now well-known images of concentration camps discovered by Allied troops (in the west of Germany towards the end of the war).<sup>68</sup> He addresses the question of just what *Nazi Concentration Camps*, the most significant film presented as evidence of conspiracy to commit Crimes Against Humanity, was a witness to – and what, exactly, it attempted to prove. He points out that, although it was used to represent the Holocaust in trials after Nuremberg, this is *not* how the American Prosecution (or the filmmakers at the camps) understood it in 1945. They used the film, Douglas observes, to represent the excesses of militarism, the annihilation of political *opposition* (real and mostly imagined by the Nazis) rather than an example of the specific Nazi project of murdering all Jews within occupied Europe. Douglas demonstrates how the American Prosecution was driven by the aim of marrying unprecedented images of atrocity with a legal case that emphasised, more than anything else, the crime of 'aggressive war'.<sup>69</sup> As we have already seen, War Crimes and Crimes Against Humanity were viewed by Jackson as offshoots of the supreme crime of Conspiracy to commit Crimes Against Peace. Thus, *Nazi Concentration Camps*, presented a particular narrative of atrocity that was shaped by, and fitted well, the American Prosecution's overall legal vision.

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The images of the 'liberated' western concentration camps that appeared in the

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58 (2004), pp. 626, 628, 631, 650.

<sup>67</sup> Delage, 'Image as Evidence', p. 502. See also: Delage, *La Vérité par l'image*. Delage has also directed the best television documentary on the Nuremberg IMT, utilizing extensive original coverage of the trial as well as interviews with members of the American Prosecution, including Budd Schulberg, one of the filmmakers: Christian Delage (Dir.), *Le Procès de Nuremberg: Les Nazis Face À Leurs Crimes*, (Arte France, 2006).

<sup>68</sup> Lawrence Douglas, 'Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal,' *The Yale Law Journal*, Vol. 105, No. 2 (1995). See also: Douglas, *Memory of Judgment*. As is often the case with ground-breaking history, Douglas has inspired criticism that either misrepresents his position or fails to appreciate the issues he raises. See, for example: Yvonne Kozlovsky-Golan, *The Shaping of the Holocaust Visual Conscience by the Nuremberg Trials. Birth of the Holocaust in Hollywood-Style Motion Pictures: The Impact of the Movie 'Nazi Concentration Camps'*, vol. 9, (Jerusalem: Yad Vashem, 2006); Susan Twist, 'Evidence of Atrocities or Atrocious Use of Evidence: The Controversial Use of Atrocity Film at Nuremberg,' *Liverpool Law Review*, Vol. 26, No. 3 (2005). Among other questionable interpretations, Kozlovsky-Golan wrongly accuses Douglas of harshly condemning and attacking *Nazi Concentration Camps* and George Stevens (pp. 25-26). He does not. Twist's article (which does not misrepresent Douglas) fixates on the characterisation of *Nazi Concentration Camps* as hearsay (citing cases in English common law), and conflates law with justice in her concluding question: '[...] if evaluation of a defendant's guilt is predicated upon emotion rather than reason, can it be said, with any degree of conviction, that the interests of justice have truly been served?' This suggests that showing the film was based entirely on emotion(s). If, however, the question is posed without this problematic premise, the answer, in the case of *Nazi Concentration Camps* (as this dissertation contends) is 'yes'.

<sup>69</sup> Douglas, 'Film as Witness,' p. 460.



courtroom did conform to the classic legal view of film-as-witness. They represented a (partial) likeness to what filmmakers had seen as their cameras recorded the scenes. The camera (and sound) operators made written notes of the circumstances they perceived that they could not record with their filmmaking equipment. These notes were used 'directly' (i.e. without modification but, of course, through a process of selection) in the creation of an audible narration that accompanied the visual narrative within *Nazi Concentration Camps*.<sup>70</sup> One of the directors of photography, George Stevens, provided the American Prosecution with an affidavit attesting to the authenticity of these images.<sup>71</sup>

Yet whilst American jurists generally understood film as a form of witnessing, the American Prosecution at Nuremberg also used it as both less and more than that. As we have already seen, problems were encountered with live witnesses that became apparent as the trial began. To recall, there were two significant *practical* problems with the use of living Prosecution witnesses.<sup>72</sup> One was the potential for lengthy and multiple cross-examinations by the Defence which threatened to prolong the duration of the trial considerably. The other was the opportunity that each cross-examination of a witness would provide to the Defence for widening the scope of issues to be investigated – including topics that might help certain defendants. The Prosecution eradicated these problems with the use of film.

Unlike living witnesses, using film enabled the Prosecution to deliver a complete and controlled narrative in the time it took to project it - without interjections from the Tribunal or objections from the Defence which would have to wait until after it finished running. (The Defence, however, did not object, in principle, to the use of film at the IMT). It was, of course, impossible to cross-examine *Nazi Concentration Camps* after it was shown. What made matters worse for the Defence is that the film's principle director of photography – authenticating, via the use of an affidavit, its true likeness to the conditions witnessed by the filmmakers – was not available for cross-examination.<sup>73</sup> The use of the film, when understood simply as a form of witnessing, therefore, conformed to the definition of hearsay – an 'atrocious use of evidence,' suggests Susan Twist, who judges the laws of the London Charter and the proceedings at the IMT by English/Welsh legal standards of the twenty-first century.<sup>74</sup>

Jurists in 1945, however, commonly understood that the single most significant

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<sup>70</sup> IMT, 29/Nov/1945, Vol. II, p. 433.

<sup>71</sup> IMT, 'Exhibit A', PS-2430, 2/Oct/1945. Vol. XXX, pp. 259-260.

<sup>72</sup> See above, p. 122.

<sup>73</sup> IMT, 'Exhibit A', PS-2430, 2/Oct/1945. Vol. XXX, pp. 259-260.

<sup>74</sup> Twist, 'Evidence of Atrocities or Atrocious Use of Evidence.' See above, note 68.

reason for the exclusion of hearsay evidence in common-law jurisdictions related to the problem that jurors were unqualified to assess the reliability of such evidence (many jurists still see this as the primary reason for excluding hearsay evidence).<sup>75</sup> But this did not apply to the continental system of law where the only 'triers of facts' were judges.<sup>76</sup> As Jackson put it in response to the Defence's objection to the use of affidavits (rather than having those that authored the affidavits available for cross-examination):

[...] the [London] Charter sets up only two standards by which any evidence [...] may be rejected. The first is that evidence must be relevant to the issue. The second is that it must have some probative value. That was made mandatory upon this Tribunal in Article 19 because of the difficulty of ever trying this case if we used the technical rules of Common Law proof. [...] We have no jury. There is no occasion for applying jury rules.<sup>77</sup>

Thus, the 'relaxed' rules of evidence (as Douglas puts it) specified in Article 19 of the London Charter were only 'relaxed' from an Anglo-American perspective: they reflected continental European legal standards instead, where the rules of evidence were far less stringent.<sup>78</sup> In keeping with continental rules, Article 17 of the Charter gave the Tribunal powers to summon witnesses itself for any reason it saw fit – such as, for example, to determine the value of any particular affidavit or hearsay evidence.<sup>79</sup> As Jackson was keen to point out to the Tribunal, this (along with other rules) represented a reluctant American concession to continental negotiators of the London Charter.<sup>80</sup> It was the judges, therefore, who would decide upon the probative value and fairness of any evidence, including hearsay evidence and including film. By the end of the first week of the trial, the defendants expressed their feelings that the Tribunal, presided over by Lord Justice Lawrence, was doing its very best to be fair to them.<sup>81</sup>

However, Twist has implied that justice was not served by the use of film at Nuremberg because images of atrocities, in addition to constituting hearsay, proved

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<sup>75</sup> Frederick W. J. Koch, 'The Hearsay Rule's True Raison D'Être: Its Implications for the New Principled Approach,' *Ottawa Law Review*, Vol. 37, No. 2 (2005-6), p. 252. Koch convincingly suggests more reasons – than jurors' inability to assess evidence – for the development of exclusionary rules for hearsay evidence. This is, however, set against a still prevailing view (in the twenty-first century) that the jury problem is the single basis for requiring such rules. For a typical expression of this singular view before Nuremberg, see: Robert E. Ireton, 'Hearsay Evidence in Europe,' *United States Law Review*, Vol. 66, No. 5 (1932), p. 253.

<sup>76</sup> For a critique of John Wigmore's theory of hearsay evidence – based only on a concern with common law practice where the only 'triers of facts' were juries – see: Koch, 'The Hearsay Rule's True Raison D'Être,' pp. 253-254.

<sup>77</sup> IMT, 14/Dec/1945, Vol. III, p. 543.

<sup>78</sup> Douglas, 'Film as Witness,' p. 466.

<sup>79</sup> IMT, Vol. I, p. 14.

<sup>80</sup> IMT, 14/Dec/1945, Vol. III, pp. 545-546.

<sup>81</sup> Major Kelley to General Donovan, Memorandum, 27/Nov/1945. Cornell/WJDP/XIX/61.04.

little more about the defendants than that they were capable of being horrified – as too, implies Twist, were the judges who, being human, were also susceptible, like jurors, to the effects of viewing unprecedented images of inhumanity:

[...] did the film [*Nazi Concentration Camps*] establish a direct link between the Defendants and the acts it sought to depict? Ultimately, from a strictly evidential perspective, was its use therefore gratuitous?<sup>82</sup>

*Nazi Concentration Camps* was certainly gruesome and, as a member of the American Prosecution admitted, did not establish a *direct* link between the behaviour of the defendants and the scenes portrayed.<sup>83</sup> But the connection Twist draws between individual culpability and the 'gratuitous' nature of the images is a false dichotomy, and her assertion that it is difficult to justify use of the film 'from a strictly evidential perspective' presumes that the acceptance of hearsay evidence, or that which is gruesome, is *necessarily* in conflict with legal principles.<sup>84</sup> Yet nowhere did the Prosecution imply that individual culpability could be demonstrated from the films' content alone. And neither was the film shown merely in order to horrify the judges. It was used as *demonstrative* (rather than substantive) evidence for the purpose of illustrating the significance of a horrific, criminal, institution seen by the Prosecution as a result of a 'conspiracy' which necessarily contemplated such horrors.

Film was not the only form of demonstrative evidence used by the American Prosecution. It also presented charts and other graphics in order to clarify the structure and functioning of the Nazi state. The Stroop report, with photographs, statistics and commentary, was used to illustrate the nature of 'the Persecution of the Jews'<sup>85</sup>. In a similar manner, the presentation of *Nazi Concentration Camps*, declared Mr. Dodd for the Prosecution, was designed to *illustrate* what the words 'concentration camp' signified:

*This is by no means the entire proof* which the prosecution will offer with respect to the subject of concentration camps, but this film which we offer represents in a brief and unforgettable form an explanation of what the words "concentration camp" imply.<sup>86</sup>

Once this demonstrative evidence was submitted, individual culpability would be proved later with numerous documents – the *substantive* evidence – relating to concentration camps in separate presentations specifically concerned with each of

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<sup>82</sup> Twist, 'Evidence of Atrocities or Atrocious Use of Evidence,' p. 288.

<sup>83</sup> Taylor, *Anatomy*, p. 187. Taylor, however, played no part in the preparation or presentation of any film, nor any presentations related to concentration camps at the IMT. He is therefore not an ideal source for determining the American Prosecution's aims and methods in relation to the use of film.

<sup>84</sup> Twist, 'Evidence of Atrocities or Atrocious Use of Evidence,' p. 289.

<sup>85</sup> See Chapter 6, p. 182 (including note 10).

<sup>86</sup> IMT, 29/Nov/1945, Vol. II, p. 431. (Emphasis added).

the individuals in the dock. For example, as part of the case against Ernst Kaltenbrunner, the Prosecution made a direct connection between his various (criminal) activities and several concentration camps, including Bergen-Belsen, Buchenwald, Dachau, Flossenbürg, Mauthausen, Natzweiler, Sachsenhausen and Ravensbrück.<sup>87</sup> This substantial volume of evidence included his orders for civilians and prisoners of war to be sent to these camps, as well as orders to murder some of them. The Prosecution also provided evidence of his visits to Mauthausen including one occasion during which he observed the killing of inmates by gas.<sup>88</sup>

The film was relevant to the Americans' conspiracy charge because it related activities, such as torture, that had occurred whilst Kaltenbrunner had held the second most significant position of responsibility for the entire network of concentration camps (second to Himmler). As we have seen in Chapter 3, one of the purposes of applying the doctrine of conspiracy was to hold superiors personally responsible for the criminal actions of their subordinates. To prove the occurrence of criminal activities in the camps, and to demonstrate that Kaltenbrunner was in a position of leadership (or 'responsibility') would have been enough to satisfy the requirements of conspiracy and personal culpability as outlined in Article 6 of the London Charter.<sup>89</sup> But the Prosecution also demonstrated that Kaltenbrunner was *directly* responsible for ordering the 'liquidation' of certain concentration camps due to his concern that they would be discovered by approaching Allied armies.<sup>90</sup> Among his several crimes towards the very end of the war, Kaltenbrunner had ordered the entire surviving inmates of a Jewish camp at Landsberg to be marched to Dachau.<sup>91</sup> He had intended for them to be murdered there (or, when this became impractical, to march them to Tyrol and have them killed there) so that the only remaining inmates of Dachau would be 'Aryan nationals of the Western Powers'.<sup>92</sup> But in the chaos of the closing days of the war this plan was not implemented.<sup>93</sup> Thus the scenes of Dachau in the film were, in part, a direct result of Kaltenbrunner's orders and activities – the camp was overcrowded with prisoners from other camps that were being shut down. As demonstrative, hearsay evidence, combined with the subsequent use of substantive evidence, justice was, therefore, served very well with the screening of *Nazi Concentration Camps*. Furthermore, words, by themselves (in documents or from

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<sup>87</sup> IMT, 2/Jan/1945, Vol. IV, pp. 295-302.

<sup>88</sup> Ibid., pp. 296-297.

<sup>89</sup> See Appendix I.

<sup>90</sup> IMT, 2/Jan/1945, Vol. IV, p. 306.

<sup>91</sup> Ibid., p. 307

<sup>92</sup> Ibid.

<sup>93</sup> Ibid., p. 308

witnesses), could not have conveyed the depths of injustice (and criminality) of the camps. But, *combined with the use of documents*, the film made a very strong case against Kaltenbrunner and others.

There is another reason why the use of film and documents worked so well together. This is because, although the American Prosecution used films as a form of witnessing, it also treated them, as much as possible, like documents. Helen Lennon, also classifying the use of film at Nuremberg primarily as a form of witnessing, has emphasised the problem of representing such (visual) evidence in an official record that is purely textual.<sup>94</sup> All that was encompassed within a film at Nuremberg was reduced, in the transcript, to the brief and parenthetical statement, '[The film was then shown]'.<sup>95</sup> Yet, whilst this appears to be a problem with the official *transcript* of Nuremberg, the American Prosecution ensured that the *full* record of the trial would include transcriptions of films as part of the documentary record. Thus, in addition to the publication of the daily proceedings (in 21 volumes), transcriptions of the films appeared together with all relevant written evidence in the accompanying 18 large volumes of the officially published record. Films were assigned document numbers which were cited in court and could (and can) be used to refer to authenticating documents as well as narration-transcriptions and descriptions of scenes.<sup>96</sup>

Furthermore, the American Prosecution made their films to look like documents in a literal sense. There were three films shown by the Americans as part of the conspiracy case presented during the first weeks of the trial (before the British<sup>97</sup>, Soviets and French presented their own cases<sup>98</sup>). The first two – *Nazi Concentration Camps* and *The Nazi Plan* – began with a narrator reading affidavits attesting to the authenticity of the images that would follow (for the third, fragile film, *Original 8mm film of Atrocities against Jews*, this method was impractical).<sup>99</sup> This audio was accompanied

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<sup>94</sup> Helen Lennon, 'A Witness to Atrocity: Film as Evidence in International War Crimes Tribunals' in Toby Haggith and Joanna Newman (eds.), *Holocaust and the Moving Image: Representations in Film and Television since 1933* (London; New York: Wallflower Press, 2005), pp. 65-73. Lennon's chapter sits within a section entitled 'Film as Witness' and her research deals with other international criminal trials that took place during the 20<sup>th</sup> century.

<sup>95</sup> *Ibid.*, p. 70.

<sup>96</sup> See Appendix 1.

<sup>97</sup> To be precise, the British presented evidence before the Americans had finished their case. But by this time, the Americans had already projected the three films as part of the conspiracy case. For a list of all films presented at the trial, see Appendix 1.

<sup>98</sup> The Americans decided to use two more films at a later stage in the proceedings (after they had already presented their conspiracy case). These were: *German newsreel of Hitler's arrival from France* and *Reichsbank Loot*. For the content of *Reichsbank Loot*, see Chapter 6, p. 191. For a list of all films presented at the trial, see Appendix 1.

<sup>99</sup> James B. Donovan implied that the Prosecution wished to project the original 8-millimetre film (silent and 'captured', i.e. German-made) for reasons of authenticity. Another probable factor in the decision not to provide an edited version with narration and on-screen affidavits is that the film was so delicate and

by slowly scrolling images of the written affidavits themselves – an entirely novel method of presenting filmic evidence to a court.<sup>100</sup> It was novel because, given the legal logic of film as witness, it was entirely redundant: the very method of authenticating a filmic witness was to provide a living being (i.e. external to the film) who could vouch for its authenticity and likeness to 'reality'. But the film was treated by the Prosecution to be a witness attesting to the authenticity of itself.<sup>101</sup> Since the Prosecution held, and presented to the Tribunal, the original affidavits, their appearance on the screen was unnecessary. Nevertheless, despite the novelty of this approach, images of documents on the screen implied that film was not radically different to the bulk of evidence upon which the case was based – a roomful of documents. The films, therefore, were understood not only as a form of witnessing, but also as having *documentary value* – a description that happens to match the first use, in the English language, of the term 'documentary' as applied to a genre of film.<sup>102</sup> In this sense, despite the fact that only *Nazi Concentration Camps* was explicitly introduced to the Tribunal as a 'documentary film,' all films presented by the American Prosecution were 'documentaries' – mostly appearing in what Bill Nichols would class as the 'expository mode' – with some having greater 'documentary value' than others.<sup>103</sup>

### 5.3. Inside Nazi Concentration Camps

*Nazi Concentration Camps* was the first film presented as evidence by the American Prosecution at Nuremberg.<sup>104</sup> Members of the Field Photographic Branch (FPB) of the OSS, working for the American Prosecution, constructed (edited) it, including an audible narration. Lasting just under an hour, it showed a sequence of crime scenes – mostly concentration camps – discovered by British and (mostly) American troops as they invaded Germany from the west.<sup>105</sup> After the images of authenticating documents (noted above), it began with a simple map of Europe upon which were

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damaged that it could not be safely reproduced. It was, however, duplicated after being used as evidence. IMT, 13/Dec/1945, Vol. III, p. 536. NARA/RG-238.7, ARC 43456.

<sup>100</sup> Douglas, 'Film as Witness,' p. 446.

<sup>101</sup> This point is also made in: Ibid., pp. 465-466.

<sup>102</sup> John Grierson & Forsyth Hardy, *Grierson on Documentary* (Revised ed.) (Berkeley: University of California Press, 1966), p. 13.

<sup>103</sup> IMT, 29/Nov/1945, Vol. II, p. 431; Bill Nichols, *Representing Reality: Issues and Concepts in Documentary* (Bloomington: Indiana University Press, 1991), pp. 34-38. Douglas also refers to *Nazi Concentration Camps* as a 'documentary' and explains that its makers aspired to represent atrocities in what has subsequently been theorised as the 'realist' mode. Douglas, 'Film as Witness,' p. 470.

<sup>104</sup> For a list of all films presented as evidence at the trial, see Appendix 1.

<sup>105</sup> PS-2430 (Exhibit E), IMT, Vol. XXX, pp. 462-472. For a list of the sites, see note 107 below.

quickly overlaid, in succession, the names of approximately 90 camps (see Figure 2). As the narrator explained, 'This film report, covering a representative group of such camps, illustrates the general conditions which prevailed'.<sup>106</sup>



**FIGURE 2, A/B/C:** The opening scene of *Nazi Concentration Camps* (after images of authenticating documentation). There are too many names, appearing too quickly, for the viewer to read most of them – effectively portraying the massive scale of Nazi injustice.

With this use of graphics, it was already clear that the scale of Nazi injustice was impossible to convey comprehensively – all that the filmmakers attempted was to offer 'representative' examples. The film would focus on only twelve sites.<sup>107</sup> Much of the footage appearing throughout was sourced from the work of U.S. Signal Corps (SC) crews that had been directed by SHAEF to make the filming of atrocities and concentration camps 'a top priority' – 'above the priority of combat photography'.<sup>108</sup> Whilst SHAEF-command and members of the U.S. War Department intended such filming to assist the prosecution of future war crimes trials, there were, in fact, several reasons for filming specified in their communications. As a Signal Corps colonel summarized on 25<sup>th</sup> April 1945:

This film will be used for the following purposes:

- a. Evidence for [the office of] Judge Advocate General [...].
- b. Showing to U.S. troops.
- c. Possible release in civilian theatres in the US.
- d. Showing [...] to German civilians.
- e. [For release] by [the] Office of War Information.<sup>109</sup>

Filming would provide evidence of war crimes to the (military) office of the Judge Advocate General (JAG), for use, envisaged by JAG at this stage, in running (only) traditional war crimes trials. As with domestic *criminal* trials, the first prerequisite to conducting war crimes trials was to have custody of one or more 'perpetrators' of

<sup>106</sup> Ibid., p. 462

<sup>107</sup> The twelve examples were (in order of appearance): Leipzig, Penig, Ohrdruf, Hadamar, Breendonck, Hannover (Harlan), Arnstadt, Nordhausen, Mauthausen, Buchenwald, Dachau and Bergen-Belsen. Not all of these sites were concentration camps: Hadamar was a 'Nazi institution [...] under the guise of an insane asylum'; Breendonck was a Belgian fort-turned Nazi prison. PS-2430, IMT, Vol. XXX, pp. 464-465.

<sup>108</sup> Col. K. B. Lawton, Signal Corps to Signal Corps Officer, 6th/12th Army Unit/Special Motion Picture Coverage Unit, 25/Apr/1945, NARA/RG-226/148/73/1038. A significant portion was shot by British camera crews – for example, at Bergen-Belsen.

<sup>109</sup> Ibid.

crime. This would, of course, also be necessary in conducting an international criminal trial with civilian judges (which, despite its name, is what occurred at the Nuremberg International 'Military' Tribunal).<sup>110</sup> But, in contrast to the IMT, the (truly) military-run war crimes trials envisaged by JAG were only aimed at judging individuals who had directly perpetrated 'war crimes' against their victims – including those in concentration camps. Allied troops captured several of these perpetrators – camp guards, as well as commanders. Their very presence at the camps constituted strong evidence against them: a knowledge, at the very least, of the conditions in which (their) victims had lived and died.<sup>111</sup> And so they were filmed.



**FIGURE 3, A/B/C:** Perpetrators before the cameras in *Nazi Concentration Camps*. The Director of Hadamar's murderous 'medical' institution, Dr. Waldman, is questioned by an American soldier before being led away. Josef Kramer, the commander of Belsen concentration camp, is taken into custody whilst a British soldier has his gun at the ready. Female guards at Belsen are marched out of their barracks and forced to bury the dead.

When it came to editing this footage for use at Nuremberg, however, more important than showing local perpetrators was the Prosecution's attempt to demonstrate the results of an overall conspiracy that contemplated the horrors of the camps – a conspiracy led by the leaders who would sit in the dock at Nuremberg. Featuring only twelve sites permitted the editors to portray – to the degree that was possible<sup>112</sup> – the depth of suffering, past and present, that Allied troops had discovered upon 'liberation'. The first concentration camp to appear in the film was near Leipzig. The narrator told of the murder, by SS troopers and a Gestapo agent, of Russian, Czech, Polish and French inmates – just before Allied troops reached the camp. The accompanying images were horrific, including close-ups of murdered prisoners who had been burned alive, shot, or electrocuted by the camp-fence in their attempt to escape the killing. There were many more horrific images to come: the film as a whole was full of images of dead victims. But such images provided little legal proof by

<sup>110</sup> Of the eight judges at the IMT, however, the two Russians held military rank – and wore military uniforms.

<sup>111</sup> This point was made, for example, by judges in both the Dachau and Mauthausen military trials. See: UNWCC, *Law Reports of Trials of War Criminals*, (15 vols.), (London: H.M.S.O., 1947-49), Vol. XI, p. 15.

<sup>112</sup> There are, of course, limits to representing the reality of the Holocaust and, more generally, atrocities or any events entailing immeasurable trauma. With regard to film, see: Libby Saxton, *Haunted Images: Film, Ethics, Testimony and the Holocaust* (London; New York: Wallflower, 2008). In relation to the writing of history, see: Saul Friedländer, (ed.), *Probing the Limits of Representation: Nazism and the "Final Solution"*, (Cambridge, Mass; London: Harvard University Press, 1992).



themselves. Instead, they communicated a sense of horror and a profound sense of injustice.

There were, however, many pictures of survivors too – several were emaciated and near death themselves. Some showed their wounds – the results of torture. Others, who were able and willing, demonstrated the various methods of torture that their Nazi guards had used on them and their fellow prisoners. At Breendonck, Belgium (a prison-fort rather than a 'camp'), ex-prisoners re-enacted the Nazi use of barbed-wire sticks and other torture devices, including the use of chains which had been wrapped around victims before 'apply[ing] the tourniquet' (see Figure 4).<sup>113</sup> A thumb-screw that had been used by the torturers was 'Berlin-made' – suggesting evidence of a pre-determined effort and organized collaboration in cruelty.



**FIGURE 4, A/B/C:** Reconstruction: survivors of Breendonck, Belgium, with help from British filmmakers, demonstrate, for the cameras, how their fellow-inmates were tortured: a barbed wire stick (a), chains that were slowly tightened (b), and a thumbscrew, 'Berlin-made' (c).

Such reconstructions demonstrated that, in some instances, Allied camera crews attempted to make more than simple records of what they discovered at first-hand.<sup>114</sup> Some other scenes appearing in *Nazi Concentration Camps* featured survivors whom the filmmakers asked to pose for the cameras. Furthermore, the editors included two interviews of survivors (with sound). For just over three minutes, a woman, speaking in German, told of the horrors of Bergen-Belsen. Without much explanation, the film's narrator stated that this doctor, as a prisoner, had been placed in charge of the female section of the concentration camp. He translated what she said: there had been a typhus epidemic, people had starved to death, and some of the men had resorted to cannibalism. She also described how, when Red Cross shipments of food finally began to arrive during the last days of German control, the commandant and SS men kept most of the supplies for themselves. Finally, she spoke of 'medical experiments' that Nazi doctors had conducted at the camp. She concluded by stating that 'pretty' (*schöne*) nineteen-year-old girls had been selected

<sup>113</sup> PS-2430, IMT, Vol. XXX, p. 465.

<sup>114</sup> Breendonck was liberated by the British on 4<sup>th</sup> September 1944. Some survivors were filmed (showing their wounds) in city locations (presumably in Antwerp and/or Brussels).

for sterilization and 'other gynaecological experiments'.<sup>115</sup> The narrator, however, did not provide a complete translation – so that the woman's description of the victims (as 'pretty') was excluded. Since much of her original German was inaudible – due to the narrator's overdubbed English – it was difficult for any viewer to identify what else may have been lost in translation. Given that the film was edited and narrated for the specific purpose of providing evidence in a courtroom, it is surprising that a verbatim translation was not provided. Yet enough of her original German was audible to recognize that, whilst details or subtleties may have been lost, the narration was essentially faithful to what she had said.<sup>116</sup> Nevertheless, that the editors of *Nazi Concentration Camps* felt entitled to exclude words from the original German demonstrates that adherence to legal convention did not always take precedence over their desire to provide a narrative in accordance with what they deemed suitable or relevant in portraying injustice on the screen.<sup>117</sup> Also missing from the film was any information relating to the identity of this witness – information that would have been appropriate for a Tribunal to know.

To viewers unfamiliar with the sound of German speech, this woman may have appeared to be German herself. This would have suggested that Germans too had suffered the injustices of the camps – and that the editors of *Nazi Concentration Camps* wished to make this point. In fact, her accent and pronunciation may have suggested to a perceptive viewer that, perhaps, she originated somewhere further eastwards. However, the narrator did not divulge the nationality of this witness (which would have clarified the significant point that she was not German). Despite the probability that uninformed viewers would have perceived her to be German, neither the British cameramen, nor the American editors of *Nazi Concentration Camps*, intended to provide evidence of any German victims of the camps: throughout the entire hour-long film, there was only one mention of 'German Jews and German political prisoners' who had suffered (in Ohrdruf concentration camp, in addition to 'Poles, Czechs, Russians, Belgians, [and] Frenchmen').<sup>118</sup> The only mention of Jewish victims, therefore, was combined with the only mention of German ones, reflecting what Tony Kushner has characterised as the universalism of the 'liberal imagination' in

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<sup>115</sup> PS-2430, IMT, Vol. XXX, p. 471.

<sup>116</sup> This can be confirmed by listening to the original recording held at the Imperial War Museum, UK: IWM/Film/A70 514-97.

<sup>117</sup> I have discovered no conclusive evidence as to why the narration excluded the description of female victims as 'pretty'. The woman's use of this description implied a particularly cynical Nazi cruelty, even if some 'scientific' Nazi method lay behind such selection. It would, therefore, have helped in portraying a particular aspect to Nazi injustice. Yet, either this point may have been lost on the filmmakers, or they may have considered it as distasteful or irrelevant.

<sup>118</sup> PS-2430, IMT, Vol. XXX, p. 464.

which the only particularism deemed noteworthy by the liberators of the camps was nationality.<sup>119</sup>

In fact, this woman was Hadassah Bimko, a 32 year-old Jewish dentist from Poland (see Figure 5-a).<sup>120</sup> That the filmmakers repeatedly referred to the nationality of other victims of the camps (including Poles) suggests that they did not wish to conceal her nationality. But the fact that she was Jewish suggests a reason for the filmmakers to avoid the issue of her identity altogether. Although, at the very least, half of the survivors at Bergen-Belsen were Jewish, it seems an understatement to say that this fact was downplayed by the (British) 'liberators' and reporters of Bergen-Belsen.<sup>121</sup> As Hagit Lavsky has noted after assessing various forms of British reports from the camp – including those recorded by camera-crews:

[T]he total disregard by the British witnesses of any reference concerning the Jewish identity of the victims, or at least most of them, is astounding. Except for [a single instance of] testimony, all the other public testimonies completely disregard[ed] the existence of Jewish prisoners and, as a matter of course, also of Jewish victims.<sup>122</sup>

Before this particular footage reached the American film-editors of *Nazi Concentration Camps*, therefore, the Jewish identity of more than half the remaining survivors had already been removed from the story of Bergen-Belsen. Yet it was not just the British at Bergen-Belsen who (self) censored the Jewish identity of victims from their reports. Kushner observes the same (liberal-democratic and universalist) phenomenon in American reporting (including filming) of concentration camps.<sup>123</sup> The American Prosecution did not attempt to censor reports of Nazi *crimes* that were directed specifically towards Jews, but from the earliest days of planning the IMT, Jackson himself expressed his fear that too many Jewish voices at the trial would only perpetuate the 'racial tensions' that the Nazis had succeeded so well in spreading across Europe (as he understood it). Whilst he was quite willing to accept any evidence from Jewish sources, and employed 'at least one' Jewish lawyer as part of his team at Nuremberg, his approach reflected the efforts of the filmmakers

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<sup>119</sup> Tony Kushner, *The Holocaust and the Liberal Imagination: A Social and Cultural History* (Oxford: Blackwell, 1994), pp. 205-228.

<sup>120</sup> Hadassah (a.k.a. 'Ada') Bimko met Josef Rosensaft, chairman of the Central Committee of Liberated Jews in the British zone of Germany. They married and she adopted his surname. She published her memoirs as: Hadassah Rosensaft, *Yesterday: My Story* (2nd ed.) (New York: Yad Vashem and the Holocaust Survivors' Memoirs Project, 2005). For a brief biography, see The Jewish Women's Archive [online], Encyclopaedia entry 'Hadassah Rosensaft', <http://jwa.org/encyclopedia/article/rosensaft-hadassah> (last access: 31/Aug/2010). She is identified in the cameraman's 'dope sheet' (notes) as Ada Bimko. IMW/Film/A70 514-97/LOC 227.

<sup>121</sup> Hagit Lavsky, 'The Day After: Bergen-Belsen from Concentration Camp to the Centre of the Jewish Survivors in Germany,' *German History*, Vol. 11, No. 1 (1993), p. 50.

<sup>122</sup> *Ibid.*, p. 47.

<sup>123</sup> Kushner, *The Holocaust and the Liberal Imagination*, p. 216.

themselves in universalising the suffering of Jews in concentration camps.<sup>124</sup> Jackson had met several prominent Jewish leaders in America and Britain<sup>125</sup> and, in answer to their requests to take an active role in the forthcoming trial, he had warned against what he viewed as the dangers of such an approach:

I pointed out to them that what we must do was to get away from the racial aspects of the situation. We were prosecuting these Nazis not because they had killed Jews, but because they had killed men and women. We didn't want to exaggerate racial tensions. The only thing to do was to avoid making this a vengeance trial. [...] We tried to steer a course that would cause no greater anti-Semitism that would eventually be taken out on the few surviving Jews in Europe.<sup>126</sup>

Whilst Donald Bloxham has pointed out that Jackson succumbed to 'the stereotype of the vengeful Jew' (through the mention of 'a vengeance trial'), Bloxham did not include the last sentence above when partly quoting from Jackson's recollections.<sup>127</sup> The American Chief Prosecutor hoped – whether one decides to commend or criticise his tactics – to conduct the trial without provoking further anti-Semitism in Europe. His comments betray the fear that anti-Semitism was widespread and not limited to Germans or Nazis. Furthermore, given the 'racial tensions' closer to home, any American condemnation of racism had the potential to detract from the American Prosecution's moral case against Nazism. As a result, the film – edited for the prosecution in the weeks before the beginning of the trial – was full of images of Jewish victims presented as anonymous 'men and women'.

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<sup>124</sup> RHJ, Phillips Oral History, p. 1,207. LoC/RHJP/259/3. Jackson was probably referring to Robert Kempner as the one relatively senior Jewish lawyer in the Prosecution (there were other Jewish aids and filmmakers). Kempner headed the Defence Rebuttal Section dedicated to preparing counter arguments and evidence against anticipated Defence arguments and evidence.

<sup>125</sup> See, for example, Anonymous, 'Minutes of a meeting with RHJ held at the Federal Court House, N.Y.C.', 12/Jun/1945. NARA/RG-238/51/14/'Minutes of Meeting with RHJ'.

<sup>126</sup> RHJ, Phillips Oral History, p. 1,205. LoC/RHJP/259/3.

<sup>127</sup> Bloxham, *Genocide on Trial*, p. 67.



**FIGURE 5, A/B:** Ex-inmates relate the horrors witnessed in Nazi Concentration Camps. Hadassah Bimko, a 32 year-old Jewish dentist from Poland (unidentified in the film) tells of the unbearable conditions as well as murderous 'medical experiments' at Bergen-Belsen. An American OSS operative, Jack H. Taylor, (who is identified) describes various methods of killing at Mauthausen. He shows the insignia of an executed American naval officer.

Yet, whilst images of the anonymous dead and the testimony of an anonymous survivor-witness provided a striking representation of the depths of Nazi injustice against *humanity*, the editors of *Nazi Concentration Camps* decided, long before the film was completed, to include Signal Corps footage of a particular American survivor and witness of Mauthausen concentration camp.<sup>128</sup> American troops and citizens would be able to identify with a fellow American who spoke their language and could relate what he had seen with his own, American, eyes. This man was Lt. Jack H. Taylor, 'U.S. Navy, from Hollywood California,' as he introduced himself.<sup>129</sup> Being a lieutenant of the Navy, however, was merely a nominal status which provided cover for his membership of the OSS – the same organization engaged in editing *Nazi Concentration Camps* for the American Prosecution.<sup>130</sup> Taylor had been a member from the first days of the organisation's inception (in 1942) and had been captured by the Gestapo whilst on an OSS mission in Austria during October 1944 (he was moved to Mauthausen four months later).<sup>131</sup> Whilst the film editors and members of the Prosecution were aware of his status, membership of the OSS remained a matter of secrecy long after the war.<sup>132</sup> Taylor's full status was not, therefore, revealed on-

<sup>128</sup> Lt. James B. Donovan to Mr. Sidney Alderman, 'Progress Report on Preparation of Prosecution', 30/May/1945, Harvard/SGP/44/1; Lt. James B. Donovan to The Planning Committee, 'Memo to the Planning Committee', 19/Nov/1945, Cornell/WJDP/Vol. 18, 56.03. It is clear from Donovan's memo of 19/Nov/1945 that his 30/May/1945 memorandum – mentioning an 'OSS naval officer' who's 'testimony [...] is now available in a film report' – was referring to Lt. Jack H. Taylor. In the 30/Nov memorandum, Donovan reported that, by then, more footage of Mauthausen was available to supplement Taylor's testimony.

<sup>129</sup> PS-2430, IMT, Vol. XXX, p. 467.

<sup>130</sup> All members of the OSS held, as cover, nominal ranks in the more traditional sections of the armed forces.

<sup>131</sup> For Jack H. Taylor's OSS Personnel File, see: NARA/RG-226/ARC-2187542.

<sup>132</sup> See note 128. Official public confirmation of individuals' status as OSS operatives only became possible

screen. Yet, being aware of his membership of their own organisation, it is easy to imagine that OSS filmmakers editing *Nazi Concentration Camps* would have felt considerable respect for, and comradeship with, this survivor-witness who spoke on the screen for just under two and a half minutes.<sup>133</sup> Without displaying anger or expressing a desire for vengeance – a manner he shared with Hadassah Bimko – the film editors presented him as a noble example of the American soldier who deserved justice.

Although this was, as Taylor commented, the 'first time [he had] ever been in the movies,' he did not appear to be nervous in the presence of the camera.<sup>134</sup> As an experience that often inspires discomfort or hesitancy in the uninitiated, it was nothing compared to his experiences of the camp. Furthermore, it is very likely that he had already given oral evidence to JAG war crimes investigators before being filmed and, thereby, gained some practice in providing useful responses to his interviewer(s).<sup>135</sup> His testimony was concise, delivered without any show of emotion and, without appearing rehearsed or formulaic, provided a well-structured account of crimes committed at the camp. In response to questions from an off-screen interviewer, he told of maltreatment and murder that Nazi guards of Mauthausen concentration camp had perpetrated. He described several sadistic methods used to kill his fellow inmates. But it was already during his opening remarks that he stated 'Two American officers, at least, have been executed here' and held up to the camera the insignia that had belonged to one of them (see Figure 5-b).<sup>136</sup> Fortunately, he stated, his turn hadn't come. He did, however, discover (soon after the filming) that the camp administration had scheduled him for execution on 28<sup>th</sup> April 1945.<sup>137</sup> Although this

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when the U.S. National Archives and Records Administration released the relevant OSS files in August 2008. See NARA/RG-226/ARC-1593270.

<sup>133</sup> Taylor did not appear as a witness at the IMT – most probably since his most effective evidence had appeared on the screen. He was, however, the first Prosecution witness to appear at the trial of *U.S. vs. Hans Altfuldisch, et al.* This was a military war crimes trial run at Dachau and held against 61 staff of Mauthausen concentration camp. The military commission found all guilty, sentencing 58 to receive the death penalty and three to life imprisonment.

<sup>134</sup> This statement was an ironic reference to his origins – Hollywood, California. Douglas has characterised the use of Taylor in *Nazi Concentration Camps* as the 'remarkable, if not grotesque, instance of filmic posturing [...] as the camera focuses upon this handsome young American who towers above the other liberated POWs crowding about him'. Douglas views 'the perverse logic behind his ironic celebration of his filmic debut' as grotesque because the 'robust' performance of this 'handsome' American soldier is followed by images of mass graves. He implies therefore, that to use Taylor was somehow disrespectful to the many dead victims in the film who were not so fortunate. Yet Taylor's ironic reference was hardly a 'celebration', his looks were not a matter of choice for the film-crew or editors (or himself), and Douglas does not explain just how this interview constituted a form of 'filmic posturing' any more than any other piece of film. Douglas, 'Film as Witness,' pp. 470-471.

<sup>135</sup> Taylor alluded to this in his interview: 'This – this is all true and has been seen and is now being recorded'. PS-2430, IMT, Vol. XXX, p. 468.

<sup>136</sup> PS-2430, IMT, Vol. XXX, p. 467.

<sup>137</sup> Thomas L. Hawkins (UDT-SEAL Association President), 'America's First SEa, Air, Land Commando [SEAL] – Lieutenant Jack Taylor, USNR', *Blast Magazine*, No. 3, (Sep, 2002) repr. at The 11<sup>th</sup> Armored Division

story of a very narrow escape could not be included in his interview, given the fact that Taylor had survived and could tell of what had happened in the camp, his inclusion within *Nazi Concentration Camps* appeared to echo briefly something of the typical Hollywood ending: in contrast to the images of vast numbers of dead, his own appearance suggested a triumph over adversity and injustice from which some justice might yet prevail. Yet, as a survivor, his function – at least as far as the law was concerned – was merely to relate what he knew, rather than deliver justice himself. Furthermore, Taylor's appearance was not the end of the film. Yet to come were further harrowing examples of Nazi crimes and there would be no Hollywood ending: only images of the dead being bulldozed into pits at Bergen-Belsen.

Survivors were not the only witnesses in *Nazi Concentration Camps*, and Jack H. Taylor was not the only American to appear on the screen. There were numerous British and American troops – easily identifiable as such – included in the film. Rather than having witnessed the crimes taking place, however, the cameras recorded them witnessing the aftermath. As legal evidence, such images of the act of witnessing were of limited value. But the filming was originally also aimed at conveying the obvious sense of injustice felt by the filmmakers themselves, reflecting the 'special obligation' felt by General Dwight D. Eisenhower, the Supreme Allied Commander of the Allied Expeditionary Force, to witness, 'first hand,' the conditions of the camps.<sup>138</sup> Eisenhower had ordered soldiers (uncommitted to frontline duties) to visit these sites of atrocity. With a first-hand view of these crime-scenes they would realise, he believed, what they had been fighting *against*.<sup>139</sup> Some American soldiers who – according to Eisenhower – still questioned what they had been fighting *for* would be able to see a strong moral case for their involvement.<sup>140</sup>

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Association Website: [http://www.11tharmoreddivision.com/history/first\\_seal\\_jack\\_taylor.htm](http://www.11tharmoreddivision.com/history/first_seal_jack_taylor.htm) (last access: 28/Aug/2010).

<sup>138</sup> Jeffrey Shandler, *While America Watches: Televising the Holocaust* (New York: Oxford University Press, 1999), p. 6.

<sup>139</sup> Robert H. Abzug, *Inside the Vicious Heart: Americans and the liberation of Nazi concentration camps* (New York; Oxford: Oxford University Press, 1985), pp. 30, 128.

<sup>140</sup> See note 138 and also: Marsha Orgeron, 'Liberating Images? Samuel Fuller's Film of Falkenau Concentration Camp,' *Film Quarterly*, Vol. 60, No. 2 (2006), p. 40.





**FIGURE 6, A/B:** Military leaders see for themselves: General Dwight D. Eisenhower (a, foreground), Omar N. Bradley (a, left) and George S. Patton (b) witness the horrors of Ohrdruf.

For those troops who could or would not witness the camps themselves, there was film to show them the justice of their cause.<sup>141</sup> As an example to them, Generals Eisenhower, Bradley and Patton were filmed at Ohrdruf concentration camp as they witnessed the horrors themselves (not recorded by the cameras, however, was General Patton becoming physically sick).<sup>142</sup> Their appearance reinforced the veracity of the images of death and suffering and lent authority and legitimacy to the act of witnessing itself. Such images of witnessing conveyed the profound sense of injustice felt by Eisenhower and his troops shortly after the camps were 'liberated'. For this reason, despite its limited legal value, the editors of *Nazi Concentration Camps* used such footage to convey their own sense of injustice. Eisenhower had invited various Congressmen to visit the camps – ensuring that democratic representatives of the American people would also witness the scenes. Whilst the editors of *Nazi Concentration Camps* did not include (available) footage of Congressmen at the camps, they deemed it important enough to include a reference to them in the narration:

American congressmen invited to view the atrocities were told by General Eisenhower. "Nothing is covered up. We have nothing to conceal. The barbarous treatment these people received in the German concentration camps is almost unbelievable. I want you to see for yourselves and be the spokesmen for the United States."<sup>143</sup>

So too would the fact that Congressmen had seen the camps lend credence to the act of witnessing, the veracity of the images on screen and the sense of injustice conveyed by the film. Eisenhower had also arranged for a committee of respected

<sup>141</sup> For Hans Frank, this led to being beaten by American troops who had recently seen pictures of 'liberated' concentration camps. Barnouw, *Germany 1945*, p. 1.

<sup>142</sup> Abzug, *Inside the Vicious Heart*, p. 27. This visit took place on the same day that the three Generals also visited a mine which, along with much of the Third Reich's wealth, contained gold teeth and other items from the murdered victims of concentration camps. See Chapter 6.

<sup>143</sup> PS-2430, IMT, Vol. XXX, p. 463.



journalists (including a committee headed by Joseph Pulitzer) to come and see.<sup>144</sup> Reports of such atrocities, he believed, would no longer be dismissed as mere 'propaganda' once democratic representatives and (sometimes previously sceptical) press-reporters could relate what they had seen to American audiences at home.<sup>145</sup>

The film also showed lower-ranking American and British soldiers witnessing the scenes. The first appearance of troops was within a sequence devoted to Penig concentration camp, the second camp to feature in the film. It had been 'liberated' by American 6<sup>th</sup> Armored Division and 'contain[ed] mostly Hungarians'.<sup>146</sup> Although hardly required, the narrator told of what appeared on screen: 'American doctors examine the victims'.<sup>147</sup> The doctors could also be seen tending to the victims' wounds, many of which were horrific. 'As soon as our troops arrived,' continued the narrator, arrangements were made to remove these people from the miserable surroundings'.<sup>148</sup> American soldiers and members of the American Red Cross could be seen slowly escorting survivors, barely able to walk, to trucks that would take them to a nearby hospital which had belonged to the Luftwaffe. Most shots, however, were of Americans carrying the victims on stretchers.

The cameras followed the trucks to the hospital where, for the first time in the film, Germans were shown. As the narrator stated, 'Nazis who formerly maltreated [the stricken inmates] are forced to help look after the patients. The staff of German nurses is also forced to attend the victims'.<sup>149</sup> Showing Germans forced to work was something that recurred throughout the film. Unlike with the images of 'caring' for victims at Penig, however, this usually entailed Germans being forced to remove and bury the dead. At Arnstadt concentration camp, for example, American troops discovered that local townspeople had, during the war, complained of the stench of the dead. They had already taken part in burying the corpses further away from their town. Now, once again, they would exhume the bodies under American 'armed persuasion'.<sup>150</sup> Implicit in such forced labour, at Arnstadt and elsewhere, was the American presumption of widespread guilt among the German population – at least of those who had lived close by to concentration camps.

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<sup>144</sup> Abzug, *Inside the Vicious Heart*, p. 132.

<sup>145</sup> *Ibid.*, pp. 128-134.

<sup>146</sup> PS-2430, IMT, Vol. XXX, p. 462. Penig was incorrectly spelled as 'Pegnig' in the documentation (cited in this note) but not in the film itself.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*, p. 463.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*, p. 466.



**FIGURE 7, A/B:** Germans forced to work. Civilians, 'under Armed persuasion', bury the dead at Arnstadt concentration camp (a). The individual in the foreground turns around to look at the camera. At Belsen concentration camp approximately fifty SS men are forced to remove and bury the dead (b).

The most frequent sign of Americans' presumption of widespread German guilt, however, was the inclusion of images of German civilians being forced to witness the camps. As already noted in Chapter 2, scenes of forced (German) witnessing had already briefly been presented to the American public before the Nuremberg IMT commenced (in the film entitled *That Justice Be Done*). Now, in *Nazi Concentration Camps*, more forced witnessing was on show. American troops coerced many hundreds of civilians into visiting local camps – they could be seen appearing for no other reason but to witness the conditions at Ohrdruf, Nordhausen, Buchenwald and Dachau. The first in the film were some of the local townspeople of Ohrdruf, including local Nazi party members and a stern-faced medical Major. Among several exhibits, they were taken to view piles of corpses in a woodshed. Although reluctant to enter, they were ordered to do so by the commander of the American troops that had first discovered the camp. To the camera crew at Ohrdruf, and to the editors of *Nazi Concentration Camps*, their reactions were important. But, in this regard, the narrator explained what, sometimes, the camera could not:

According to reports, the local Nazis continued their tour of the camp without apparent emotion. All denied knowledge of what had taken place at Ohrdruf. [...] The day before these Nazis visited the camp, the Burgomeister [sic] of Ohrdruf was forced to view the horrors. He and his wife were later found dead in their home, apparently suicides.<sup>151</sup>

Here were two entirely opposing reactions: one of denial – of both knowledge of the atrocities and, therefore, any responsibility for their occurrence; and one – suicide – that could be interpreted (by Americans) as the result of shame, disgrace or, more simply, guilt. For the American troops and the American prosecutors, there was no salvation for Germans in either case. Denial of knowledge or guilt was no sign of

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<sup>151</sup> PS-2430, IMT, Vol. XXX, p. 464.

innocence, but merely the continued perpetration of further injustice. And suicide could imply the acknowledgment of guilt. One purpose of showing forced witnessing, therefore, was – rather than to assess the *extent* of Germans' guilt – to display either the acknowledgment or the denial of a guilt that Americans presumed undoubtedly existed.



**FIGURE 8, A/B/C:** Germans forced to witness. (a) Some of the townspeople of Ohrdruf, including a Nazi medical officer are forced to witness the conditions of the concentration camp. (b) Women smile on their way to Buchenwald concentration camp. (c) Having seen macabre souvenirs kept by the commandant and his wife, the womens' reactions are captured by the camera.

It was obvious, however, that at least one group of civilians was not aware of the nature or purpose of their visit until they had passed through the gates of Buchenwald concentration camp (see Figure 8-b). As the narrator explained:

Twelve hundred civilians walked from the neighbouring City of Weimar to begin a forced tour of the camp. There are many smiling faces and, according to observers, at first the Germans act as though this were something being staged for their benefit.<sup>152</sup>

With the prosecution of the remaining highest Nazi leaders of the Third Reich, there was little direct evidentiary value in seeing German civilians on their way to a concentration camp after the war – whether they were smiling or not. That civilians may have thought the exercise was ‘staged for their own benefit’ was hardly directly relevant to the accusations aimed at the defendants in Nuremberg. Furthermore, there was little effort on behalf of the American Prosecution to corroborate the assertions said to be made by ‘observers’ (that the civilians thought the exercise was ‘being staged for their own benefit’). The identity of the ‘observers’ – perhaps regular American soldiers or members of the camera crew themselves – was not revealed. Even as demonstrative evidence, the relevance of such images to the legal process of Nuremberg was questionable. But, despite the evidentiary deficiencies of the narrator's assertion, inherent in such images was the American sense of injustice: not only were the atrocities themselves an outrage; so too – the presentation of these images implied – did the attitude of local (guilty) populations constitute a form of injustice in continuance. But once confronted with shrunken heads – ornaments

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<sup>152</sup> PS-2430, IMT, Vol. XXX, p. 469.

created from two murdered inmates after their skulls were removed – as well as decorated 'parchment' made from the skin of other murdered inmates, the cameras recorded the reactions of civilians who no longer smiled (Figure 8-c)<sup>153</sup>:

These, and other exhibits of Nazi origin, are shown to the townspeople.  
The camera records the changes in facial expressions as the Weimar citizens leave  
the parchment display.<sup>154</sup>

Such repeated examination of the reactions of German civilians begs the question: what exactly were the American cameras looking to find on the faces of these reluctant witnesses?

Laurence Douglas has suggested that forcing German citizens to witness the camps was a sanction that amounted to 'no more than the punishment of *witnessing*'.<sup>155</sup> He continues:

[This] is, in certain respects, an odd punishment, for although we might take grim satisfaction in watching the Germans forced to confront the legacy of their shame and quiescence, the film places the "innocent" viewer in much the same position as the German civilians.<sup>156</sup>

However, there was a crucial difference in American expectations between those they presumed to be innocent viewers and those presumed to be guilty. Forcing German civilians to see atrocities at the camps (whilst filming them in the process) amounted to a form of indictment which demanded of each witness an internal, personal, plea of 'innocent' or 'guilty' – an individual confrontation with the universally constituted conscience that liberal Americans believed German civilians possessed. This was also the case for those German civilians forced to watch atrocity films throughout Germany after the war, and presumed by Americans to be, also in some way, responsible for what they could see. 'Innocent viewers' certainly would experience painful emotions such as feelings of sorrow, empathy, horror, anger, or outrage. Some of these feelings might even be experienced by those deemed to be guilty too. But *only* those presumed to be guilty might be hoped (by Americans) to experience – and display – feelings of *remorse*. As Dagmar Barnouw so well demonstrated in relation to still photography of forced German witnessing, the moral incentive to seek out signs of remorse – or its absence – was, despite similar British attempts, a particularly American (Signal Corps) phenomenon.<sup>157</sup> Just like the

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<sup>153</sup> One of these shrunken heads was used by the American Prosecution as an exhibit at the IMT. See Lawrence Douglas, 'The Shrunken Head of Buchenwald: Icons of Atrocity at Nuremberg,' *Representations*, No. 63 (1998).

<sup>154</sup> PS-2430, IMT, Vol. XXX, p. 469. (Emphasis added).

<sup>155</sup> Douglas, 'Film as Witness,' p. 472.

<sup>156</sup> *Ibid.*

<sup>157</sup> See Chapter 2, page 54; Barnouw, *Germany 1945*, p. 27.

aftermath of unprecedented atrocities, so too, Barnouw asserted, did the American Signal Corps photographers seek to make remorse or its absence visible because it, too, 'needed to be seen to be believed'.<sup>158</sup> The same American phenomenon can be observed in *Nazi Concentration Camps*. Americans in fact, could, better than with the use of still photography, observe their reluctant witnesses through the use of moving images which could portray the effect of emotions over time – rather than in a single instant. Any detectable presence of remorse would signify some measure of affinity with the occupiers' moral universe. It would signify the acknowledgement of past wrongs that would aid transition to a new moral (and political) future. In contrast, the absence of remorse would signify the 'otherness' of the Germans, the atavistic barbarity to which they had descended, and justify the punishment and damnation they deserved.<sup>159</sup> For wrongs that reached beyond any purely legal framework, impossible to meet with any commensurate sanction, remorse was, therefore, the most salient form of punishment that might be meted out to civilians by such visual confrontation alone. Furthermore, following the logic of a liberal belief in a universal morality, such a punishment as remorse could discriminate between those civilians who were guilty and those who were not. Put simply, those who knew they had done wrong would suffer most from the experience of being forced to witness the camps.

For the defendants at Nuremberg, forced to watch *Nazi Concentration Camps*, there would, of course, be other means of punishment available to the Tribunal. Yet any form of punishment – including death by hanging – would remain incommensurate with the wrongs of which they were accused. 'The Nazi crimes,' suggested Hannah Arendt in 1946, 'explode the limits of the law; and that is precisely what constitutes their monstrousness'.<sup>160</sup> Her choice of words might have been more precise, however, for what she really meant – in response to Karl Jasper's own answers to *The Question of German Guilt* – was that Nazi 'crimes' were unprecedented wrongs for which the word 'crime' was inadequate.<sup>161</sup> Words, laws, and legal

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<sup>158</sup> Ibid., p. 12.

<sup>159</sup> For an example of how Nazism would be characterised at Nuremberg as atavistic barbarity in opposition to the modernity of 'civilization', see: Douglas, *Memory of Judgment*, pp. 80-89. Some jurisprudential research suggests, both normatively and empirically, a negative correlation between a judicially perceived presence of remorse and the deserved level of punishment due. For a typical empirical case-study see: Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, 'But Was He Sorry? The Role of Remorse in Capital Sentencing,' *Cornell Law Review*, Vol. 83 (1998). A denial of a normative relationship can be found in: Mirko Bagaric & Kumar Amarasekara, 'Feeling Sorry? - Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing,' *The Howard Journal*, Vol. 40, No. 4 (2001). Yet Steven Tudor's response (and qualified critique of R.A. Duff) seems more convincing: Steven Tudor, 'The Relevance of Remorse in Sentencing: A Reply to Bagaric and Amarasekara (and Duff),' *Deakin Law Review*, Vol. 10, No. 2 (2005).

<sup>160</sup> Lotte Kohler & Hans Saner, (eds.), *Hannah Arendt, Karl Jaspers, Correspondence, 1926-1969* (trans., Robert & Rita Kimber, 1992), (London: Harcourt Brace Jovanovich, 1992), p. 54.

<sup>161</sup> Jaspers, *The Question of German Guilt*.

methods had to be invented in order to criminalise the leading perpetrators of Nazi injustice, a phenomenon more horrible than any previously, legally, defined 'crime' – and also more effectively communicated through visual, rather than literary, means. (Legalists' critiques of *ex post facto* 'law' at Nuremberg could not offer a solution to this requirement for invention – other than that of trying the defendants for lesser, traditional, 'war crimes').<sup>162</sup> Since the maximum penalty meted out to any individual could not constitute commensurate reckoning for million-fold murder, no punishment could ever be enough. All that might be done was to inflict such punishment as was possible – inadequate though it might be. The use of film in the courtroom would serve as a form of evidence but so too, through the inducement of remorse, would it function as a form of punishment – at least for each of those with a conscience which might be unearthed. It was not, however, the Tribunal that could bestow such a punishment upon the defendants. That was something only the prosecutors would be able to inflict when it presented its case against the defendants.

#### **5.4. Catching Consciences in the Courtroom**

Since the Americans were the first prosecutors to present their case, and because Americans, more than anyone else, were in control of their physical environment – for example, in the management of security and with the design of the courtroom – the American Prosecution had a unique opportunity to influence the way the trial would be conducted. Wherever some leeway existed in determining procedures or methods in presenting evidence, the Americans were, of all the prosecuting teams, the freest to experiment. It was, therefore, straightforward for members of the American Documentary Evidence Section to execute an idea that only sprang to mind on the night before the American Prosecution presented *Nazi Concentration Camps*. Stuart Schulberg and his colleagues realised only at that moment that, with the main courtroom lights switched off – a necessity in order to see images on the projection-screen clearly – it would be impossible to monitor the defendants' reactions as they watched the film.<sup>163</sup> He had been present when, before the trial had begun, the American Prosecution had shown Hess excerpts from *Triumph of the Will* – in the attempt to 'cure' his amnesia. As we have seen, in preparation for that screening, American psychologists and psychiatrists had arranged for Hess to be lit from below,

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<sup>162</sup> Hankey, *Political, Trials and Errors*; Christoph Burchard, 'The Nuremberg Trial and its Impact on Germany,' *Journal of International Criminal Justice*, Vol. 4, No. 4 (2006). Hankey provides a typical example of the critique whereas Burchard provides analysis of various German assessments.

<sup>163</sup> Stuart Schulberg, 'An Eyewitness Reports,' *Hollywood Quarterly*, Vol. 2, No. 4 (1947), pp. 413-414.

so that his face was visible to the many observers who had watched keenly for his reactions to the film. Now, in the closing hours of Wednesday, 28/Nov/1945, Schulberg and his colleagues decided 'on the spot' to have a row of neon tubing installed on the inside of the defendants' dock.<sup>164</sup>

When, on the following afternoon, the main lights were switched off and the film was projected, the judges, the prosecutors and the observers in the gallery could see, not only the film on the screen, but also the faces of the defendants – lit softly by the neon tubing (see Figure 9). Gilbert, the American psychologist, and Kelley, the American psychiatrist, stood at each end of the dock so that they had the very best view.<sup>165</sup> Gilbert made notes of what he observed whilst the film played:



<sup>164</sup> Ibid., p. 413. Several participants, observers, and historians incorrectly state that the defendants were lit up by spotlights or overhead lighting, for security reasons. This makes little sense, since the 'security' of the defendants was as great a concern to the American prosecution as any other. A darkened room with only the defendants clearly visible was an ideal opportunity for any would-be assassin. They probably appeared to be lit by spotlights because the neon lighting, by the stage it reached the back wall, would have been relatively dim. Such mistakes can be found, for example, in: Andrus, *The Infamous of Nuremberg*, p. 133; Airey Neave, *Nuremberg: A Personal Record of the Trial of the Major Nazi War Criminals in 1945-46* (Coronet 1980 ed.) (London: Hodder & Stoughton, 1978), p. 270; Tusa & Tusa, *The Nuremberg Trial*, p. 160.

<sup>165</sup> Gilbert, *Nuremberg Diary*, p. 29.

These notes, which Gilbert added to his 'diary', were published two years after the trial.<sup>166</sup> As might be expected of a psychologist at work, Gilbert had focused almost entirely on the defendant's behaviour: the section of his book entitled 'The Showing of the Atrocity Film' provides little mention of what appeared within the film itself.<sup>167</sup> After two pages describing the defendant's reactions, there are two more describing their responses, made later that day, to his questioning relating to the film.

What is more significant, however, is that in the many other contemporaneous descriptions of the screening of *Nazi Concentration Camps* (made by non-clinicians), in addition to brief descriptions of the content of the film, as much text – if not more – was also usually devoted to describing the reactions of the defendants.<sup>168</sup> The American prosecution had, in effect, provided to all observers in the courtroom an opportunity to take part in a psychological experiment. But whereas the Rorschach inkbot test had entailed examining reactions to images with no meaning, the images in *Nazi Concentration Camps* conveyed unprecedented representations of injustice that demanded of each defendant an assessment of personal responsibility.

It was not only public reports of the spectacle that were predominantly concerned with the appearance of the defendants. Some observers wrote home to their wives or families with the defendants' reactions uppermost in their thoughts. In one letter home, for example, Leonard Wheeler viewed the screening of *Nazi Concentration Camps*, and the opportunity to watch the defendants, as a 'psychological masterpiece':

The climax came for them today, [...] when our motion picture showing conditions found in concentration camps by the Americans [...]. Keitel averted his gaze and blew his nose frequently, Goering looked very worried, Frank actually wept, all were silent, and not one looked up from the floor as they were shepherded out. They certainly looked as if they felt the noose around their necks.<sup>169</sup>

James B. Donovan, in a similar vein, wrote home with an obvious sense of satisfaction and pride:

My first films were a tremendous success. Perhaps you read about them. Up to then the defendants had been taking the case very lightly. You should have seen the expression on their faces during the showing.<sup>170</sup>

Furthermore, without much analysis, several historians have replicated this pattern in

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<sup>166</sup> Ibid.

<sup>167</sup> Ibid., pp. 29-30.

<sup>168</sup> For examples, see: Raymond Daniell, 'War-Crimes Court Sees Horror Films', *New York Times*, 30/Nov/1945; 'Nazi Aggression in Austria', *The Times*, 30/Nov/1945.

<sup>169</sup> Leonard Wheeler to Cornelia, Mother & Grandma, 29/Nov/1945. Harvard/LWP/4/3.

<sup>170</sup> James B. to Mary Donovan, [c. Dec 1945], Hoover/JBDP/34/20.



general narratives of the trial.<sup>171</sup> The spectacle, however, consisted of more than merely showing and viewing a film that happened to affect the defendants. For most observers it entailed just as much – if not more – watching of the defendants as they, in turn, watched – or averted their gaze from – the film.

The widespread impulse to examine the defendants' reactions was not driven by a desire to assess the extent of their guilt which was already widely presupposed to be extensive (this was, after all, officially, the 'Trial of the Major War Criminals' – not of 'suspects'). Instead, as with the 'innocent viewers' of reluctant German witnesses within the film, the 'innocent' viewers in the courtroom had an opportunity to inspect those they presumed guilty for signs, or the absence, of remorse.

It is the case that, even without the use of film, the impulse to examine the reactions of the defendants was, for at least one American prosecutor, overwhelming. As James B. Donovan had already wrote home in a letter to his wife:

I sit at the counsel table and within a few feet are sitting all the defendants, Goering being closest. I could just sit there all day, studying their reactions to the evidence going in against them.<sup>172</sup>

However, by lighting up the defendants in a darkened room, the American Prosecution had made this impulse irresistible to most other observers present. This scene, in fact, constituted a plea by the American Prosecution to all observers to look at the defendants and judge them with their own eyes. It mirrored the functions of a Shakespearian theatrical device in which such a plea was made to an observer of a murderer watching his crimes re-enacted on a stage:

There is a play to-night before the king;  
One scene of it comes near the circumstance,  
Which I have told thee, of my father's death:  
I pr'ythee, when thou see'st that act a-foot,  
Even with the very comment of thy soul  
Observe mine uncle [...]  
Give him heedful note;  
For I mine eyes will rivet to his face;  
And, after, we will both our judgements join  
In censure of his seeming.<sup>173</sup>

What the American prosecutors shared with the fictional Dane was the belief that, through this spectacle, a perpetrator might discover his conscience. What they also shared was a desire to observe – and have others observe – the change this would effect on a perpetrator's face.

But neither of these morality-plays, fictional or real, were – like their medieval

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<sup>171</sup> For examples, see: Tusa & Tusa, *The Nuremberg Trial*, p. 160; Taylor, *Anatomy*, pp. 186-187.

<sup>172</sup> James B. to Mary Donovan, [c. 23/Nov.1945], Hoover/JBDP/34/20.

<sup>173</sup> William Shakespeare, *Hamlet*, III, 2.

English precursors – designed to facilitate or portray the salvation of their principle subjects.<sup>174</sup> 'For those who see punishment as a mechanism intended to remould the defendant into an accepted [...] member of society', states Bryan Ward, 'the use of remorse for purposes of punishment is unfair and self-defeating'.<sup>175</sup> Yet as Jackson had assured his colleagues in Washington, he was 'not in the least concerned that [Goering] be reformed'.<sup>176</sup> Rehabilitation of the defendants was of no concern to the American Prosecution (or most others) at Nuremberg. Instead, the inducement of remorse amounted to a (very) *public* damnation, a crucial element of punishment with ancient precursors and seen by Americans as crucial to the rehabilitation of the German nation.<sup>177</sup> To experience remorse in a public setting – as, for example, Walther Funk appeared to do with his tearful reaction to the film – was not only to betray a personal sense of guilt; it was also to acknowledge publicly the moral legitimacy of the accusations and those who accused. On the other hand, to display no signs of remorse – as, for example, appeared to be the case with Hjalmar Schacht – was to refrain from betraying a sense of guilt. Schacht, more than his fellow defendants (and, indeed, perhaps more than many others in the courtroom), appeared to understand the mechanics and implications of this spectacle. Not only did he choose to turn his back to the film – as though to dissociate himself from the images and his fellow defendants – he also, rather than merely looking down or to his side, returned the gazes of the spectators in the gallery.<sup>178</sup> This act of defiance demonstrated his outrage at being accused with the eyes of his observers. But whilst some (for example, a British official) took Schacht to be innocent, others (for example Jackson) presumed that he was guilty.<sup>179</sup> The absence of remorse – if guilty he was presumed to be – could be interpreted as a sign that his conscience lay buried deep beneath his 'Nazi mind'.<sup>180</sup>

Although the opportunity to inspect the defendants for signs of remorse or its absence was the result of American innovation in the courtroom, perhaps the best example of the limits of this test of conscience – which could only function through visual means alone – is provided by a British observer of the scene. Airey Neave's

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<sup>174</sup> Robert A. Potter, *The English Morality Play: Origins, History, and Influence of a Dramatic Tradition* (London: Routledge & Kegan Paul, 1975), pp. 30-57.

<sup>175</sup> Bryan H. Ward, 'Sentencing without Remorse,' *Loyola University Chicago Law Journal*, Vol. 38, No. 1 (2006), p. 132.

<sup>176</sup> RHJ, Diary, 5/Sep/1945, LoC/RHJP/95/'Diary'.

<sup>177</sup> Foucault, *Discipline and Punish*, p. 58.

<sup>178</sup> Gilbert, *Nuremberg Diary*, p. 29.

<sup>179</sup> For a British view on Schacht's innocence – before the trial began – see page 56. For Jackson's desire to indict Schacht – using the legal doctrine of conspiracy – see page 55.

<sup>180</sup> Kelley, *22 Cells*, p. 196.

recollections suggest that his view of the defendants was only entirely clear when the film finished playing and the courtroom lights were switched on:

I cannot forget the sudden vision of those twisted guilty faces, some like Funk and Fritzsche with tears on their cheeks. I sometimes dream of it. *I sought for any signs of true remorse and did not find them.* These were crocodile tears. They wept for themselves, not the dead. They feared for their own necks as they watched...<sup>181</sup>

Neave's recollections are particularly interesting because they highlight two significant interrelated matters regarding the impulse to seek out remorse or its absence in the courtroom. The first concerns the limits of a purely visual assessment of emotions. What exactly does remorse look like? The answer must be that visual means alone cannot be enough to identify it clearly. Being forced to watch the film in the presence of observers, the defendants were subjected to an experience that also had the potential to induce shame and self-pity. Visually, remorse cannot be clearly distinguished from these emotions. Yet Neave seemed quite sure in his conclusion that the defendants could not identify or empathise with the suffering of the victims – a necessary prerequisite for experiencing 'true' feelings of remorse.<sup>182</sup> Instead, he believed, 'they wept for themselves, not the dead'.

Next, however, and in spite of the inherent problem of *identifying* remorse through visual means alone, there nevertheless remained a strong impulse in many of those present in the courtroom to identify the emotion, or its absence, on the faces of the defendants. Observers' motivation for this test of conscience was stronger than any proclivity for a rational consideration that such an inspection might be forlorn. But whilst the *signs* of remorse would always be impossible to discern clearly through visual means alone, the attempt to induce it by confronting the defendants with film was not a hopeless exercise – given the belief that at least some of the defendants knew they had done wrong. (As we have seen in Chapter 4, Robert Jackson firmly held this belief). To induce remorse in the defendants, in the very public setting of Nuremberg, was to hope that, derived from this spectacle, some justice might be seen before their eyes. As a form of punishment, it had the potential to inflict more pain than self-pity or shame (which might also be experienced at the same time).<sup>183</sup> It could also do some justice to the memory of the dead.

Whilst Neave's assessment was one of bitter disappointment, however, other observers (in particular, American ones) took a very different view. As Jackson later recalled, the film had 'really scored':

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<sup>181</sup> Neave, *Nuremberg*, p. 270. (Emphasis added).

<sup>182</sup> Barnouw, *Germany 1945*, p. 13.

<sup>183</sup> For the idea of remorse as self-punishment see: Ilham Dilman, 'Shame, Guilt and Remorse,' *Philosophical Investigations*, Vol. 22, No. 4 (1999), pp. 324-326.

It was a shot in the arm that the case needed at that point and it certainly deflated the defendants in an effective manner. They never got their courage back after that picture.<sup>184</sup>

As far as Jackson was concerned, the use of *Nazi Concentration Camps* in the courtroom had succeeded at a time when the trial had required something in addition to the proof that resided in the many documents the American Prosecution had already submitted to the Tribunal. Since Jackson had persevered (against considerable criticism from within his own organization<sup>185</sup>) with his faith in the use of documents as the best way to prove to the Tribunal the guilt of the defendants, his willingness to employ film was not based purely on this legal objective. The 'shot in the arm' that the use of film brought to 'the case' entailed an unparalleled and dramatic portrayal of the depths and breath of Nazi injustice.

'The case', as previously discussed, was not only a legal one. The spectacle surrounding the use of film constituted the most successful method of enacting the morality play that had been envisaged by the American Prosecution. Without it, the moral drama of Nuremberg would have been limited to (the far less dramatic) speeches of prosecutors and witnesses. Instead, to see most of the defendants horrified while the images were projected, and to believe that some of them showed signs of remorse, was to see a *dramatic* form of justice being done in a way that no other form of 'evidence' could achieve. Whilst providing some proof to the Tribunal, it also provided a moral lesson for Germans and Americans outside of the courtroom: with those defendants who appeared to suffer remorse came an apparent admission that their actions and ideas had been morally wrong. For Americans, it constituted proof that their cause was just, and that justice was being done with the leaders of a nation who had embroiled their country in a Second World War – a war more horrible than most Americans had dared to imagine. Thus, the success of Nuremberg as a morality play was due, more than anything else, to the American use of film.

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<sup>184</sup>RHJ, Phillips Oral History, pp. 1,405-1,408. LoC/RHJP/259/4.

<sup>185</sup>Salter, *Nazi War Crimes*, pp. 398-410.

## CHAPTER 6

# SPECTRES OF ATROCITY

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*What would he do,  
Had he the motive and the cue for passion  
That I have? He would drown the stage with tears  
And cleave the general ear with horrid speech;  
Make mad the guilty, and appal the free;  
Confound the ignorant, and amaze, indeed,  
The very faculties of eyes and ears.*

William Shakespeare<sup>1</sup>

As demonstrated in the previous chapter, the main effect of presenting *Nazi Concentration Camps* in the courtroom was to stage publicly a confrontation between the defendants and the results of their 'conspiracy' in the hope of observing remorse or its absence – and encouraging all other observers to take part in the same experiment. The spectacle was a success. But since *Nazi Concentration Camps* was an entirely gruesome film, it makes sense to ask whether the success of that spectacle was due to the horrific nature of the images that were shown. It is, therefore, worth examining the use of other films that were, in a variety of ways, considerably different to the first. This chapter examines the use of two other (less graphic) films relating to Crimes Against Humanity presented by the American Prosecution. The first, made on a home-movie camera – most probably by a member of the SS – will be used to demonstrate that, although a film could be found which fitted the aim of presenting evidence produced by perpetrators, such evidence in visual form did not reach the same 'probative value' of the written word. In contrast to the precision of written correspondence between high-level perpetrators, unofficial images shot by those 'on the ground' were by their nature more chaotic and less informative. Such simple questions as who made the film and where or why it had been made, could not be answered at Nuremberg.

The film with which this chapter is mostly concerned, however, is a simple recording – made by American filmmakers – of valuables taken from victims of concentration camps. It has only recently been discovered and restored in the Imperial War Museum.<sup>2</sup> Coming closest of all films shown at the IMT to highlighting the culpability of an individual defendant, it will be used here to investigate the limits, not only of visual evidence in court, but also of any supporting evidence that had the potential to

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<sup>1</sup> William Shakespeare, *Hamlet*, II, 2.

<sup>2</sup> The restoration was undertaken after my correspondence with Kay Gladstone at the Imperial War Museum.

cause controversy between the fragile alliance of American and Soviet delegations. This American-made film will be shown to have been potentially dangerous to this relationship when (again) such simple questions as to how and where it was made were asked. We shall see the extent to which such a fragile relationship could affect the use of this film and other evidence. We shall also see if a film that can easily be described as 'boring' (at least, without any historical context) could replicate the courtroom spectacle in which observers might look for the presence or absence or remorse.

### 6.1. 'Persecution' on film

After *Nazi Concentration Camps* had been screened in court, the American Prosecution assessed its stock of remaining film that might still, potentially, be presented as evidence. James B. Donovan, the head of the OCC's Visual Presentation Unit, considered three more films, each relating to Crimes Against Humanity. He decided that only one of them – 'Original 8mm film of Atrocities against Jews', as it was named – would definitely be exhibited at the trial.<sup>3</sup> The others were – as we shall see – deemed problematic by the prosecutors.<sup>4</sup> The 8mm film would be shown on 13<sup>th</sup> December 1945 as part of the American presentation of 'The Persecution of the Jews', a title admitted by Major William F. Walsh (who took charge of this phase) to be an inadequate description of the evidence that followed:

Academically, I am told, to persecute is to afflict, harass, and annoy. The term used does not convey, and indeed I cannot conjure a term that does convey the ultimate aim, the avowed purpose to obliterate the Jewish race.<sup>5</sup>

It may now seem obvious that Raphael Lemkin's neologism, 'genocide', was precisely the appropriate term Walsh might have used.<sup>6</sup> Yet the use of the term, as we have already seen, lost favour with the American Prosecution even before the IMT trial had begun (and was used seldom during it). However, while the genocide of the Jews itself was not *central* to the trial, the American Prosecution did, in its presentation of 'The Persecution of the Jews,' provide a 'brief' that constituted the first publicly disseminated draft of a history of the genocide of European Jewry.<sup>7</sup> This phase

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<sup>3</sup> James B. Donovan to Colonel Storey, 12/Dec/1945, NARA/RG-238/51/26/'Photographic Evidence'. This film is listed, along with the appropriate document and exhibit numbers, as item 3 in Appendix 1. It is available to view at the US National Archives: NARA/ARC 43456/RG-238.7.

<sup>4</sup> These films were representations of the Warsaw Ghetto and another made in the vaults of the Frankfurt Reichsbank. See p. 161 below.

<sup>5</sup> IMT, Vol. III, 13/Dec/1945, p. 519.

<sup>6</sup> Lemkin, *Axis rule in occupied Europe*.

<sup>7</sup> Michael Marrus stated that 'The Trial of the Major War Criminals at Nuremberg in 1945-46 [...] presented

consisted of the following sections:

1. Hate propaganda against Jews
2. Discriminatory decrees against Jews
3. Anti-Jewish boycotts, raids, and violence
4. The program of the complete elimination of Jewry
5. Results of the extermination program<sup>8</sup>

The case began by citing the 25-point Nazi program of 1920 – in which it was declared that ‘Only a member of the race can be a citizen’ – and ended with evidence of Adolf Eichmann’s estimation of the murder of 6 million Jews.<sup>9</sup> Evidence submitted during the case included the ‘Stroop Report’ regarding the ‘clearance’ of the Warsaw ghetto with descriptions of murder and photographs that had featured in the meticulously crafted leather-bound volume sent by General Stroop to Heinrich Himmler.<sup>10</sup> As with the screening of films, Walsh’s presentation of photographs from Stroop’s report provided an opportunity to evoke more than ‘proof’ of crimes. It encouraged an emotional response that was greater than words, by themselves, might convey:

This picture ... is entitled ‘The Leader of the Large Scale Action’. The Nazi-appointed commander of this action was SS Major General Stroop, who probably is the central figure in this picture. I cannot refrain from commenting at this point on the smiling faces of the group shown there, in the midst of violence and destruction.<sup>11</sup>

Such images combined with commentary appeared to evoke a sense of injustice more salient to press reporters than purely documentary evidence of even greater horrors. For example, the American Prosecution also presented a report submitted by the Polish representative of the United Nations War Crimes Commission (UNWCC) that described Treblinka-B concentration camp as a site dedicated to the ‘wholesale’ murder of Jews.<sup>12</sup> Despite Donald Bloxham’s contention that the extermination camps of Treblinka, Belzec and Sobibor were absent from the immediate postwar trials,<sup>13</sup> the

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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.’ Michael R. Marrus, ‘The Holocaust at Nuremberg,’ *Yad Vashem Studies*, Vol. XXVI (1998), p. 5. David Bloxham has disputed Marrus’ claims without mentioning the latter’s qualifications. Bloxham, *Genocide on Trial*, p. 1.

<sup>8</sup> These subtitles were not read out in court but applied subsequently to the brief when printed by the war department once the American prosecution was completed. See: NCA, Vol. I, pp. 978-1022.

<sup>9</sup> PS-1708, IMT, Vol. III, 13/Dec/1945, p. 521; PS-2738, IMT, Vol. III, p. 569.

<sup>10</sup> This report was translated at Nuremberg as ‘The Warsaw Ghetto is No More,’ but is perhaps better translated as ‘The Jewish Quarter of Warsaw is No More’. It is now commonly referred to by historians as ‘The Stroop Report’ in reference to its author, the commander in charge of the ‘liquidation’ of the Warsaw Ghetto, SS Major General General Jürgen Stroop. It consisted of both text and photographs bound in black leather. IMT, Vol. III, 13-14/Dec/1945, pp. 530, 553-558; PS-1061, IMT, Vol. XXVI, pp. 628-694.

<sup>11</sup> IMT, Vol. III, 14/Dec/1945, p. 558.

<sup>12</sup> PS-3311; IMT, Vol. III, 14/Dec/1945, pp. 567-8.

<sup>13</sup> Bloxham, *Genocide on Trial*, p. 110.

evidence read in court suggested that 'several hundred thousands of Jews' had been murdered at Treblinka-B.<sup>14</sup> Yet such information being read from an official (Polish) report by an American prosecutor (after approximately two weeks of the presentation of an avalanche of documentation), did not provoke media interest to the same degree that – in regard to the same subject – the presentation of visual evidence, or the examination of a witness, did.<sup>15</sup> The evidence relating to Treblinka-B was later supplemented by the Russian Prosecution's use of a witness who described the methods of killing and the fact that the site was designed for the exclusive purpose of 'exterminating' only Jews.<sup>16</sup> The use of this witness, and the cross-examination of the commander of Auschwitz, Rudolf Höss (who spoke of the 'improvement' in killing machinery and procedures compared to Treblinka) led to some news-reporting that made mention of Treblinka as a site of 'extermination' of the Jews.<sup>17</sup> Yet largely due to Jackson's aversion to the use of witnesses (in part due to his distaste for the Soviet purge trials of the 1930s and the more recently conducted Kharkov trial) the American case would remain primarily based upon documents.<sup>18</sup> It was in this context that the use of film was deemed to be a more reliable, 'objective', source than witnesses in demonstrating Nazi criminality: rather more like 'documents' than ('subjective') witnesses who were open to cross-examination and influence from various quarters.

Mere words read from written sources, as Dodd had implied before the screening of *Nazi Concentration Camps*, did not seem adequate to describe even single events or institutions in such a murderous enterprise, whether described as 'genocide' or not. This was, in fact, precisely the problem with official Nazi documents – particularly with the correspondence of leaders and highly-placed administrators who continually

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<sup>14</sup> Bloxham states that Walsh did not cite the important passage that identified Treblinka as a site 'closely connected with the German plans aiming at a complete destruction of the Jewish population in Poland [...]'. Yet Walsh did read this passage in court. Bloxham, *Genocide on Trial*, p. 121, fn. 143; IMT, Vol. III, 14/Dec/1945, p. 567. The much expanded and revised 2003 edition of Raul Hilberg's classic work estimates a death-toll of 'up to 800,000' for Treblinka: Raul Hilberg, *The Destruction of the European Jews* (3rd ed.) (New Haven; London: Yale University Press, 2003), Vol. III, p. 1320.

<sup>15</sup> The day after Walsh spoke of Treblinka-B, this was not mentioned in the (London) *Times* report of the day's proceedings. Instead, the subject of this extermination camp was upstaged by that of the Strop Report on the 'clearance' of the Warsaw ghetto and the screening of 'Original 8mm film of Atrocities against Jews': 'Annihilation of a Ghetto', *The Times*, 14/Dec/1945. Treblinka was also absent from the report of the proceedings in the *New York Times*: 'Yule Trees Scene of German Crimes', *New York Times*, 14/Dec/1945. In contrast, after Höss had been cross-examined in court, both newspapers made note of the camp: 'Oswiecim Leader Boasts of Killings', *New York Times*, 16/Apr/1946. 'Extermination of Jews', *The Times*, 16/Apr/1946.

<sup>16</sup> IMT, Vol. VIII, 27/Feb/1946, pp. 324-329.

<sup>17</sup> See note 15. IMT, Vol. XI, 15/Apr/1946, pp. 416-7. Remarkably, Höss was called as a defence witness in an attempt to exonerate Ernst Kaltenbrunner. Thus the overall circumstance of holding the trial (and the tactics of defence council), rather than the efforts of the prosecution teams, are to be credited for the information that Hoess divulged. Once called as a defence witness, however, Hoess was cross-examined by the prosecution (IMT, Vol. XI, 15/Apr/1946, pp.412-18).

<sup>18</sup> On the Kharkov trial – and Jackson's reactions – see Chapter 2.



referred to the murder of Jews with coded or euphemistic language, refraining from explicit acknowledgment of mass murder – such as the invention and use of the phrase ‘final solution’.<sup>19</sup> This issue also seemed to apply in conveying the horror of ‘persecution’ that could be seen in the courtroom when the 8mm film was projected. Having been shot by a non-professional operator (probably a member of the SS) on a hand-held 8mm home camera, most of the scenes were very brief, poorly shot and difficult to comprehend.<sup>20</sup> To assist the Tribunal in making some sense of the chaotic violence that appeared before them, a textual summary of the various scenes was submitted by the Prosecution.<sup>21</sup> Every shot, usually lasting only a few seconds, was listed in a very brief manner as the following first ten entries demonstrate:

1. Crowd milling in front of doorway.
2. Naked girl runs across courtyard.
3. Older woman is pushed past camera. Man in SS uniform stands by left of scene.
4. Bicycle wheeled past man, lying on ground.
5. Man with skullcap, and woman, are manhandled.
6. Crowd at doorway as man and woman are pulled out.
7. Two women come out of house, one tugging at torn clothes.
8. Man hurries after woman apparently ripping clothes off.
9. Milling.
10. Man runs from doorway, dodging blows....<sup>22</sup>

This text did little to convey what appeared on the screen and only served to demonstrate the inadequacy of the written word in the representation of atrocity. But this is not to imply that the film itself could fully convey the meaning of events it had recorded. The American Prosecution deemed it necessary to project the film at a speed slower than it had originally been shot and to show it twice before the Tribunal.<sup>23</sup> Even with these procedures, and the accompanying text, it was (and is) still difficult to make sense of exactly what had been filmed. It is possible to view a copy today at any speed (even frame-by-frame) in order to examine the film more carefully than was possible in the courtroom at Nuremberg. Yet even so, most scenes remain difficult to comprehend and some bear little relation to the (chronologically ordered) textual descriptions supplied by the Prosecution. An additional problem was that the film was badly burned in places before it was shown.

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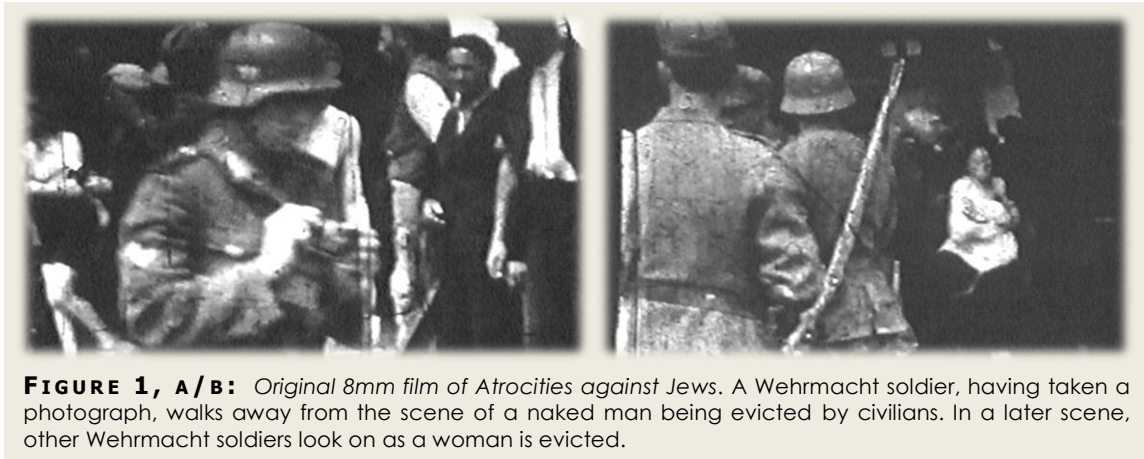
<sup>19</sup> The longevity of this Nazi term – implying as it does the existence of a ‘problem’ – far outlived the duration of the IMT trial. One of the first monographs on the genocide of the Jews used the Nazi phrase as its title: Gerald Roberts Reitlinger, *The final solution: the attempt to exterminate the Jews of Europe, 1939-1945* (London: Vallentine, 1953).

<sup>20</sup> The film was discovered by American troops in an SS barracks near Augsburg. PS-3052, IMT, Vol. XXXI, pp. 520.

<sup>21</sup> PS-3052, Exhibit B, IMT, Vol. XXXI, pp. 522-4.

<sup>22</sup> *Ibid.*, p. 522.

<sup>23</sup> IMT, Vol. III, 13/Dec/1945, p. 536.



However, what was apparent on the screen was the humiliating and utterly brutal violence towards men and women in an undetermined location at least partly perpetrated by, and certainly with the approval of, members of the SS and Wehrmacht.<sup>24</sup> Beatings of clearly defenceless men – some of whom were bearded and wore skullcaps – and women were delivered by civilians while German soldiers stood by, sometimes observing, sometimes examining the victims and most often directing them towards their tormentors or away from the buildings from which they had been evicted. One German soldier could be seen preparing to take photographs of one of the victims, a man who was naked and being led away from the entrance of a building (see Figure 1-a).<sup>25</sup>

It seems almost certain that the film was a record of the clearance of a Jewish ghetto.<sup>26</sup> That there was no evidence that could date or locate what was recorded was 'immaterial' as far as the Prosecution was concerned.<sup>27</sup> What the film offered, as James Donovan stated to the Tribunal, was:

<sup>24</sup> This is a conservative description of what can be seen, because it is not clear to me, for example, whether several victims on the ground are alive or have (already) been murdered.

<sup>25</sup> No mention in court or in documentation was made of the soldier-photographer in scene 39 of document PS-3052, IMT, Vol. XXXI, p. 523.

<sup>26</sup> The film, lasting three and a half minutes, is available for online viewing through the United States Holocaust Memorial Museum-Spielberg film archive. The online catalogue description states that the film represents a pogrom perpetrated in Lvov. Although I have not discovered any published material that confirms Lvov as the location, after correspondence with Bruce Levi at the museum, I have been informed that the location of Lvov has been confirmed through the comparison of scenes in the moving picture with still photographs of the town. <http://resources.ushmm.org/film>, 'Lvov pogrom, Jews rounded up, beatings', Story RG-60.0441, Tape 402. A copy of the film is also available at the US national archives: NARA/ARC 43456, RG-238.7.

<sup>27</sup> IMT, Vol. III, 13/Dec/1945, p. 536.

[...] undeniable evidence, made by the Germans themselves, of almost incredible brutality to Jewish people in the custody of the Nazis, including German military units. [...] And, as the other evidence to be presented by the prosecution will indicate, the scene presented to the Tribunal is probably one which occurred a thousand times all over Europe under the Nazi rule of terror.<sup>28</sup>

Thus, rather than constituting specific evidence that would implicate the defendants on trial with direct involvement, this film – as with *Nazi Concentration Camps* – was used as an *illustrative* example of the ‘conspiracy’ that contemplated such brutal behaviour by subordinates and others throughout occupied Europe. Although more comprehensive proof of direct participation in other particular events would be offered in the form of documentation, the film provided an emotive visual representation of violence that could be associated with other (documentary) evidence of ‘persecution’. Once again, as with *Nazi Concentration Camps*, the association made between pictures and the use of a particular word (or two) had the potential to conjure images of injustice with more import than words alone could achieve. The use of film brought greater import to the use of words.

The decision to screen the 8mm film as evidence in court was also accompanied, however, by the decision *not* to utilize two other films. One was a Nazi-made film of the Warsaw Ghetto and, for Major Walsh, was too ‘controversial’:

The German film on the Warsaw Ghetto is not going to be used because the shots of Jewish policemen, Jewish defectives, etc., are, in the judgement of Major Walsh, too controversial and with the 8 mm we have (plus the written SS [Stroop] report) exterminations of Ghettos are well covered.<sup>29</sup>

The other film deemed unsuitable for use as evidence was an American-made film of items in the vaults of the Reichsbank in Frankfurt. These items were believed by the Prosecution to constitute the remnants of SS deliveries of ‘loot’ taken from concentration-camp victims and delivered to the bank. But, unlike the other American-made films, there appeared to be a dearth of written documentation in regards to what, *precisely*, had been filmed. Thus, at first appearances, the film seemed to offer little ‘proof’ relating to the direct involvement of any of the defendants:

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<sup>28</sup> Ibid.

<sup>29</sup> James B. Donovan to Colonel Storey, 12/Dec/1945, NARA/RG-238/51/26/‘Photographic Evidence’.

The movies we took of some "Reichsbank Loot" at Frankfurt, [...] cannot be used because Captain Harris finally advised me yesterday that they have no proof that the materials photographed really were loot from Concentration Camp victims [...]. You realize that unlike our other films, that one does not speak for itself and cannot be used in the absence of such evidence. Needless to say, after having the [movie made ...] I was rather shocked to learn of the absence of supporting evidence. In any event, I have talked to Mr. Dodd about it and we both are agreed that if they have not the evidence the motion picture cannot be used.<sup>30</sup>

This film, *Reichsbank Loot*, was different to other American motion-picture exhibits in a number of significant respects: most obviously, no perpetrators or victims were present on the screen. With no significant editing and no sound – such as the overdubbed narration, or display (and narration) of affidavits on-screen (as adopted in *Nazi Concentration Camps*, for example) – this film could not 'speak for itself' as the prosecutors deemed other films could. As merely a sequence of mostly stationary shots of valuables being inspected, little that appeared seemed capable of provoking reactions in any defendant in the way that screening *Nazi Concentration Camps* or the 8mm 'Persecution of the Jews' had. Thus in December 1945, whilst the American Prosecution case was still being presented to the Tribunal, the decision not to use the Warsaw Ghetto or Reichsbank films appeared to signal the end in the matter of the American use of motion-pictures before the Nuremberg IMT.<sup>31</sup> By the time the American Prosecution case was completed, on 16<sup>th</sup> January 1946, no further motion-picture films were presented.<sup>32</sup>

## 6.2. Walther Funk's Tears and Incrimination

This may have remained the situation in regard to the American use of film were it not for the emergence of fresh evidence in relation to 'The Persecution of the Jews'. With new documents and a new witness, the American Prosecution would prepare to revive a particular aspect of a case against an individual defendant and would use the Reichsbank film against him during cross-examination. Defendant Walther Funk had, even before the trial had begun, already admitted some part in pre-war 'economic discrimination' against Jews. During an interrogation on 22<sup>nd</sup> October 1945 he had spoken about his role in excluding Jews from the German economy as well as

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<sup>30</sup> Ibid.

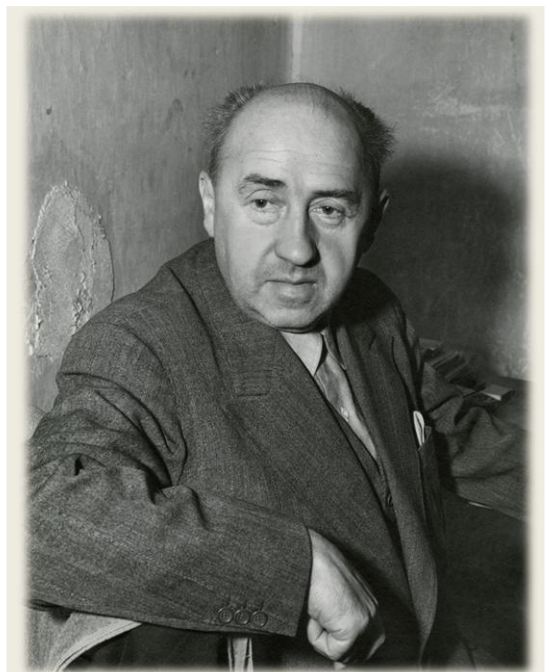
<sup>31</sup> David Irving is one of the few non-contemporaries to write about the Reichsbank film (briefly). He states that it was 'totally suppressed' because there was, he concludes, 'no proof that the loot really had come, as claimed, from concentration camp victims'. This, as we shall see, is entirely wrong. David J. C. Irving, *Nuremberg: the last battle* (Electronic ed.) (London: Focal Point, 1996), pp. 196-197. This book can be downloaded for free: <http://www.fpp.co.uk/books/Nuremberg/index.html> (last access: 13/Dec/2009).

<sup>32</sup> See Appendix I.

the confiscation of Jewish property:

- [Funk:] So far as my participation in this Jewish affair is concerned, that was my responsibility, and I regretted later on that I ever participated. The Party had always brought pressure to bear on me to make me agree to the confiscation of Jewish property, and I refused repeatedly. But later on, when the anti-Jewish measures and the brutality against Jews were being carried out with full force, something legal had to be done to prevent the looting and confiscation of the whole of Jewish property.
- [Interrogator:] You knew that the looting and all that was done at the instigation of the Party, didn't you?
- [Funk:] *Here Defendant Funk wept and answered:*  
That is when I should have resigned, in 1938. I am guilty. I am guilty. I admit that I am a guilty party here.<sup>33</sup>

Funk and his counsel continually maintained that he had been on the periphery of the circle of Nazi leaders, a little man of little influence, despite joining the Nazi Party before it came to power (in 1931) and becoming State Secretary of Public Enlightenment and Propaganda in March 1933. "I arrived at the threshold, so to speak, but I was never permitted to cross it."<sup>34</sup> That there is some truth in his statement can hardly be said to exonerate his active involvement with the Nazi regime: it was, in part, because Funk was so pliable, so willing to accept his role in obeying Hitler's (and Göring's) command, that he was chosen to replace Hjalmar Schacht as Reich Minister



**FIGURE 2:** Walther Funk, ex-President of the Reichsbank, in his cell at Nuremberg jail.

of Economics in 1938 and President of the Reichsbank in 1939.<sup>35</sup> His statement only betrayed the desire to have been more accepted within the circles of the highest Nazi leadership. His admission of guilt on the 22<sup>nd</sup> October 1945, however, did not extend to the part he was accused of playing in the 'final solution' *during* the war. Yet his tearful breakdown and (qualified) admission of guilt during the interrogation – "I admit that I am a guilty party here" (i.e. only due to his activities during 1938) – came not only after his interrogator's brief accusations relating to confiscation of Jewish

<sup>33</sup> PS-3544, IMT, Vol. XXXII, pp. 375-6; IMT, Vol. V, 11/Jan/1946, p. 161 (Emphasis added).

<sup>34</sup> IMT, Vol. XIII, 4/May/1946, p. 101.

<sup>35</sup> For Hans Pohl, the author of a biographical collection of German bankers of the 20<sup>th</sup> Century, Funk did not warrant inclusion. Schacht did however (along with other Nazi-era bankers such as Karl Rasche). Hans Pohl, *Deutsche Bankiers des 20. Jahrhunderts* (Stuttgart: Franz Steiner Verlag, 2007).

property *before* the war, but also after the much longer attempt to procure a confession in relation to something even more sinister:<sup>36</sup>

[Interrogator:] Let me ask you something else: Do you remember the gold that the SS was collecting from the concentration camps?

[Funk:] I have never concerned myself with *that* gold.<sup>37</sup>

This part of the interrogation was not read in court during the American Prosecution case because, given Funk's denials, there appeared to be little hard evidence from other sources (i.e. written documentation) to condemn him in this particular matter. But this part of the interrogation had led to twenty more questions and answers on the subject of Funk's complicity with the SS during the war. Funk would admit no part in the arrangements made between the Economic section of the Reich Security Main Office (RSHA) and the Reichsbank in accepting deliveries of property taken from Jews murdered in concentration camps. Yet the answer he gave suggested knowledge of something he wished to ignore at the time and after: "*that* gold". It was after only the third question on the next – and less sinister – topic of seizing the property of *living* Jews (before the war) that Funk, as we have seen above, broke down. The accusations of collaboration with the SS in converting the possessions of murdered concentration camp victims into cash or gold bullion, therefore, appears to have played some part in provoking an emotional response that ended, not on the only occasion, in tears.

On a previous occasion when Funk had also wept, what might have been interpreted as remorse – after what appears to have been an exaggerated confession of his own role in genocide – was perceived by his jailer as the self-pity and desire for leniency of a broken, 'degraded', man.<sup>38</sup> Colonel Buton C. Andrus would recount the showing of concentration camp footage to some of the prisoners (at Mondorf prison, before they were transported to Nuremberg) in order, as he told them, 'not to inform you of what you already know, but to impress on you the fact that we know it, too'.<sup>39</sup> After the film had been shown, recalled Andrus,

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<sup>36</sup> IMT, Vol. V, 11/Jan/1946, p. 161.

<sup>37</sup> PS-3544, IMT, Vol. XXXII, p. 372 (Emphasis added).

<sup>38</sup> Andrus, *The Infamous of Nuremberg*, p. 56.

<sup>39</sup> *Ibid.*, p. 54. The concentration camp footage shown to Funk and other prisoners at Andrus' behest (or with his approval) – although likely to have been composed of similar and, in some instances, the same footage – was not the same edited film of concentration camps that appeared (with narration) in the courtroom on 29/Nov/1945 (see Appendix I and the discussion of *Nazi Concentration Camps* in Chapter 5, section 5.3). According to Andrus, what the prisoners saw was composed only of footage of Buchenwald camp. The making of *Nazi Concentration Camps* was not complete until the autumn of 1945.

Funk said: 'I have something to tell you, sir.' Then he began weeping. [...] He twisted his fingers and said: 'I have been a bad man Colonel and I want to tell [you] about it.'

Funk then haltingly explained that he had been personally responsible for having Jewish prisoners murdered so that gold could be taken from their teeth without trouble. He had had it knocked out of their mouths while they were alive, but if they were dead there was far less bother.<sup>40</sup>

So incredible is Andrus' account that it needs to be approached with caution. It seems highly improbable that Funk himself arranged for Jews to be murdered or had any say in the way that gold was taken from the victims although his part in (and knowledge of) the use of their possessions – once they were dead – is a different matter. Even if his tears were the product of self-pity or shame, rather than genuine feelings of remorse, or even if Andrus' account represents some form of embellishment of Funk's reaction to the film, Funk was evidently deeply troubled by his part in the 'persecution' of the Jews. The report of an interrogation of Funk in November 1945 noted that:

[The] witness broke down and wept bitterly on several occasions during the interrogations as to the Jewish question. Although he admits responsibility for the Jewish discriminatory laws, he denies any participation in concentration camp activities'.<sup>41</sup>

Others observed him weeping on several other occasions in his cell and again when the Prosecution presented *Nazi Concentration Camps* in the courtroom.<sup>42</sup>

Despite the tears, Funk's interrogation of 22<sup>nd</sup> October had not procured an admission of guilt as far as the Reichsbank's relationship with the SS was concerned. It was, however, the Defence's application for the testimony of a new witness that would provide a pretext to the Prosecution for reviving this part of the case against him. On 5<sup>th</sup> March 1946 Funk's Defence counsel, Dr. Fritz Sauter, had submitted a successful application to the Tribunal in order to present written answers from Emil Puhl, the ex-vice-President of the Reichsbank.<sup>43</sup> The questionnaire sent to Puhl was designed to elicit answers that would demonstrate the limited influence that Funk had on finance policy and to imply that any measures that improved Reichsbank reserves

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<sup>40</sup> Ibid., pp. 55-56.

<sup>41</sup> IWM/FO645/151/'Funk'/Interrogation, 8/Nov/1945.

<sup>42</sup> Gilbert, *Nuremberg Diary*, p. 30; 47. Douglas Kelley, an American psychiatrist at Nuremberg, noted that Funk 'wept frequently in his cell, overwhelmed by maudlin self-pity'. Kelley, *22 Cells*, p. 159. Another American psychiatrist, Leon Goldensohn, noted that 'When the question of his political activity is approached he becomes tearful or defensive or both [...]'. Leon Goldensohn & Robert Gellately, *The Nuremberg interviews* (New York: Alfred A. Knopf, 2004), p. 76. Funk had also wept on being served with the indictment: Neave, *Nuremberg*, p. 124.

<sup>43</sup> There were certain qualifications to the prosecution's acceptance of this application: '[...] as I understand Dr. Sauter, he wants an affidavit in the form of answers to questions. The Prosecution have no objection to that, only [...] they reserve the right to apply for cross-interrogatories, if necessary; if the answers take a certain form, they might have to apply to the Court that the witness [Puhl] be brought for cross-examination'. IMT, Vol. VIII, 5/Mar/1946, p. 538.

of gold were already in place before he took charge.<sup>44</sup> This evidence, therefore, was primarily designed to counter the charge of conspiracy to wage aggressive war(s).<sup>45</sup> But by the time Funk took the stand as a witness in his own defence, and the charge of conspiracy to wage aggressive war was being confronted, the document containing Puhl's answers had not yet arrived in Nuremberg to be used by the Defence.<sup>46</sup> In the meantime, interrogators on behalf of the Prosecution had reached Puhl and asked questions of their own.

It appears that the Prosecution had already interrogated Puhl specifically on the subject of SS wartime deliveries to the Reichsbank, but had decided not to use him as a witness in court. Instead, he was merely questioned in order to garner information that would be useful in confronting Funk (during interrogation before the trial) so that the latter might confess his own guilt.<sup>47</sup> It is possible that Jackson's aversion to the use of witnesses precluded the use of Puhl's testimony during the preparation and presentation of the American Prosecution case (particularly at a time when General William B. Donovan, head of the Office of Strategic Services, was in conflict over methods with Jackson who strongly favoured the use of Nazi self-incriminating documents rather than witness-testimony).<sup>48</sup> However, when it came to using Puhl's testimony in May 1946, the Prosecution's use of such evidence occurred under quite different circumstances: by this time Donovan had left and the use of Puhl as a witness had first been requested by Defence counsel, a point stressed by the Prosecution in court.<sup>49</sup> This helped to allay the Prosecution's concerns over appearances of reliability ('objectivity') in the witnesses it chose to use. Furthermore, testimony from Puhl and another witness that would be called, could be supported by

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<sup>44</sup> Document Funk-17, IMT, Vol. XL, pp 231– 243. At this time Emil Puhl was being held as a prisoner in Altschweier, within the French zone of occupation.

<sup>45</sup> Of the four charges brought against Funk, this was, in fact, the only one with which Funk was declared innocent by the Tribunal.

<sup>46</sup> IMT, Vol. XIII, 6/May/1946, p. 108.

<sup>47</sup> When, on 22<sup>nd</sup> October 1945 at Nuremberg (before the trial began), Funk was confronted with the Reichsbank's acceptance of SS deliveries, the interrogator referred to 'testimony [that] is clear that you came back and reported to the Reichsbank directors of a conference that you had with Himmler before the gold was received' (PS-3544, IMT, Vol. XXXII, p.373.) The only bank employee in captivity and in a position to report this at the time was Emil Puhl. The interrogator also stated 'Puhl also told you, didn't he, that that gold consisted of ... other kinds of gold articles ...?' (IMT, Vol. XXXII, p.374). Although Puhl was interrogated soon after this at Frankfurt (on 2<sup>nd</sup>, 7<sup>th</sup>, and 8<sup>th</sup> November 1945 – see documents EC-436, EC-437, and EC-438 of IMT, Vol. XXXVI, pp. 513-520) there appears to be no record from Puhl before 3<sup>rd</sup> May 1946 on the particular subject of SS war-time deliveries to the bank. After being named as a defence witness, interrogators on behalf of both the defence and the prosecution reached Puhl on 1<sup>st</sup> May 1946. It was two days later that he gave prosecution interrogators an affidavit on the subject of SS deliveries to the Reichsbank (see: PS- 3944, IMT, Vol. XXXIII, p. 570).

<sup>48</sup> Salter, *Nazi War Crimes*, pp. 398-410.

<sup>49</sup> IMT, Vol. XIII, 6/May/1946, p. 161.



newly available documentation created by the bank itself during the war.<sup>50</sup> The Prosecution was therefore willing not only to use written evidence provided by Puhl, but in fact suggested that it might be necessary to bring him to Nuremberg so that he might testify in court.<sup>51</sup> On the 3<sup>rd</sup> May 1946, Puhl supplied the American Prosecution with written answers that would serve as new and damning evidence against Funk in regard to Crimes Against Humanity.

Funk's cross-examination was conducted by Thomas J. Dodd, a prosecutor who appeared more capable in the art than his chief, Robert Jackson.<sup>52</sup> In questioning Funk in the courtroom on 6<sup>th</sup> May 1946, after dealing with various other issues, Dodd asked about the character of Puhl.<sup>53</sup> Funk vouched for the reliability of his ex-vice president of the bank. Dodd then switched to more general matters, extracting from Funk the admission that, during the war, gold required for foreign-exchange was plundered from Belgian and Czechoslovakian banks. Perhaps, as the line of questioning suggested, there was considerable need for as much gold as possible (to this Funk assented).<sup>54</sup> Then Dodd switched to a new topic, beginning with the question that had not been posed to Funk for more than 6 months. The exchange is worth quoting at length:

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<sup>50</sup> See documents PS-3947, PS-3948, PS-3949, IMT, Vol. XXXIII, pp. 577-583.

<sup>51</sup> IMT, Vol. VIII, 5/Mar/1946, p. 538.

<sup>52</sup> I must qualify this statement, however, with the observation that Walther Funk was, from the point of view of the prosecution, much easier prey than Göring who had caused problems for Jackson during cross-examination – see: Tusa & Tusa, *The Nuremberg Trial*, pp. 274-292.). The prosecution case of Hjalmar Schacht, with whom Jackson conducted cross-examination, was also more difficult than that of Funk's (see: Taylor, *Anatomy*, p. 383.).

<sup>53</sup> IMT, Vol. XIII, 6/May/1946, p. 161.

<sup>54</sup> *Ibid.*, pp. 161-2.

- MR. DODD: [...] When did you start to do business with the SS, Mr. Funk?
- FUNK: Business with the SS? I have never done that.
- MR. DODD: Yes, sir, business with the SS. Are you sure about that? I want you to take this very seriously. It [...] is very important to you. I ask you again, when did you start to do business with the SS?
- FUNK: I never started business with the SS. I can only repeat what I said in the preliminary interrogation [of the 22<sup>nd</sup> October 1945]. *Puhl one day informed me* that a deposit had been received from the SS. First I assumed that it was a regular deposit, that is, a deposit which remained locked and which was of no further concern to us, but then *Puhl told me* later that these deposits of the SS should be used by the Reichsbank. I assumed they consisted of gold coins and foreign currency, but principally gold coins, which every German citizen had had to turn in as it was, and which were taken from inmates of concentration camps and turned over to the Reichsbank. [All other v]aluable which had been taken from the inmates of concentration camps did not go to the Reichsbank but [...] to the Reich Minister of Finance [...].
- MR. DODD: Just a minute. Were you in the habit of having gold teeth deposited in the Reichsbank?
- FUNK: No.
- MR. DODD: But you did have it from the SS, did you not?
- FUNK: I do not know.<sup>55</sup>

Dodd then proposed to read Puhl's affidavit. But due to (unsuccessful) Defence objections, he could not do so until the next day.

When proceedings continued the following morning, Dodd first resumed with a recapitulation of what Funk had said and admitted the previous day. In reply to Dodd's summary, Funk provided a little more information that was probably unintended: after Puhl had informed him that SS deliveries would be made to the bank he had also told Funk, 'somewhat ironically,' that it would be better to remain ignorant of their contents.<sup>56</sup> At this time, Dodd did not capitalise on the potential inference that Funk must have thereby understood – even before they began arriving at the bank – that there was at least something suspicious about the contents of these deliveries.<sup>57</sup> Instead, Dodd soon moved on to the question of whether the defendant had ever visited the vaults of the bank himself. Funk admitted that he had occasionally taken visitors there to show them the rooms where gold bars were kept but denied that he had ever seen any 'jewels, cigarette cases, watches, and all that business' as Dodd had put it.<sup>58</sup> After the process of questioning and denial was exhausted, Dodd next proposed to show the film of 'Reichsbank Loot' that had been

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<sup>55</sup> Ibid., pp. 162-3. (Emphasis added).

<sup>56</sup> IMT, Vol. XIII, 7/May/1946, p. 166.

<sup>57</sup> Dodd did later observe the inference that Funk's contemporaneous understanding of 'irony' must have led him to believe that there was something potentially 'sinister' about the contents of the deliveries. IMT, Vol. XXI, 16/Aug/1946, p. 238.

<sup>58</sup> IMT, Vol. XIII, 7/May/1946, p. 168.

abandoned by the Prosecution the previous December.<sup>59</sup>

### 6.3. *Reichsbank Loot* is shown

Just before it was projected, the Tribunal agreed to Dodd's request that Funk be brought down from the dock to a position closer to the screen so that his memory would be 'properly refreshed' (a touch of sarcasm that Dodd repeatedly employed in the face of the defendant's denials).<sup>60</sup> Since Funk's front-row position in the dock was already quite close to the screen, one result of his repositioning would be to bring him significantly closer to the judges on the bench – making their observation of his reactions to the film a little easier. It also physically separated him from the other defendants enabling a more focused observation of him alone by everyone else in the courtroom.



**FIGURE 3:** One of the first scenes in *Reichsbank Loot* panning across the hoard of valuables stored in the vaults of the Frankfurt Reichsbank. (See note 59).

<sup>59</sup> IWM/Film & Video Archive/FOY 9; USA-845, IMT, Vol. XIII, 7/May/1946, p. 169. After the IMT trial, the American prosecution agreed to supply the British Foreign Office with copies of most of the films that had been presented by the American prosecution as evidence in return for the supply of microfilms of all British documents used in the trial. For confirmation of the delivery of *Reichsbank Loot* to the Foreign Office in London, see: Anne G. Blau to [E.J.] Passant, 25/Oct/1946, NA(UK)/FO-370/1330/[L 4590]. As far as I am aware, the only copy of *Reichsbank Loot* available for viewing in its original form is the very same Foreign Office copy that was subsequently transferred (possibly via what was the Public Record Office) to the Imperial War Museum (UK). This has only been catalogued and available for viewing since the summer of 2008. Very brief excerpts were used in the production of Stuart Schulberg & Pare Lorentz (Dirs.), *Nuremberg: Lessons for Today*, (Berlin: DFU/OMGUS, 1948), (from 49:32) and S. Svilov (Dir.), *The Nuremberg Trials: A Film Document of the Trial of the Principal German War Criminals*, (Moscow: Central Documentary Film Studios; American release: Artkino Pictures, Inc., 1947), (from 48:33).

<sup>60</sup> IMT, Vol. XIII, 7/May/1946, p. 169.

As the film was played, the court transcribers had little to do so that – just as with other films that were screened in court – the official transcripts would merely note (in brackets) that '[Moving pictures were then shown]'.<sup>61</sup> Those present in the courtroom, however, would first see the establishing shots of 'loot' that had been filmed in the vaults of the Frankfurt Reichsbank.<sup>62</sup> The rest consisted of close-up shots of valuables being inspected by Lt. Robert M. Braggins Jr., the only (partially) visible human presence in the film.<sup>63</sup> Opening boxes and sacks, he revealed their contents: paper currency, coins, necklaces, rings, gems, broaches, clocks, cutlery, fob watches, eyeglasses and more.



**FIGURE 4, A/B:** The sequence of close-ups in *Reichsbank Loot* begins with the clapperboard (which has appeared already in establishing scenes). Written in chalk, the names of the two filmmakers, 'Goldstein' and 'Braggins' appear mid-way down. The words 'Reichbank-Frankfurt' [sic], along with the date, '21 Aug 1945', can be seen on the lower section of the board. Lt. Robert M. Braggins then removes it to inspect the contents of the box beneath. In a shot that follows later, he empties a sack-full of glittering gems on the floor and lets handfuls fall from his palm.

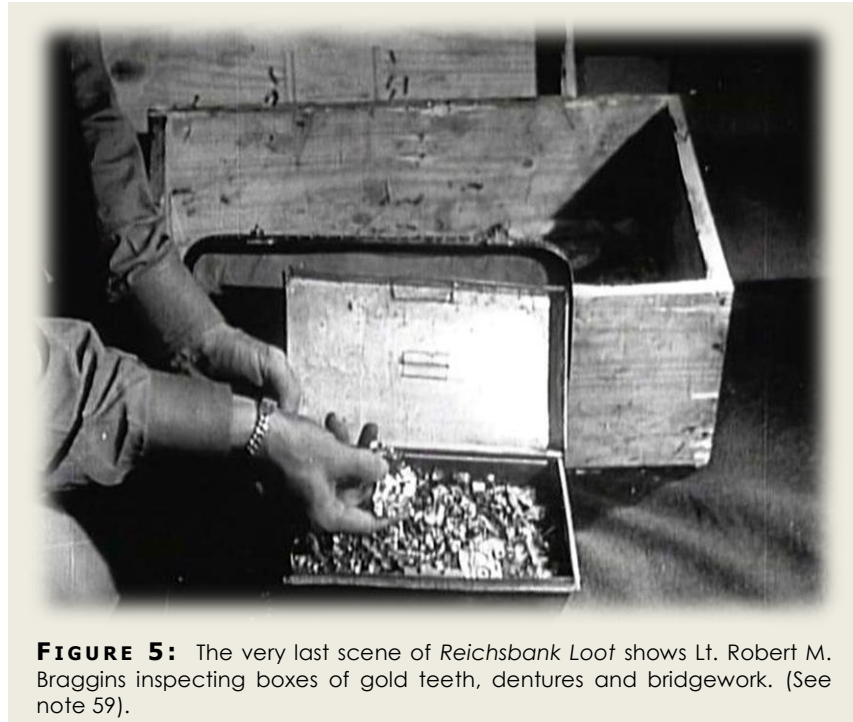
It was only the very last scene – the last fifty seconds in a 10-minute film – that suggested very probable signs of the bank's criminal association with genocide: Braggins opened boxes containing gold teeth, bridgework and dentures. It was only images of such items that had the potential to remind at least some people in the courtroom of the visual horrors of *Nazi Concentration Camps*. From where else, implied the Prosecution – and the images themselves – could such items in such quantity originate but from the murdered victims of concentration camps? Yet this film on its own, as the Prosecution had already decided in December, could not prove that such items originated from such places. As with other films presented as evidence, *Reichsbank Loot* was merely to serve as an illustrative example of crimes

<sup>61</sup> Ibid. (Brackets and emphasis in original). On the general topic of reference to film in transcripts of international criminal trials (without space for much consideration of the details of the films presented at Nuremberg, Tokyo, or The Hague) see: Lennon, 'A Witness to Atrocity', pp. 65-73.

<sup>62</sup> The two OSS cameramen that made this film for the prosecution (OCC) were: Lt. Robert M. Braggins Jr. and Lloyd Louis Goldstein (who later changed his surname to 'Garnell'). PS-3956 (USA-878) & PS-3976 (USA-879), IMT, Vol. XXXIII, pp. 591-594.

<sup>63</sup> PS-3976 (USA-879), IMT, Vol. XXXIII, pp. 593.

that could not be fully explained or proven through visual means alone.



**FIGURE 5:** The very last scene of *Reichsbank Loot* shows Lt. Robert M. Braggins inspecting boxes of gold teeth, dentures and bridgework. (See note 59).

After Funk's denials that he had ever known about the items in the film, Dodd introduced the affidavit signed by Puhl, 'the man who you told us yesterday was a credible gentleman, and whom you asked the Tribunal to call as a witness on your behalf.'<sup>64</sup> Puhl's written answers contradicted Funk's version of the way in which arrangements had been made to accept the SS deliveries. According to Puhl's statement, during the summer of 1942, *Funk had told him* of an arrangement agreed with Himmler to accept deliveries of unusual valuables sourced from concentration camps. Next, Puhl's statement asserted, *Funk had instructed him* to work out the specific arrangements for deliveries to the bank with Oswald Pohl, the head of the economic & administrative section (WVHA) of the Reich Security Main Office (RSHA) responsible for managing the 'economic' aspects of the concentration camps.<sup>65</sup> Puhl's affidavit suggested not only that the initiative within the bank for arranging to receive SS deliveries had come from Funk, but that Funk was also well aware of the unusual nature of their contents and from where they had originated:

<sup>64</sup> IMT, Vol. XIII, 7/May/1946, p. 170; PS-3944 (USA-846/851), IMT, Vol. XXXIII, pp. 570-2.

<sup>65</sup> On Pohl's capture, see page 187. During interrogation by Leon Goldensohn, an American psychologist at Nuremberg, Pohl twice confirmed (on 4/Jun/1946 and 5/Jun/1946) that he had discussed arrangements for SS deliveries to the Reichsbank with Emil Puhl. He also implied that Funk was party to the arrangements. Goldensohn & Gellately, *The Nuremberg interviews*, pp. 395-396; 401-393.

I asked Funk what the source was of the gold, jewels, banknotes, and other articles to be delivered by the SS. Funk replied that it was confiscated property from the Eastern Occupied Territories, and that I should ask no further questions. I protested against the Reichsbank handling this material. Funk stated that we were to go ahead with the arrangements for handling the material, and that we were to keep the matter absolutely secret.<sup>66</sup>

Funk appeared to be shocked by his ex-colleague's testimony: according to one observer, his reaction amounted to 'an almost hysterical explosion of anger and fear'.<sup>67</sup> Puhl's assertions were simply not true, he claimed.<sup>68</sup> Puhl, according to Funk, was simply trying to shift all the blame on him and should be brought to Nuremberg to deliver his testimony in the courtroom – 'before God,' and Funk himself (the Tribunal subsequently agreed to have Puhl appear in court once he too had been shown the film).<sup>69</sup> Although Funk had stated that his first knowledge of the SS deliveries had come from Puhl, he (Funk) could not deny the essential facts of the case: that in addition to accepting consignments of 'unusual' material sourced from concentration camps, arrangements had been made by the bank itself to convert and sell such valuables in order to credit an account of the Reich Ministry of Finance.<sup>70</sup> Dodd now presented him with documents providing evidence of such transactions, including a memo dated September 1942 sent from the Main Accounts Office of the bank. It reported the second delivery it had made to the Berlin Municipal Pawn Brokerage of an unusual collection of items to be valued and credited to the state. In addition to jewellery and other valuables that could be seen in the film, the one entry that had been crossed out read 'diverse dentures, partly of gold'.<sup>71</sup> Another document provided evidence of related credits made to the Reich Ministry of Finance.<sup>72</sup> Although Dodd suggested it was remarkable for such arrangements and transactions to take place without the knowledge of the Reichsbank's president, Funk still denied all knowledge of such details, admitting only that he had presumed that the SS deliveries included only gold coins that Germans, just like concentration camp inmates, were obliged to surrender to the state.<sup>73</sup> Finally, Dodd adopted a very different approach which had little to do with 'hard' evidence at all:

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<sup>66</sup> IMT, Vol. XIII, 7/May/1946, p. 170-1; PS-3944 (USA-846/851), IMT, Vol. XXXIII, pp. 570-2.

<sup>67</sup> Taylor, *Anatomy*, p. 396.

<sup>68</sup> IMT, Vol. XIII, 7/May/1946, p. 172.

<sup>69</sup> *Ibid.*, pp. 172, 179; IMT, Vol. XIII, 11/May/1946, pp. 434-5.

<sup>70</sup> IMT, Vol. XIII, 7/May/1946, pp. 173-176.

<sup>71</sup> PS-3948, (USA-847), IMT, Vol. XXXIII, pp. 579-581 (see note 1).

<sup>72</sup> PS-3949, (USA-848), IMT, Vol. XXXIII, pp. 582-3.

<sup>73</sup> IMT, Vol. XIII, 7/May/1946, p. 176.

MR. DODD: All right. You know you did on one occasion at least, and possibly two, break down and weep when you were being interrogated [in prison], you recall, and you did say you were a guilty man; and you gave an explanation of that yesterday. You remember, those tears. I am just asking you now; I am sure you do. I am just trying to establish the basis here for another question. You remember that happened?

FUNK: Yes.

MR.DODD: And you said, "I am a guilty man." You told us yesterday it was because you were upset a little bit in the general situation. I am suggesting to you [the following:] is it not a fact that this matter [of SS deliveries] has been on your conscience all the time and [is] really what is on your mind, and it has been a shadow on you ever since you have been in custody? And is it not about time that you told the whole story?<sup>74</sup>

This attempt to induce more tears, to break down the witness so that he might finally admit his guilt in the face of his own conscience (rather than in the face of the evidence) did not result in any confession or expressions of remorse.

But the film itself had a considerable effect on Funk who exclaimed that he was deeply shocked and confused by it.<sup>75</sup> When Funk's Defence counsel asked him to comment on it, he declared:

Photography and especially films are always very dangerous documents because they show many things in a light different from what they really are. I personally have the impression, and I believe the Prosecution will probably corroborate this, that all these deposits of valuables [...] came from the potassium mines where, at my instigation, all gold, foreign currency and other valuables of the Reichsbank had been stored away when, because of a terrific bombing attack on *Berlin*, we were no longer able to work in the Reichsbank. [...] Gold, foreign currency, and all other deposits of valuables were then taken to a potassium mine in Thuringia and from there apparently to Frankfurt, I assume.<sup>76</sup>

Funk was correct in this assumption and, without expressly accusing the Americans of attempting to mislead the Tribunal in its use of the film, highlighted a problem for the Prosecution. Implicit in Funk's explanation – and in conflict with some of Dodd's statements – was the proposition that American troops had made the film only after they themselves had placed the items that appeared on the screen in the vaults of the Frankfurt Reichsbank. After the film had been shown in court the president of the Tribunal had reminded Dodd that proof would be required of how and where the film had been made.<sup>77</sup> But in his reply and subsequent question to Funk, Dodd had appeared to be unsure of the exact circumstances surrounding the making of the Reichsbank film. The recording of his speech conveys just a little hesitancy that is lost

<sup>74</sup> Ibid., pp.178-9.

<sup>75</sup> IMT, Vol. XIII, 7/May/1946, p. 203.

<sup>76</sup> Ibid., pp. 203-4 (Emphasis added).

<sup>77</sup> The official transcript merely reads '...I take it you will offer evidence as to where that film was made'. What the president actually said was 'I take it, you will offer evidence of where that eh... how that film was made?' IMT, Vol. XIII, 7/May/1946, p. 169; IWM/Sound/3323, 7/May/1946.

in the official transcript:

MR. DODD: [...] There will be an affidavit as to the circumstances under which [the film] was made, who was present, and the time it was taken; but, for the information of the Tribunal, *it was taken in ...eh... Frankfurt when the ...eh... Allied Forces ...eh... captured that city and went into the Reichsbank vaults.*

[Turning to the defendant.] Now, Witness, having seen these pictures of *materials that were found in your Reichsbank vaults a year ago, or a little earlier than a year ago*, this time [do] you now recall that you did have such material [...]?<sup>78</sup>

Dodd's answer to the president of the Tribunal suggested that, once Frankfurt had been captured, the SS 'loot' had been found by Allied troops in the vaults of that city's Reichsbank branch. Furthermore, taken together with the question he then posed to the defendant, Dodd suggested that the film had been shot at some time between late March and (at the very latest) early May, 1945: at the time, or soon after, the SS items were presumed by Dodd to have been discovered by Allied troops in Frankfurt.<sup>79</sup>

The appearance of Emil Puhl in court would both help and hinder the Prosecution case in various respects and would cast more doubt on Dodd's version of events in relation to the making of the film. The Defence proposed that before he gave testimony in court, Puhl should be shown the film; to this the Prosecution consented.<sup>80</sup> When he took the stand, Puhl's priority appeared to be to avoid, as much as was possible, incriminating himself: a wise approach since he would later be prosecuted in the eleventh 'subsequent' trial at Nuremberg.<sup>81</sup> Now, at the IMT, he retracted and even contradicted some of the most devastating testimony he had provided to the Prosecution in the form of his affidavit on 3<sup>rd</sup> May, suggesting, for example, that he had become aware of the *contents* of the SS deliveries only after his initial arrest and interrogation by the Allies (i.e. not from what Funk – or anyone else – had told him during the war).<sup>82</sup> Yet he did maintain – contrary to Funk's testimony – that Funk had *first informed him* of the proposal to accept and process the deliveries. This would lead to Funk's admission, some days later, that, indeed, after meeting with Himmler, he (Funk) had then informed Puhl that the deliveries would take place.<sup>83</sup> Despite this little victory for the Prosecution, however, a significant problem materialised with Puhl's assessment of the context in which the film had been made: '[...] I had the

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<sup>78</sup> IWM/Sound/3323, 7/May/1946; IMT, Vol. XIII, 7/May/1946, p. 169 (Emphasis added).

<sup>79</sup> Frankfurt was captured by the 90<sup>th</sup> Division of Patton's 3<sup>rd</sup> Army on 26/Mar/1945. Greg Bradsher, 'Nazi Gold: The Merkers Mine Treasure,' *Prologue: Quarterly of the National Archives and Records Administration*, Vol. 31, No. 1 (1999), p. 7.

<sup>80</sup> IMT, Vol. XIII, 7/May/1946, p. 434.

<sup>81</sup> Puhl would be found guilty of Crimes Against Humanity and sentenced to 5 years imprisonment – chiefly for his part in the dealings between the SS and the bank.

<sup>82</sup> IMT, Vol. XIII, 15/May/1946, p. 569 (Emphasis added).

<sup>83</sup> IMT, Vol. XVII, 4/Jul/1946, p. 495.



impression that the things of which we are now talking had been put there [in the vaults of the Frankfurt Reichsbank] expressly for the purpose of taking the film.'<sup>84</sup>

Rebecca West, who observed some sessions of the court and reported for a variety of newspapers and magazines during and after the trial, suggested that Dodd had made a 'single slip' in his comments regarding the film: 'He either meant to say "photographed" instead of "found", or suffered a confusion which was purely momentary'.<sup>85</sup> In other words, West implied that Dodd had already known about the move, by American troops, of the treasure into the Frankfurt vaults before the film had been made. West also implied that Dodd had intended to convey this information but instead had made a slip of the tongue. Yet such a suggestion does not tally with what took place in the courtroom: Dodd had asserted on *three* separate occasions that when Allied troops entered Frankfurt for the first time, they had discovered the items in the vaults of the Reichsbank and then immediately (or soon after) made a film of them.<sup>86</sup>

#### **6.4. The story of the Reichsbank 'Treasure'**

Dodd's assertions were plainly wrong. Whilst Funk had claimed that he was 'completely confused' by the film, he had, in fact, partly explained what had happened: vast quantities of gold bullion, currencies and other items commonly expected to be found in a bank, had accumulated and/or been stored, not only in the vaults of the *Frankfurt* Reichsbank, but (to a much greater degree) also in the vaults of the *Berlin* branch for most of the duration of the war.<sup>87</sup> The 'unusual' items delivered by the SS had been brought to the Berlin branch where both Puhl and Funk had been based. It was due to the heavy Allied bombing raid on 3<sup>rd</sup> February 1945, that Funk himself had ordered the transfer of the Berlin Reichsbank's contents to the Kaiseroda potassium mine in Merkers, Thuringia (the Berlin Reichsbank building had sustained considerable damage).<sup>88</sup> The Merkers mine was the last refuge in the centre

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<sup>84</sup> IMT, Vol. XIII, 15/May/1946, p. 563.

<sup>85</sup> West, *A Train of Powder*, pp. 252-253. It appears likely that West was not present during Funk's defence or at the time the film was shown: when she wrote about Funk and the film, she used the official transcripts (see West, *op. cit.*, p. 254) rather than notes from personal observation. Thus clues in the film, and in Dodd's slight hesitations in his declaration of its provenance, were not available to her.

<sup>86</sup> See the statements Dodd made the day before the film was shown (IMT, Vol. XIII, 6/May/1946, p. 163) and just before and after it was projected in the courtroom (IMT, Vol. XIII, 7/May/1946, pp. 169).

<sup>87</sup> Puhl had confirmed to Funk's defence counsel that the items had been delivered by the SS to the *Berlin* branch of the bank. IMT, Vol. XIII, 15/May/1946, p. 564.

<sup>88</sup> IMT, Vol. XIII, 7/May/1946, pp. 203-4; Bradsher, 'Nazi Gold,' pp. 8-9. According to an early interrogation of Funk, Hitler had instructed him to move the contents of the bank to 'a mine in central Germany but this was captured by American troops'. PS-2828, NCA, Vol. V, p. 484.

of Germany for the vast bulk of the Third Reich's wealth, increasingly threatened by the last efforts of a successful Allied invasion.<sup>89</sup> It did not take long for the Allies to discover it. On 8<sup>th</sup> April American troops of Lt. General George Patton's Third Army, having already occupied Frankfurt on 28<sup>th</sup> March, confirmed the existence of a huge hoard of wealth buried 21,000 feet beneath the ground at Merkers.<sup>90</sup>

After the discovery it quickly became apparent that, at the rear of the huge cavern in which the entire horde was located, an unusual collection of items, quite different to the rest of the treasure, was relevant to potential war crimes investigators:

Included in this inventory is a large quantity of material which it is evident belonged to the SS or the Gestapo. Evidence indicates that this part of the treasure represents loot taken from individuals who have been murdered as it includes thousands of gold and silver dental crowns, bridges and plates and some personal articles. It may, therefore, constitute items of evidence, and should be considered in that light. It is believed that agencies engaged in the determination of evidence for the prosecution of war criminals should be informed, and at the proper time should be permitted to inspect and investigate this part of the property.<sup>91</sup>

Generals Patton and Eisenhower soon visited the mine which, in addition to the Berlin Reichsbank deposits, contained gold bullion from other Reichsbank branches as well as a huge collection of some of the most prized pieces of art in Europe.<sup>92</sup> The discovery of such wealth, and the issue of what to do next, was soon understood by Patton to be a 'political question': it was something other than a matter of security, since he was confident that German troops would not be able to recapture the mine (he had originally considered keeping the treasure where it was).<sup>93</sup>

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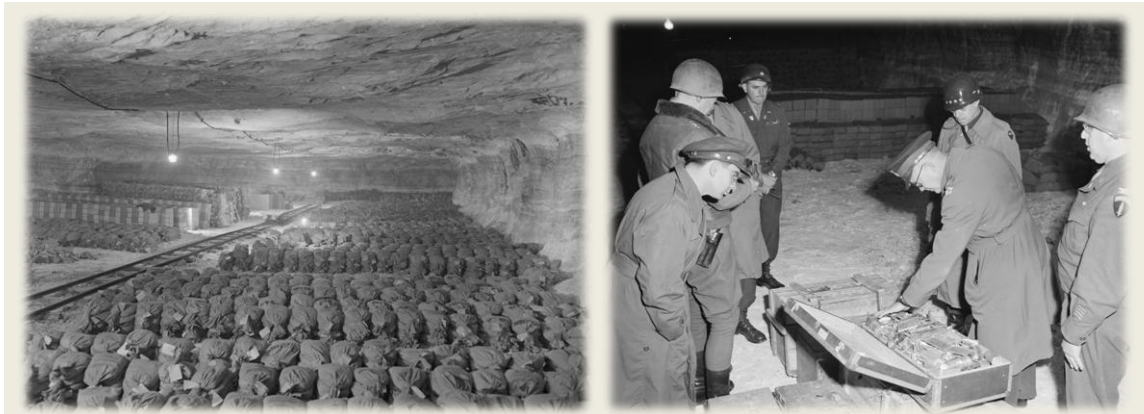
<sup>89</sup> At this time, gold was also being transferred to Merkers from several other branches of the Reichsbank in Germany. The Merkers hoard would account for approximately 91% of the entire gold reserves of the Third Reich recovered by the Allies. William Z. Slany, *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II: Preliminary Study*, (Washington: Dept. of State, 1997), p. 153.

<sup>90</sup> Bradsher, 'Nazi Gold,' p. 11.

<sup>91</sup> Lt. Gen. W.B. Smith [on behalf of Gen. Dwight D. Eisenhower, the Supreme Commander] to the Secretaries of the Combined Chief of Staff Committee [SHAEC], 'Gold bullion, currency and other property discovered by Third Army near Merkers', 20/Apr/1945, NA(UK)/FO-1046/266/17.

<sup>92</sup> Bradsher, 'Nazi Gold,' p. 15.

<sup>93</sup> *Ibid.*, p. 11. Richard D. McKinzie, *Oral History Interview with Bernard Bernstein*, 23/Jul/1975, Truman Library Online/Bernard Bernstein Papers, <http://www.trumanlibrary.org/oralhist/bernsten.htm#transcript> (last access: 7/Jan/2010), p. 116.



**FIGURE 6, A/B:** Part of the Reichsbank hoard discovered by General George Patton's 3<sup>rd</sup> U.S. Army on 8/Apr/1945 at the Kaiseroda Potassium mine, Merkers, Thuringia. On 12/Apr/1945, Generals Dwight D. Eisenhower, Omar N. Bradley and Patton examine the treasure including the cache of SS-looted valuables. (NARA/RG-111/SC-205409;SC-204515).

The answer that Eisenhower quickly reached was to move the hoard westward as soon as possible. Col. Bernard D. Bernstein, the man chosen by Eisenhower to take charge of the move, had astounded Patton by telling him that the current location of the treasure sat in what – at the Big Three conference at Yalta – had been designated as the Russian zone of occupation and that it needed to be moved further west before the Russians arrived.<sup>94</sup> The incentive to move quickly was increased by what was soon viewed as a grave mistake to allow reporters to publish reports of the discovery. Not only would the major newspapers cover the story: the familiar voice of Ed Herlihy would dramatise the find for his American audience of Universal Newsreels: 'Murder will out', he would conclude in his report, 'even from the depths of the earth'.<sup>95</sup>

Although one British official perceived the gravity of the situation in allowing Germans to learn of the mine's discovery (according to his report, the responsible censor was sacked), it seems more likely that the greatest danger apparent to American commanders was making the Russians aware of the move of such treasure away from the prospective Russian zone.<sup>96</sup> The sooner it was moved, the less trouble there might be. On the 15<sup>th</sup> April, therefore, the entire contents of the mine were

<sup>94</sup> McKinzie, *Bernstein Oral History*, pp.117, 122-3. Merkers stood approximately five miles east of the Yalta-designated American-Russian zonal boundary, an area in which American troops made speedy progress and would soon relinquish to Russian troops. (See NA(UK)/FO-1046/266/13A).

<sup>95</sup> Ed Herlihy, 'German Loot Discovered', Universal Newsreel, 17/May/1945.

<sup>96</sup> G. M. Jennings to Colin Crowe, UK Treasury Delegation, Washington, 3/May/1946, NA(UK)/FO-1046/266/14A. The following story (in this letter) that had made its way to the British appears to have been embellished in order to provide politically acceptable justification for quickly moving the treasure away from what would become the Russian zone of occupation: 'The censor (afterward sacked) who let the story of the discovery of the gold get past did the Third Army a bad turn; as soon as the Germans knew the discovery had been made they counter attacked, in an effort to recover their valuables, and caused a considerable number of casualties among the Americans. Patton thereupon insisted on the gold being moved immediately to Frankfurt.'

transported by American troops with 32 ten-ton trucks under heavy guard (including low-flying P-51 Mustang fighter-planes) to the Reichsbank in Frankfurt, soon to become the Foreign Exchange Depository (FED) of U.S. military government.<sup>97</sup> It was not until much later – on 21<sup>st</sup> August 1945 – that Lt. Robert M. Braggins and Lloyd Louis Goldstein, at the direction of the OCC, reached the Frankfurt Reichsbank in order to film what had previously constituted the contents of SS shipments to the Berlin branch of the Reichsbank during the war.<sup>98</sup>

Funk had alluded to this (correct) version of events: that the treasure had been moved at his instigation to 'the potassium mines' and then, by Americans, into Frankfurt before being filmed. But although he had also suggested that the Prosecution should confirm this story, Dodd refrained from doing so explicitly in the courtroom.<sup>99</sup> There are a number of ways in which to interpret Dodd's incorrect suggestions (that once American troops entered Frankfurt, they had discovered and then filmed SS items in the vaults of the city's Reichsbank) and his subsequent disinclination to clarify explicitly the circumstances under which the film had been made. One is to suggest that he, along with the filmmakers, was intentionally involved in a deception aimed at unfairly convicting Funk. This was the line taken subsequently by Hans Fritzsche, one of the three defendants that the Tribunal would acquit (he later served as a Defence witness in the 'subsequent' Nuremberg trials of Oswald Pohl and Emil Puhl).<sup>100</sup> In 1953, Fritzsche's memoirs of the trial were published and included a short chapter entitled 'Funk and the bogus film'.<sup>101</sup> Here Fritzsche portrayed the banker as an unfortunate, 'impressionable' and 'unpolitical' pawn whom the Nazis had misled (as though he had not been a Nazi himself) and whom, subsequently, the prosecutors at Nuremberg had damned unjustly.<sup>102</sup> In addition to a stream of inaccuracies relating to facts (as well as interpretation) Fritzsche ended his chapter without having mentioned the origins of the treasure and implying that the circumstances surrounding the making of the film were very simple: it was an American hoax.<sup>103</sup>

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<sup>97</sup> Slany, *U.S. and Allied Efforts to Recover and Restore Gold*, p. xxxi.

<sup>98</sup> Both men were members of the Field Photographic Branch of the OSS which was assisting the OCC.

<sup>99</sup> As we shall see, the circumstances surrounding the making of the film were clarified to an extent, but this was only done through the submission of written documentation which was not read in court.

<sup>100</sup> *NMT*, Vol. V, p. 1258 ; *NMT*, Vol. XIV, p. 1022. Fritzsche also appeared as a defence witness in cases 3 (*NMT*, Vol. III, p. 1213), and 6 (*NMT*, Vol. VIII, p. 1355).

<sup>101</sup> Hans Fritzsche, *The Sword in the Scales: As told to Hildegard Springer*, (trans. Diana Pyke and Heinrich Fraenkel) (London: Allan Wingate, 1953), pp. 219-224.

<sup>102</sup> *Ibid.*, p. 220.

<sup>103</sup> *Ibid.*, p. 224. Among the numerous inaccuracies Fritzsche made was the confusion of images of *Reichsbank Loot* with newsreel of the Merkers discovery (p. 221); he also stated (incorrectly) that the

After the publication of Fritzsche's book, Robert Jackson recalled that:

[Fritzsche] had been amused at everything that happened at the trial and frequently at the end of a day entertained [himself] by telling the other [defendants] what he would say if he was running Goebbels' propaganda bureau. He later wrote about the trials in the same spirit of propaganda.<sup>104</sup>

This was echoed by Rebecca West, who went a little further in denouncing Fritzsche's suggestion of an American hoax as 'a lie': although he had been justly acquitted because he had not participated in gravely criminal activity, Fritzsche was, however, 'so much of a Nazi that one of his chapters troubles us as if Goebbels was still about'.<sup>105</sup> Given Fritzsche's highly selective and inaccurate use of facts, this was a fair observation but, as we have seen, West was unaware of, or unwilling to admit, Dodd's repeated (and incorrect) insistence that the Allies had first discovered the 'loot' in the vaults of the Frankfurt Reichsbank before filming it. Although West was under the mistaken impression that the SS had originally delivered the treasure to Frankfurt and that American troops had simply returned it to its place of origin, she still made a convincing case that the idea of an American hoax was illogical.<sup>106</sup> But a particularly significant item of evidence remained unavailable to her: the film, *Reichsbank Loot*.<sup>107</sup>

Unlike the other American-made films used as evidence (*Nazi Concentration Camps* and *The Nazi Plan*), the film did not begin with the on-screen reading of affidavits attesting to the authenticity of subsequent images or details surrounding its making. However, it did provide some information with a close-up and wider shots of a clapper-board. Not only the names of the film-makers appeared on the board; the location and date was also clear to see: the Frankfurt Reichsbank, on 21<sup>st</sup> August, 1945 (see Figure 4-a, p. 170). If the American Prosecution's aim had been to present a 'bogus' film intentionally – in order to trick the judges into believing it had been made at the time of the initial Allied occupation of Frankfurt – the appearance of such a late date would have been particularly unhelpful. As it stood, the date on the clapperboard demonstrated that, at the very least, the filmmakers themselves were not involved in any hoax: its very inclusion contradicted Dodd's statements when the

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witness Emil Puhl had come to Nuremberg as a free man but was, after giving evidence in court, imprisoned by the Allies (p. 223-4). This implied – without evidence – that witness testimony unhelpful to the prosecution might be punished (leading to the further implication that helpful witness testimony might be rewarded). Fritzsche had probably confused Puhl with another witness, Albert Thoms, who had come to Nuremberg without being imprisoned.

<sup>104</sup> LoC/RHJP/259/4, p. 1620.

<sup>105</sup> West, *A Train of Powder*, p. 251.

<sup>106</sup> *Ibid.*, pp. 252-253.

<sup>107</sup> The only copy in the UK at the time West wrote sat in the library of the Foreign Office and was not available to the public or journalists for viewing. See note 59.

film was shown. This also suggests that Dodd was mistaken rather than engaged in deceiving the Tribunal.

What appears to be most likely is that Dodd was initially unaware of the relocation of the Merkers treasure to Frankfurt (or of its relevance to the items shown in the film) and unaware of the date on which the film had been made. If he had intended to deceive the judges or anyone else it seems highly probable that he would have taken more notice of the details written on the clapperboard.<sup>108</sup> It would then have made more sense to either edit the film (so that the clapperboard would not appear) or simply not to have used it at all (since, as has already been noted, the Prosecution did not view the film by itself to constitute enough evidence to convict Funk). Since Dodd's main reason for showing it was to confront Funk with images of gold dentures – in the very last scene – Dodd did not take notice of the evidence within the film itself of when it had been made. The other main purpose of the film was to provide 'illustrative' images that could be confirmed by witnesses to represent what were 'typical' of the contents of the SS deliveries (as we shall see). Thus the location and date of the film appeared unimportant to Dodd.

However, the matter of why Dodd did not acknowledge his mistake – after the relocation of the treasure from 'the potassium mines' to Frankfurt was mentioned by Funk in court – remains to be explained.<sup>109</sup> There are at least three good reasons for this: the matter of personal prestige; maintaining the appearance of as strong a case as possible against Funk; and the desire to avoid controversy with the Russians.

As Dodd wrote with evident pride in a letter to his wife on 8<sup>th</sup> May 1946, much praise had been given him by important members of the court for the job he had made of Funk's cross-examination:

I finished cross-examining Funk yesterday morning. I feel it was successful and I am pleased because the British and American judges complimented me. Sir Norman Birkett, the British alternate judge and a great trial lawyer in Britain, told me it was "one of the very best of the trial". He told the others the same. Justice Jackson was very kind and generous in his praise, and so was [Judge] Biddle. All in all everyone seemed to think it was very successful. I of course was glad of that. I am wondering if it was carried in the press at home. If so you know of it now.<sup>110</sup>

For every piece of praise laid on Dodd – by such major players in the trial – there came an added incentive to avoid any admission of error that might tarnish what was

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<sup>108</sup> Furthermore, if the use of the film had been 'bogus' then it seems highly unlikely that the Americans would have given copies of it to the British. Even more significantly, the film was also made available to Svilov, the Russian director who made use of some scenes in his 1947 production of *The Nuremberg Trials* (see note 59.)

<sup>109</sup> See Funk's testimony at p. 27.

<sup>110</sup> Thomas J. Dodd to Grace Dodd, 8/May/1946, Christopher J. Dodd & Lary Bloom, *Letters from Nuremberg: My Father's Narrative of a quest for Justice* (New York: Crown, 2007), p. 300.

perceived (at least by Judge Birkett) as one of the best Prosecution performances of the trial.<sup>111</sup> Furthermore, the very process of expressing pride in his work to his wife would have served as another incentive towards preserving the appearance of a job well done. His letter also demonstrated his concern with the wider, public, reception of his case against Funk. All this would be jeopardised by what seemed to be an unnecessary admission of what appeared to be a relatively insignificant mistake.

Next, an admission that he had been mistaken *should* not have impacted the strength of the case against Funk: the issue of whether or not the items in the film had been moved into Frankfurt by American troops should hardly have mattered since Funk himself had implied that they had originally been delivered to the very building in Berlin at which he had worked as Reichsbank president<sup>112</sup>. Yet as Fritzsche's book later demonstrated, any small matter of detail provided by the Prosecution that could be questioned in any way would serve to complicate the Prosecution's case and help Funk's defence. Funk had, in fact, used the circumstances of the treasure's move to attempt to obfuscate the matter of what could be observed in the film:

I cannot tell from this film which of these items were deliveries by the SS and which were genuine deposits. [...]. It is [...] quite possible that certain functionaries of concentration camps made genuine deposits in the Reichsbank which contained such articles, to safeguard them for future use. [...] However, [...] I had no knowledge whatsoever of these things and of the fact that jewellery, diamonds, pearls, and other objects were delivered from concentration camps to the Reichsbank to *such an extent*. [...]<sup>113</sup>

Here Funk was making use of the fact that the items in the film were never demonstrated beyond doubt by the Prosecution to be the *actual* items delivered by the SS to Berlin. Funk's knowledge of the American move of the treasure allowed him a significant measure of wishful thinking in his assertion that such items might constitute 'genuine' deposits from 'functionaries' of concentration camps. Faced with Dodd's repeated questioning as to whether it was normal for anyone to deposit their gold dentures in a bank, Funk's suggestion constituted a rather hopeless and desperate attempt to confuse 'genuine' deposits with items taken from murdered victims of concentration camps. His speech, cited above, only confirmed his acknowledgement of the fact of the original SS deliveries to Berlin, and his last four words, 'to such an extent', implied at least some basic knowledge of the shipments during the time that they had been delivered to the Berlin Reichsbank. However, if

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<sup>111</sup> Before Dodd's cross-examination of Funk had even begun, Justice Jackson had praised him highly in a letter to President Harry Truman. Whether or not Jackson informed Dodd of the commendation I cannot say. RHJ to The President, 24/Apr/1946, Truman Library Online/Nuremberg.

<sup>112</sup> IMT, Vol. XIII, 7/May/1946, pp. 203-4.

<sup>113</sup> Ibid. (Emphasis added).

further discussion over the making of the film had taken place in court, there was at least the possibility that, once the judges were publicly made aware of the circumstances of its making (i.e. that it was made only after the treasure was moved in by American troops), they might have decided to dismiss the film as inadmissible evidence on the basis of its being irrelevant. It therefore made little sense for the Prosecution to highlight the complex circumstances under which it was made. From the perspective of the Prosecution, a good case had already been made against Funk. There seemed little point in jeopardising a case which had already been praised by the most important individuals that the Prosecution needed to persuade: the judges on the bench.

Finally, there is the political matter of the treasure that, throughout the entire trial, cast a deafening silence. The fact that the American army had quickly removed such a vast horde of wealth away from the designated Russian zone was a potentially contentious issue between the Russians and Americans, within and beyond Nuremberg. This story had the makings of a Soviet ideological critique of western 'capitalist' motivation in the fight against 'fascism': put simply, had not the Americans taken the booty of war away from what was rightfully due to the Russians? Not once was the word 'Merkers' – the original location of the treasure discovered by American troops – uttered in court during the IMT trial.<sup>114</sup> Even within the private correspondence of the American Prosecution, no discussion of the matter appears to have been recorded. From the sources available, it seems impossible to determine exactly when Dodd learned of the move of the treasure from Merkers to Frankfurt (or of the relevance of the move to what could be seen in the film). What is apparent, however, is that the decision to use the film and to gain affidavits attesting to its authenticity was a hastily arranged matter in May 1946 (the two affidavits relating to the film were signed and dated in May 1946 – rather than December 1945, when the prosecutors had first considered using it).<sup>115</sup> Thus it seems most likely that Dodd only learned of the relevance of Merkers on the day the film had been shown in court (when Funk then suggested that the items in the film had come from 'the potassium mines', rather than being discovered by American troops in the vaults of the Frankfurt Reichsbank). Whatever the timing of Dodd's knowledge of the move from Merkers, once aware of such a contentious issue, the Prosecution resolved on keeping the issue private: before the affidavits were presented to the court, Dodd received a memorandum

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<sup>114</sup> The only reference to the location of the mine – that could identify it as standing in the prospective Russian zone – was Funk's unprompted mention of 'Thuringia' on two occasions. (IMT, Vol. XIII, pp. 137, 204). However, even Funk did not refer to the name of the mine or the village itself.

<sup>115</sup> PS-3956, PS-3976, IMT, Vol. XXXIII, pp. 591-594.



implying that he should not dwell on the issues surrounding the origins of the treasure. The suggested text to be read in court was as follows:

A motion picture film was shown during the cross-examination of the defendant Funk. The film showed a portion of the loot turned over to the Reichsbank by the SS, *as discovered after the defeat of Germany*. [...] I stated that I would submit affidavits as to the source of the film. I would now like to offer these affidavits, and ask that they be admitted into evidence *without their being read*. The first affidavit is by Captain Harris, who arranged to have the pictures taken, and the second is by Mr. [Goldstein], one of the photographers who made the picture.<sup>116</sup>

With this proposed statement, Dodd was supposed to brush over both the location of the treasure's original discovery by American troops (in the designated Russian zone) as well as the date the film had been made (much later than when American troops entered Frankfurt) by vaguely stating 'as discovered after the defeat of Germany'. Most significantly, with this unusual proposal that Dodd request the documents not be read in court, the date of the film's making would only become publicly available *after* the trial.<sup>117</sup> Even then, the date, together with more details on the making of the film, would be buried in volume XXXIII within a total of 18 thick volumes of thousands of documents in the official publication of the Tribunal (published three years after the trial, in 1949).<sup>118</sup> When Dodd came to offer the documents to the Tribunal, he did not stick to the script he had been given and did not even allude in any way to the time or place of the treasure's discovery or filming. The judges did not request that the documents be read – only the document *numbers* were read in court.<sup>119</sup> Thus a major problem with this film – that it constituted part of the story of the American endeavour to remove the vast bulk of the Third Reich's wealth away from Russian troops – was successfully circumvented by the American Prosecution at Nuremberg.

What made most sense from an American perspective – in prosecuting Funk and avoiding potential public or diplomatic controversy – was to focus on the circumstances of the original SS deliveries to the Berlin branch of the Reichsbank during the war (and, as we can say now, during the Holocaust). Because both Walther Funk and Emil Puhl continued to deny that they had had specific knowledge

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<sup>116</sup> [Anonymous, possibly Bernard D. Meltzer] to Mr. Thomas J. Dodd, 'Notes for presentation of Funk Documents to the Tribunal', 28/May/1946, TJDC/TJDP/300/7621, p. 3 (Emphasis added). Lloyd Louis Goldstein had changed his surname to 'Garnell' since making the film (see PS-3976, IMT, Vol. XXXIII, p. 592).

<sup>117</sup> The date was, as already stated, written on the clapperboard shown in the film itself so would have been visible to a particularly perceptive observer in court. However, since the prosecution chose to focus on the 'looted' items – and, in particular, the dental gold – it seems unlikely that the date on the clapperboard (or the other information written on it) was deemed by anyone to be significant at the time the film was shown.

<sup>118</sup> See footnote 115. The 18 volumes were published in addition to transcripts, indexes and guides, making a total of 42 volumes (see *IMT* in bibliography).

<sup>119</sup> IMT, Vol. XIV, 28/May/1946, p. 602.

of the contents of the Melmer deliveries (particularly the existence of dental gold), it took the use of a new Prosecution witnesses to demonstrate that somebody in the bank knew exactly what was being delivered. During Puhl's cross-examination by Dodd during the morning of 15<sup>th</sup> May, the former had been confronted with a statement made by Albert Thoms, previously a middle-ranking employee at the Berlin Reichsbank who had been instructed by Puhl to receive and process the deliveries.<sup>120</sup> Dodd read and summarized passages from this statement in court, including the assertion that Puhl had told Thoms that the deliveries would include 'unusual property'.<sup>121</sup> Also contained in this statement was the assertion that Puhl later contacted Thoms for an update on the progress of the deliveries.<sup>122</sup> Perhaps most significantly, Thoms' statement provided comments on the origins of the items:

One of the first hints of the sources of these items occurred when it was noticed that a packet of bills was stamped with a rubber stamp, "Lublin". This occurred some time early in 1943. Another hint came when some items bore the stamp, 'Auschwitz.' We all knew that these places were the sites of concentration camps. It was the tenth delivery, in November 1942, that dental gold appeared. The quantity of the dental gold became unusually great.<sup>123</sup>

Thoms' statement also explained that a certain Bruno Melmer of the SS was the man who appeared, out of uniform, with each of the approximately 77 deliveries to the bank, beginning with the first on 26<sup>th</sup> August of 1942.<sup>124</sup> Having been shown the film outside the courtroom at midday, Thoms took the stand on the afternoon of 15<sup>th</sup> May at the request of Dr. Sauter, Funk's counsel.<sup>125</sup> He was, however, first questioned by Dodd, who referred to the film, but only as an *illustrative example* of the items contained within the 'Melmer' deliveries:

MR. DODD: After seeing that film, are you able to say whether or not that represents a fair representation of the appearance of some of the shipments that were received by the Reichsbank from the SS?

THOMS: I may say that this film and the pictures which I have seen in it were typical of the "Melmer" deliveries [...]<sup>126</sup>

Thoms was in a position to say much more than he did about what he had seen in the film. Most significantly, he could have stated that there was little doubt that the items in the film were not merely 'typical', but *actual* elements of the Melmer deliveries. It

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<sup>120</sup> Albert Thoms was head of the Precious metals department at the bank. On his capture, see: James Stewart Martin, *All honorable men* (Boston: Little, Brown & Company, 1950), p. 121.

<sup>121</sup> IMT, Vol. XIII, 15/May/1946, p. 580; PS-3951, IMT, Vol. XXXIII, p. 585.

<sup>122</sup> IMT, Vol. XIII, 15/May/1946, p. 581; PS-3951, IMT, Vol. XXXIII, p. 585.

<sup>123</sup> Ibid. (Both sources).

<sup>124</sup> IMT, Vol. XIII, 15/May/1946, pp. 580, 605. There were 78 deliveries in total according to the FED: Slany, *U.S. and Allied Efforts to Recover and Restore Gold*, p. 165.

<sup>125</sup> IMT, Vol. XIII, 15/May/1946, pp. 593-4.

<sup>126</sup> Ibid., p. 604.

had been Thoms himself who had been charged with inventorying all the deliveries as they came in to Berlin and was also in charge of moving what remained of them (i.e. those items that had not been processed) from Berlin to Merkers (later than the rest of the contents of the vaults of the Reichsbank in Berlin).<sup>127</sup> He therefore knew the distinctive form that the cache took: unlike anything else in the vaults he had dealt with, they were contained within tattered suitcases, boxes, chests, and other containers that could be seen in the film.<sup>128</sup> He had been captured attempting to escape from Merkers and brought back by American investigators to the mine in order to identify the 'Melmer' cache.<sup>129</sup> As Thoms had known, each container brought to the Berlin vaults had been labelled to identify it clearly as being part of the SS treasure (these labels could be seen in the film).<sup>130</sup> Furthermore, the Melmer items were kept separate from the rest of the treasure when moved into the Frankfurt Reichsbank by American troops and were kept under especially strict security conditions.<sup>131</sup> Thoms had been present when the treasure was moved into Frankfurt. The tag identifying each item as an SS delivery remained attached in the Frankfurt vaults. There had, therefore, been no chance of confusing SS-delivered items with those that constituted more regular items from the bank when the film was made.

Yet although Thoms was aware of all this, to prove it would have required evidence from somebody else who could demonstrate with some authority that the SS items had reached Frankfurt intact and had remained isolated from the rest of the Merkers treasure: that what could be seen in the film were indeed the actual by-products of 'the Final Solution'. The most appropriate of several Americans who would have been able to provide such evidence – in the form of either an affidavit or testimony in court – was Bernard D. Bernstein, the man who had been in charge of moving the treasure once it was in American custody. (In fact, Bernstein had sent reports about the Melmer cache to Justice Jackson, before the trial had begun.)<sup>132</sup> But, as we have seen, there were good reasons for Dodd and the Prosecution to

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<sup>127</sup> The SS items were not moved from Berlin until 18/Mar/1945. Bradsher, 'Nazi Gold,' p. 9.

<sup>128</sup> Most of the items were contained in such containers which signified that they had not been processed at the Berlin Reichsbank. The small amount of valuables that *had* been inventoried, however, were contained in sacks bearing the word 'Reichsbank' (IMT, Vol. XIII, 15/May/1946, p.616). The 'Melmer' cache moved to Merkers, and subsequently, to Frankfurt, constituted only a small portion of the approximately 78 original Melmer deliveries to the Berlin Reichsbank: the portion which had not been processed and converted into gold bullion or liquid assets by the bank. See Slany, *U.S. and Allied Efforts to Recover and Restore Gold*, pp. 160-163.

<sup>129</sup> Bradsher, 'Nazi Gold,' p. 10.

<sup>130</sup> McKinzie, *Bernstein oral history*, p. 132.

<sup>131</sup> *Ibid.* pp. 128-9.

<sup>132</sup> McKinzie, *Bernstein oral history*, p. 132. Furthermore, Bernstein had known Jackson from earlier days in the Roosevelt administration when he had worked in an office next door to Jackson's. It appears that the two men had had good relationship (see McKinzie, pp. 11, 32-5).

avoid providing more details of the events that preceded the making of *Reichsbank Loot*.

When Thoms was cross-examined by Dr. Sauter, he could not say whether Funk had any knowledge of the contents of the Melmer deliveries: Thoms never had any contact with the President of the bank. Besides, it was Puhl, according to Thoms, 'who had to decide the way this affair was to be dealt with; and he desired and ordered [it]'.<sup>133</sup> Sauter employed a useful tactic for Funk's defence: some of the questions were clearly aimed to make Thoms wary of incriminating himself. As with the *unintended* results of the Prosecution's cross-examination of Puhl, this resulted in qualifications and retractions of some of Thoms' previously submitted written testimony. The witness now asserted that at the time the deliveries began, he was unaware of their potentially criminal nature.<sup>134</sup> Even more troublesome for the Prosecution, he now attempted to suggest that, despite having noticed the words 'Lublin' and 'Auschwitz' in later deliveries, he did not know until after he was captured by the Allies that these were the sites of concentration camps.<sup>135</sup> Yet Dodd had a chance to contest this with some skill:

- MR. DODD: Now, I suppose you found lots of things among these shipments with names written on them. There must have been something that made you remember "Auschwitz," isn't that so?
- THOMS: Yes.
- MR. DODD: Well, what was it?
- THOMS: I must assume - I mean that I know from my recollection that there was some connection with a concentration camp, but I cannot say. I am of the opinion that [my realization of this connection] must have happened later. It is really...
- MR. DODD: Well, I don't care to press it. I just wanted to make perfectly clear to the Tribunal that you told us that you did remember "Auschwitz" and it had such a meaning for you that you remembered it as late as after the surrender of Germany. That is so, isn't it?
- THOMS: Yes.
- MR. DODD: I have no further questions.<sup>136</sup>

### 6.5. Funk's defence breaks down

Despite the efforts of the Defence, Thoms had provided enough useful testimony to compliment the Prosecution's written evidence of transactions between the SS and the bank (as well as the bank's internal correspondence concerning the processing

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<sup>133</sup> IMT, 15/May/1946, Vol. XIII, p. 606.

<sup>134</sup> Ibid., p. 608.

<sup>135</sup> Ibid.

<sup>136</sup> IMT, Vol. XIII, 15/May/1946, p. 615 (Emphasis added).

of the items).<sup>137</sup> Pohl had provided convincing evidence of Funk's awareness of these deliveries. The case against Funk was, therefore, strong enough to provoke the ex-president of the Reichsbank into devoting most of his final statement to the matter of the 'Melmer' deliveries.<sup>138</sup> By then, he had also to contend with an affidavit given by Oswald Pohl, the head of the WVHA, a man who was directly responsible to Himmler, and who had been in contact with both Pohl and Funk in regard to arranging the deliveries. Pohl had only been captured by the British on 27<sup>th</sup> May 1946 (after Funk's defence case had been completed) and his testimony read in court (by a Prosecution lawyer) in early August as part of the case against the SS as a criminal organisation.<sup>139</sup> The Defence had objected to the use of this affidavit on the grounds that Pohl was a 'millionfold murderer' who could not be trusted to tell the truth.<sup>140</sup> But the reply that came from the Prosecution seemed to be accepted by the Tribunal: '...even murderers sometimes tell the truth'.<sup>141</sup>

Pohl's affidavit was accepted as evidence and confirmed that Himmler had told him of his meeting with Funk before the deliveries began.<sup>142</sup> The courtroom discussions over Pohl's affidavit had even provoked Funk into admitting that *he, Funk, had asked Himmler to appoint someone* (Himmler chose Pohl) to discuss the arrangements with his bank's vice-president.<sup>143</sup> It also led to his admission that Funk had discussed the matter with his vice-president *after* (as well as before) the first SS delivery had been made.<sup>144</sup> Just as incriminating for Funk was Pohl's recollection of visiting the vaults with the vice-president and seeing some of the items that his SS department had delivered (items which Thoms had suggested were similar to those represented by the film).<sup>145</sup> Pohl remembered that after this tour, he had lunched with Funk, vice-president Pohl, and others, during which time it was mentioned that the valuables he had just seen in the vaults had been delivered by his department (the WVHA) and that they had originated from concentration camps.<sup>146</sup> The testimony that Pohl had provided did little to exonerate his own, more active, role in genocide – other than to imply

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<sup>137</sup> See notes 71 & 72.

<sup>138</sup> IMT, Vol. XXII, 31/Aug/1946, pp. 387-8.

<sup>139</sup> IMT, Vol. XX, 5/Aug/1946, pp. 315-7; PS-4045, IMT, Vol. XXXIV, pp. 110-13. The prosecutor was Major Frederick Elwyn-Jones who was later Attorney General of Great Britain, 1964-70.

<sup>140</sup> IMT, Vol. XXI, 12/Aug/1946, pp. 1-3.

<sup>141</sup> *Ibid.*, p. 3.

<sup>142</sup> As we have seen, Funk, despite having first denied it, admitted meeting Himmler before instructing Pohl to arrange for the deliveries (see p.174). IMT, Vol. XX, 5/Aug/1946, p. 316; PS-4045, IMT, Vol. XXXIV, p. 112.

<sup>143</sup> IMT, Vol. XXI, 16/Aug/1946, p. 238. Funk asserted that he had already testified to this, but this was not the case.

<sup>144</sup> IMT, Vol. XXI, 16/Aug/1946, p. 245.

<sup>145</sup> IMT, Vol. XX, 5/Aug/1946, p. 317.

<sup>146</sup> *Ibid.*

continually that everything he had done had been first instigated or ordered by Himmler.<sup>147</sup> When asked by Dodd what motive Pohl might have in falsely incriminating Funk, therefore, the ex-president of the bank could not provide a very convincing reason:

- FUNK: In my opinion the motive is purely psychological, because people who are in the terrible situation that Pohl is in, who are indicted for the murder of millions, usually attempt to incriminate others. We know that.
- MR. DODD: May I interrupt you ...You mean in the same position that you find yourself in?
- FUNK: No, I do not regard myself as a murderer of millions.<sup>148</sup>

Funk was *not* a murderer of millions but, during the period of his presidency, he had collaborated with such murderers – most significantly, Heinrich Himmler. Furthermore, he had facilitated further collaboration between his subordinates – employees at his bank – and the head of the WVHA, Oswald Pohl, a man who was responsible for the 'administration' of concentration camps and was indeed a 'murderer of millions'.<sup>149</sup>

#### 6.6. Injustice Conveyed

The Tribunal's judgement regarding Funk's part in this affair suggested that his guilt amounted to turning a blind eye to murder:

In 1942 Funk entered into an agreement with Himmler under which the Reichsbank was to receive certain gold and jewels and currency from the SS and instructed his subordinates, who were to work out the details, not to ask too many questions. As a result of this agreement the SS sent to the Reichsbank the personal belongings taken from the victims who had been exterminated in the concentration camps. The Reichsbank kept the coins and bank notes and sent the jewels, watches, and personal belongings to Berlin municipal pawn shops. The gold from the eyeglasses and gold teeth and fillings were stored in the Reichsbank vaults. Funk has protested that he did not know that the Reichsbank was receiving articles of this kind. The Tribunal is of the opinion that he either knew what was being received or was deliberately closing his eyes to what was being done.<sup>150</sup>

Although, elsewhere in the judgement, the Tribunal had derived an interpretation of the London Charter that curtailed the relevance of the doctrine of conspiracy (see Chapter 3), this particular section of the judgement – relating to Funk's culpability in

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<sup>147</sup> PS-4045, IMT, Vol. XXXIV, pp. 110-113.

<sup>148</sup> IMT, Vol. XXI, 16/Aug/1946, p. 242.

<sup>149</sup> In January 1947, Oswald Pohl would be indicted for trial before a subsequent Nuremberg tribunal (Case No. 4) and found guilty of War Crimes, Crimes Against Humanity, and membership of a criminal organization (the SS). He would be sentenced to death by hanging – a sentence, unlike many others, that was (eventually, after unsuccessful appeals) carried out on 7/Jun/1951. NMT, Vol. V, pp. 195, 1062, 1254-5. Hilberg, *Destruction*, p. 1161.

<sup>150</sup> IMT, Vol. XXII, p. 551.

regard to the 'Melmer' deliveries – appears to have reflected the American Prosecution's aims in proving just such crime: *conspiracy* to commit Crimes Against Humanity.<sup>151</sup> Funk had been 'of a station and rank which does not soil his own hands with blood'; he had been a defendant who had known 'how to use lesser folk as tools,' as Jackson had put it in his opening speech.<sup>152</sup> This part of the judgement sounded (inadvertently) so like an endorsement of the validity of the American Prosecution's emphasis on the doctrine of conspiracy because there was no evidence that Funk had actually seen the contents of the deliveries until they were shown on the screen in the courtroom. Whilst remaining president of the bank, it was quite possible – and probable – that Funk had, indeed, never set eyes on the personal effects of the murdered victims of concentration camps, such as alarm clocks, cigarette cases, or gold teeth and dentures. To keep them out of sight was, for Funk, to keep them from troubling his conscience.

Without mention of the film in the judgement, Funk was found guilty, among other things, of Crimes Against Humanity.<sup>153</sup> This was not, however, quite the end of the film's legal history. It appeared once again in a 'subsequent' Nuremberg trial, the 'Ministries' trial (case 11). Before an exclusively American tribunal, it was shown on 20<sup>th</sup> March 1948 as part of the Prosecution case against Reichsbank vice-President Emil Puhl.<sup>154</sup> For the American judges at this trial, as with those on the bench at the IMT, the film was of little 'probative' value. Yet, without a Soviet contingent of prosecutors and judges involved, there was less concern about controversy over the move of treasure from the Russian zone. Thus the word 'Merkers' had appeared very occasionally during this under-reported trial, and briefly in the judgement. There was, as a result, a more explicit explanation in this Tribunal's judgement regarding the limits of the film as a piece of evidence:

While we have little doubt that the articles shown in the film (*US-845 IMT, Pros. Ex. 1919*) were delivered by the [United States] Army to the Reich Bank branch in Frankfurt and were part of the loot which the Reich Bank had stored in the salt mines at Merkers, the chain of proof is not entirely complete. We shall therefore disregard the film, but the facts are proved independently by the evidence which we have heretofore outlined.<sup>155</sup>

Once again, a tribunal had deemed the film worthy as admissible evidence, but due

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<sup>151</sup> For the differences between the prosecution's indictment and the tribunal's interpretation of it – most particularly in regard to the doctrine of conspiracy – see Chapter 3.

<sup>152</sup> IMT, Vol. II, 21/Nov/1945, pp. 105.

<sup>153</sup> Indicted on all four counts, Funk was found guilty on counts 2, 3, and 4 – as they were interpreted by the tribunal (see Chapter 3).

<sup>154</sup> IWM/FO-646/Case XI/Vol. 210, p. 3,758. This case is also referred to as the 'Wilhelmstrasse' case, from the street in Berlin at which several departments of government were located.

<sup>155</sup> NMT, Vol. XIV, p. 617.

to a certain reticence on the part of prosecutors in divulging the full story of the American move of treasure, viewed it as inadequate as proof without other – written and oral – evidence.

More than reliance on documents and witness testimony, however, the screening of *Reichsbank Loot* had generated sufficient drama and a suitably salient sense of injustice for news reporters who might otherwise have omitted mention of the case of Funk's collaboration with the SS. As one employee of the IMT General Secretariat put it, 'all the talk at the Palace of Justice was of the gold teeth of concentration camp victims stored in the vaults of the Reichsbank while [Funk] was president.'<sup>156</sup> Such headlines as 'Tribunal to see Film of Hoard' or 'Funk shaken by Gold Teeth Film' did something to inform readers of the case.<sup>157</sup> It had been, therefore, the showing of the film that had brought greater significance as well as public attention to the case of Funk's collaboration with the SS. As with the other films designed to illustrate a systematic programme of atrocity, the process of showing *Reichsbank Loot* constituted more than the submission of evidence within a framework of legal procedure: confronting Funk with his conscience – and shaping this confrontation into a public event – was an act of justice in the mode of drama.

Whilst providing little probative value upon which either of the tribunals could rely, to have presented such items in visual form was to have evoked the moral implications of collaboration with the SS – something which Funk (and Puhl) had, until the film was shown, managed to avoid. Projecting the film produced more drama than documents or even witnesses could have achieved by themselves. It had been the film that had left Funk 'confused' and 'deeply shocked'.<sup>158</sup> The very process of projecting it had provided a tangible connection to the victims of concentration camps, something that had already been visualized with horror during the IMT trial in November 1945 (see Chapter 5). Displaying images of the personal effects and gold dentures of those murdered – mostly Jews from Auschwitz, although this was not clearly expressed by the Prosecution – and repeatedly mentioning the words 'concentration camps' after the film had been shown (evoking the unforgettable images in *Nazi Concentration Camps*), was enough to conjure a lasting image of what Jackson would refer to in his closing speech as 'probably the most ghoulish collateral in banking history'.<sup>159</sup> The spectacle of moral drama, therefore, was

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<sup>156</sup> Neave, *Nuremberg*, p. 125.

<sup>157</sup> 'Tribunal to see film of hoard', *Palestine Post*, 7/May/1946; Walter Cronkite, 'Funk Shaken by Gold Teeth Film', *United Press/Palestine Post*, (Jerusalem), 8/May/1946.

<sup>158</sup> IMT, Vol. XIII, 7/May/1946, p. 203.

<sup>159</sup> IMT, Vol. XIX, 26/Jul/1946, p. 416.



achieved using film despite the absence of gruesome imagery. The accusatory nature of showing a film to a defendant in the courtroom added drama to a case that was based upon more 'probative' documentary evidence and witness-testimony. To see the film itself was to visualize a case of injustice. To see it being showed to the defendant was to see some justice being done. We can conclude, therefore, that the American Prosecution's case at the Nuremberg IMT succeeded as moral drama most especially due to the way in which it utilized the medium of film.

## CHAPTER 7

# CONCLUSION

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Whilst negotiating plans in the summer of 1945 for a trial of 'the Major War Criminals' that would take place as soon as possible, British representatives appeared relatively content to have the Nazi leaders condemned for the violation of treaties. The Soviets were primarily interested in *punishment* so that the enemies of Soviet communism would see the price of opposition. The French hoped for justice, not by demonstrating the immorality of Nazi 'aggression', but simply by proving to a court 'that the Nazis were bandits'.<sup>1</sup> The Americans were, in contrast to all the other negotiators, particularly interested in planning a grand showcase of American justice that would revisit two decades of European history and, in doing so, impart political and moral lessons – for the present and the future.

Thirty-five years later, Michael Biddiss provided an insightful analysis of some of the legacies the trial had bequeathed to the time in which he wrote.<sup>2</sup> There were problems – such as the creation of a historical record derived from the overriding objective to condemn rather than to explain – but there were commendable achievements too. The trial, together with the historical narrative it produced, ensured that, at least within Western Germany, 'fewer fantasies' were likely to develop after the Second World War than had been the case after the First.<sup>3</sup> He concluded by claiming that what E. M. Forster had said of democracy was worth saying of the trial as well: 'that it be given two cheers [, ...] probably no more than two cheers, but also very definitely no less'.<sup>4</sup> With this, Biddiss had, in fact, inadvertently alluded to a crucial connection between the trial and a particular concern of the American Prosecution. That team of well-educated and privileged Americans was – as we have seen most clearly through an examination of the film *That Justice Be Done* in chapter 2 – insistent about the 'democratic' nature of the trial when appealing for support from the American people. What these lawyers advocated was 'democratic justice' with all its virtues – in *dramatic* contrast to the horrific vices of 'Nazi justice'. Just as significantly, as chapter 2 also demonstrated, American designs on the laws of the London Charter were heavily influenced by what their American authors believed to be the interests of the American people.

This has significant implications for the contention that the Nuremberg IMT, *due to*

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<sup>1</sup> Jackson, (ed.), *Conference*, pp. 381-382.

<sup>2</sup> Biddiss, 'The Nuremberg Trial.'

<sup>3</sup> *Ibid.*, p. 613.

<sup>4</sup> *Ibid.*, pp. 613-614. (Emphasis in original).

*the fact of being a legal process*, distorted the historical record by obscuring the specific identity of the primary intended and actual victims of Nazi ideology and genocide. The argument is made most forcefully by Donald Bloxham who suggests that the historical narratives produced at Nuremberg were subject to the 'tyranny of a construct' – the legal doctrine of 'conspiracy' which was used most particularly in conjunction with the new crime of waging an 'aggressive' war.<sup>5</sup> There is evidence within the pages of this dissertation that clearly supports the idea that the specifically Jewish identity of victims was, indeed, obscured by the American Prosecution in its narration of Nazi criminality at Nuremberg – the case of the film, *Nazi Concentration Camps*, demonstrates this well in chapter 5. There is also much evidence to suggest that the American Prosecution's first priority of prosecuting the defendants for their part in a conspiracy to commit 'aggressive war' (considered more significant than War Crimes and Crimes Against Humanity) meant that the genocide of European Jewry was characterised as a mere by-product of Nazi war-making. As we have seen in chapter 3, Robert Jackson stated that atrocities committed within the borders of a foreign state were of no concern to outsiders unless that state was involved in planning illegal wars.

Yet to imply that the legal framework of Nuremberg was, of itself, primarily responsible for a distortion of historical interpretation that lasted for decades, is to downplay the significance of the political context surrounding the creation and application of the laws of the London Charter. From an American perspective, the reality of war had begun with the humiliation of Pearl Harbour and, twenty years after the First World War, had embroiled, once again, American soldiers in bloody European affairs. This had led to the murder of American soldiers by the SS at Malmedy. From this American perspective, such injustices experienced *in war* would not have happened without the 'crime' of *making war* itself. If any law had the potential to deter aggressors from embroiling peaceful Americans in further wars, then, believed Robert Jackson, it was the crime of aggressive war that was most likely to succeed. Until the Tribunal delivered its Judgement, it had seemed to him, furthermore, that the use of the doctrine of conspiracy would only help in addressing the scale of Nazi ambition. A conspiracy to commit aggressive war, therefore, appeared to be the best combination of legal invention and the use of American domestic legal tradition that would address the sense of injustice experienced by millions of Americans. The most dramatic expression of this American sense of injustice appeared in *That Justice Be Done*, a film that also aimed to justify – to the American

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<sup>5</sup> Bloxham, *Genocide on Trial*, pp. 69-75.

people – a legal response. The effort and expense invested in making this film constitutes evidence in itself of the importance that Jackson and others held in addressing the American public's concerns.

Since American influence in creating the laws of the London Charter was driven by a concern with the interests of the American public, it was those interests – as perceived by American representatives – that a) prioritised American victims as most worthy of justice and b) prioritised the classification of war-making as the supreme crime. The adoption of 'Conspiracy' and 'Crimes Against Peace' was *the result* of these American concerns – and the efforts of democratic elites to address them. Such interests, rather than any laws, were themselves *the sources* of historical distortion – driven, as they were, by a perspective that downplayed the significance of genocide. A critical perspective on the practice of law must counter the legalist's belief in law's autonomy with the question 'who's law?'<sup>6</sup> Although Gary Bass convincingly dismisses the old complaint of 'Victors' Justice' as irrelevant, one major problem with the laws applied at the Nuremberg IMT is that, in the case of American involvement, the prosecutors were also the legislators.<sup>7</sup> In both respects, the Americans took the leading roles; thus, the IMT was not as 'international' as it is sometimes remembered.<sup>8</sup> It was not, therefore, the fact of a legal process, *per se*, that resulted in a distorted historical interpretation of Nazism; rather, it was the result of too much opportunity for American Prosecutors to advance their particular interests. The same criticism has been made of Israelis in regard to the trial of Adolf Eichmann.<sup>9</sup> But, despite *its* legal imperfections, the Eichmann trial demonstrated that the primary victims of Nazi-perpetrated genocide could be written into history within a legal setting.

The other purported consequence of Bloxham's 'tyranny' of conspiracy is the historiographical legacy of intentionalism enforced by the Nuremberg IMT.<sup>10</sup> This has reinforced the view that Nuremberg was 'the *birthplace* of intentionalism'.<sup>11</sup> It is true that the doctrine of conspiracy, as well as the very process of holding Nazi leaders to account, did *reinforce* an intentionalist interpretation of Nazi responsibility. Yet, once again, there is a danger of confusing the source of the problem with its effects. As we

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<sup>6</sup> By 'autonomy' I mean what Judith Shklar referred to when observing legalists' belief that 'the rules are "there"' – i.e. simply "there" to be discovered rather than – in reality – invented. Shklar, *Legalism*, p. 10.

<sup>7</sup> 'The question', states Bass, 'is not whether we are looking at victors' justice. Probably. But *which* victor? And what justice?'. Bass, *Stay the Hand of Vengeance*, p. 16.

<sup>8</sup> Jeremy Rabkin, 'Nuremberg Misremembered,' *SAIS Review*, Vol. 19, No. 2 (1999), pp. 86-88.

<sup>9</sup> Arendt, *Eichmann*, p. 259.

<sup>10</sup> Bloxham, *Genocide on Trial*, pp. 204-208.

<sup>11</sup> Erich Haberer, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes,' *Holocaust and Genocide Studies*, Vol. 19, No. 3 (2005), p. 494. (Emphasis Added).

have seen in chapter 2, war-time research and analysis by the OSS – the organisation that became an early influence in Washington on the topic of prosecuting Nazi war criminals – suggested, as early as June 1943, the idea of prosecuting individuals for plotting 'world domination' and for the 'launching of illegal wars' and 'aggression'. Such prescriptions were based upon a considerable amount of historical work authored by individuals considered to be the most talented and authoritative historians of the Third Reich.<sup>12</sup> The histories they wrote, being products of their time, were mostly concerned – as most history had been since the days of Ranke – with the leaders and structures of government rather than the responsibility or behaviour of 'ordinary' people. Not much significance could be placed in the 'little man' (or woman) given the context of a German historiography in Washington that was already weighed down with Totalitarianism, an interpretive stance that precluded much consideration of low-level agency in anything – including participation in genocide.<sup>13</sup> In short, 'intentionalism' preceded Nuremberg; law merely followed the interpretive trends of historical research. As a result, the implication that a legal process is inherently incompatible with historical pedagogy remains unproven.

Many historians have utilised the documentation produced as evidence at the IMT, but it is Nuremberg's legal achievements that are most widely considered to have provided a valuable institutional legacy. Since the end of the Cold War, Nuremberg has served as a guide in identifying successes to be imitated and pitfalls to be avoided. As one jurist summarizing the spirit of the laws in the first decade of the 21<sup>st</sup> century has stated, 'History has proven kind to Nuremberg, in so far as it remembers the trials that were held there as a watershed. Over time, these trials have in fact become lionised – mostly because of the events of the past decade'.<sup>14</sup> The international criminal courts that have been in operation over the last decade were built upon some of the same foundations as Nuremberg. They inherit some of the same political imperfections but, apart from a few notable exceptions (including the USA), the laws of the ICC have garnered a much wider, and thus more legitimate, international consensus than was achieved for the Nuremberg IMT (where one nation took a leading role, only three others were directly involved, and approximately a score could only opt to register their approval). The ICC is also more devoted to

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<sup>12</sup> Katz, *Foreign Intelligence*, pp. 62-96.

<sup>13</sup> *Ibid.*, p. 67.

<sup>14</sup> Mark Drumbl, 'International Criminal Law: Taking Stock of a Busy Decade,' *Melbourne Journal of International Law*, Vol. 10, No. 1 (2009), p. 38.

foregrounding the victims of genocide and crimes against humanity.<sup>15</sup>

Nevertheless, there are critics of the ICC. But most do not make a priority of complaining about the lack of drama in the courtroom (the most aggressive critics are usually motivated by the fear of finding themselves or their fellow-nationals held to account).<sup>16</sup> However, advocates of the ICC might take something valuable from Nuremberg by identifying an important element that has not been much replicated in international criminal courts today: the process of dramatizing procedure in striving to ensure that justice is seen to be done. There are, it appears, irresolvable problems. The glass screen that Nuremberg prosecutors decided to do without (as we saw in chapter 4) provides a relevant example of a concrete and metaphorical difference between the Nuremberg IMT and its more recent successors. The courtroom at Nuremberg was a theatre in which defendants, prosecutors, judges and observers sat in the same room together. Such circumstances enhanced the potential for staging the spectacle that I have dubbed 'the celluloid mousetrap' – staging a play within the play of Nuremberg in order to test for signs (or the absence) of remorse. But for an observer at the ICTY or ICC, the entire courtroom is hermetically sealed with bullet-proof glass. There are, of course, very good and obvious reasons for this. Nevertheless, the observer beyond the glass screen, who hears the proceedings only through headphones, cannot but feel one step removed from the heart of the matter – as though s/he is watching the entire affair on a very large screen. Furthermore, whilst it is commendable that proceedings of the ICC can be viewed on any computer with an internet connection, such a mode of viewing removes the observer one step further – to the point of creating a purely private experience.<sup>17</sup> The difference suggests a parallel to the comparison of watching a film in a cinema (i.e. communally) with watching it privately at home. This is a very relevant comparison since Nuremberg was not only recorded as a very public piece of theatre; news of its development was also experienced communally – in the cinema-theatres across the United States and elsewhere. In this sense, news in the 1940s was a communal experience that allowed its audience to engage in the spectacle of justice at Nuremberg.

Such circumstances (particularly those beyond the courtroom) cannot be reconstructed now. Yet, being confronted with genocide and crimes against

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<sup>15</sup> Susana SàCouto & Katherine Cleary, 'Victims' Participation in the Investigations of the International Criminal Court,' *Transnational Law and Contemporary Problems*, Vol. 17, No. 1 (2008).

<sup>16</sup> A good example comes in the person of John Bolton who stated: '[Our] approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective'. See: Shahram Dana, 'Law, Justice & Politics: A Reckoning of the International Criminal Court,' *John Marshall Law Review*, Vol. 43, No. 3 (2010), p. xxiii.

<sup>17</sup> The ICC website currently has video-streaming facilities available from the main page: <http://www.icc-cpi.int> (last access: 19/Sep/2011).

humanity, the existence of the International Criminal Court is evidence of a moral, as well as political, consensus. In the 1940s, there was considerable consensus among the Allies – before, during and after the Nuremberg IMT – that Nazism was not only a terrible form of politics, but that it was also terribly (morally) wrong. Crimes committed against humanity, proclaimed François de Menthon, the French Chief Prosecutor, were not only directed against specific innocent victims; they were crimes committed against *la condition humaine*.<sup>18</sup> The British Attorney General, Hartley Shawcross, echoed Jackson's moral assertions when, in his final speech, he declared: 'That these defendants participated in and are morally guilty of crimes so frightful that the imagination staggers and reels back at their very contemplation is not in doubt.'<sup>19</sup> Given this consensus amongst the Allies (or, at least, amongst the liberal ones) the American effort to impart moral lessons to Germans was bound to receive Allied support. But as we have seen, the moral spectacle that was staged by the American Prosecution was also designed with American reception in mind. Not only would Germans see that what their leaders had done was wrong; Americans would see, in dramatic fashion, that their own cause was just. Whilst using film proved to be the most effective method of producing moral drama from within the courtroom, the examination of the American Prosecution in this dissertation demonstrates that, whatever form of evidence might have been available, Americans were determined to do justice in the form of moral drama. Today, however, the moral drama of international criminal justice is not articulated or communicated to the same degree.

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<sup>18</sup> IMT, 16/Jan/1946, Vol. V, p. 406.

<sup>19</sup> IMT, 26/Jul/1946, Vol. XIX, p. 433.

**APPENDIX 1**

**MOTION-PICTURE FILMS**

**PRESENTED AS EVIDENCE AT THE NUREMBERG IMT TRIAL**

	Film Title	Date Screened	Docu- ment(s) Number	Exhibit Number	IMT documentation, Vol. & pages
1	<i>Nazi Concentration Camps</i>	29/Nov/1945	PS-2430	USA-79	XXX, pp. 357-471
2	<i>The Nazi Plan</i>	11/Dec/1945	PS-3054	USA-167	XXXI, pp. 524-636
3	<i>Original 8mm film of Atrocities against Jews</i>	13/Dec/1945	PS-3052	USA-280	XXXI, pp. 520-524
4	<i>Hidden Forces</i>	05/Feb/1946	RF-1152	RF-1152	-
5	<i>The Atrocities by the German Fascist Invaders in the USSR</i>	19/Feb/1946	USSR-81	USSR-81	-
6	<i>Destruction of Art and Museums of National Culture perpetrated by the Germans on the territory of the USSR</i>	21/Feb/1946	USSR-98	USSR-98	-
7	<i>On the Destruction of Lidice</i>	22/Feb/1946	USSR-370	USSR-370	-
8	<i>On the Destruction perpetrated by the Germans on the territories of the Soviet Union</i>	22/Feb/1946	USSR-401	USSR-401	-
9	<i>German newsreel of Hitler's arrival from France</i>	03/May/1946	USA-835	USA-835	XXXIX, p. 236
10	<i>Reichsbank Loot</i>	07/May/1946	USA-845	USA-845	XXXIX, p. 240

This table lists all the moving-picture films presented as evidence at the Nuremberg IMT trial in chronological order (of their courtroom screening). The quickest way to identify which nation presented any given film is to note the alpha-prefix to the Exhibit Number in the penultimate column (e.g. USA for America, RF for the Republic of France, etc). Of the ten films, the American Prosecution submitted five: items 1, 2, 3, 9 and 10. The French Prosecution submitted one (item 4); the Soviets presented four (items 5, 6, 7 and 8); the British presented none. Items 3, 4, 7 and 9 were ('captured') original German-made films (or extracts) that remained unedited by the Prosecution teams.<sup>1</sup> Item 2, *The Nazi Plan*, was a two-hour and forty-minute collection of original German newsreel edited by the American Prosecution. Each one of items 1, 5, 6, 8 and 10 was shot either mostly or entirely by Allied cameramen and edited by the Allied nation concerned with its screening in court. The last column in the table provides references to the documentation volumes (rather than the transcripts which can be easily found with the relevant dates shown above) of the official publication of the Tribunal. Only the American Prosecution ensured that documentation relating to each of their film exhibits would appear in the official publication of the IMT.

<sup>1</sup> The American prosecution showed films 3 & 9 twice in succession in the courtroom due to the difficulty in identification of scenes and/or individuals.



## APPENDIX 2

ARTICLE 6 OF THE LONDON CHARTER, 8<sup>TH</sup> AUGUST, 1945

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II. JURISDICTION AND GENERAL PRINCIPLES<sup>1</sup>

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

**[ i ]**<sup>2</sup> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) *CRIMES AGAINST PEACE*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) *WAR CRIMES*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, 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;
- (c) *CRIMES AGAINST HUMANITY*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war,<sup>3</sup> 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.

**[ x ]**<sup>2</sup> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

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<sup>1</sup> IMT, Vol. I, p. 11.

<sup>2</sup> I have labelled in brackets paragraphs *i* and *x* for the purposes of discussion in Chapter 3.

<sup>3</sup> After the discovery of inconsistencies between various translations of the Charter, a comma was substituted in place of a semi-colon after the word 'war' through the Protocol of 6/Oct/1945. This correction was evident in the official publication of the Tribunal: International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg: 14 November 1945 - 1 October 1946*, 42 Vols. (Nuremberg: Secretariat of the Tribunal, 1947-9). This correction was not made, however, in the American prosecution's separate publication: Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, 11 Vols. (Washington, D.C.: U.S. Depts. of State & War, 1946-8). The erroneous semi-colon was also reproduced subsequently in an article authored by one of the judges: Justice Birkett, 'International Legal Theories Evolved at Nuremberg,' *International Affairs*, Vol. 23, No. 3 (1947). For the legal significance of this punctuation, see: Egon Schwelb, 'Crimes Against Humanity,' *British Year Book of International Law*, Vol. 23 (1946).

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