

THE TRIAL OF THE CENTURY--AND OF ALL TIME, PART ONE

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In a large red brick schoolhouse (the Ecole Professionnelle et Technique des Garçons, which I visited in 1971) in Reims, France, Germany surrendered unconditionally to the Allies in the early morning hours of Monday, May 7, 1945. CBS correspondent Charles Collingwood was there for the ceremony. Shortly afterward he gave an eyewitness account of the surrender in a live radio broadcast which ended: "The most terrible war in human history had finally come to an end. The mad dog of Europe was put out of the way, the strange, insane monstrosity that was Nazi Germany had been beaten into submission. To millions of people this was the end of suffering. It was perhaps the best news the world had ever had--the surrender of Reims had been signed."

The defeat of Nazi Germany brought to the forefront a problem the Allies had been grappling with for years--what should be done with the Nazi leaders who had not been killed, committed suicide, or escaped into hiding? The Allies agreed that the top Nazi leadership could not be allowed their liberty. But beyond that the Allies were in sharp disagreement. Some wanted to summarily execute the Nazi leadership without further ado. Others wanted to place the Nazi leaders on trial and punish them only if convicted.

On August 8, 1945 the four principal Allies--the United States, the U. S. S. R., France, and England--signed the London Charter, an international agreement setting up the International Military Tribunal for the trial of the major war criminals of the European Axis countries. Pressure from the United States, which strongly opposed summary executions of the Nazis, was the principal reason the Allies, after lively discussions, had decided to put the Nazi leaders on trial, rather than simply shoot them on the spot. The matter was of such grave importance to the United States that as early as May 2, 1945, five days before Germany's capitulation, President Truman appointed U. S. Supreme Court Justice Robert H. Jackson as chief prosecutor of major Axis war criminals, whereupon Jackson took a leave of absence from the Supreme Court.

After the London Charter had been signed, the Allies decided to hold the trial in the German city of Nuremberg, partly because its Palace of Justice was one of the few courthouses still standing in bombed-out Germany, and partly because Nuremberg had been the site of annual Nazi party mass rallies and celebrations, making it a fitting place in Germany to put the leading Nazis on

trial for their enormous crimes. (Because the trial was for the benefit of the German people as much as for the Allies themselves, and also because of logistics, the trial had to be in Germany.)

The trial of the top Nazis that took place in Nuremberg between November 1945 and October 1946 is generally regarded by legal scholars as the Trial of the Century--the most important criminal proceeding of the 20th century. But the Nuremberg Trial was even more. It was, in the words of one of the presiding judges, not only a "trial unique in the history of jurisprudence," but also "the greatest trial in history." "This trial," Robert Jackson, the chief American prosecutor, observed, "has a scope that is utterly beyond anything that has ever been attempted that I know of in judicial history." As Robert E. Conot says in *Justice at Nuremberg* (1983): "The panorama was epic, the issues profound, the cast of characters unparalleled. For the first time, the leaders of a nation were charged with international crimes committed on a scale so vast as to strain belief."

There are in fact many reasons why the Nuremberg Trial towers over all other trials and ranks as the mega-giant among legal cases. Even putting to one side the atrocious criminality charged, the time span of the crimes, and the fact that the defendants had been high-ranking Nazi leaders utilizing governmental power to commit their crimes on a massive scale, nearly everything about the Nuremberg Trial must, in order to be comprehended, be couched in the superlative. The findings, judgments, verdicts, and sentences of the trial court take up a whopping 133 double-columned pages in the Federal Rules Decisions, where the Nuremberg Trial is officially reported. The English translation of the Nuremberg Trial's transcript, including documents introduced into evidence, is nearly 17,000 pages long, filling 42 thick published volumes. The International Military Tribunal sat continuously in Nuremberg in 403 open sessions for a trial that lasted 10 months and 10 days, hearing 216 days of testimony from 125 witnesses. Another 143 witnesses testified by submitting written answers to interrogatories. Over 4,000 documents and 38,000 affidavits were introduced into evidence.

The Nuremberg Trial was the most publicized state trial in modern history. Proceedings were public; attendance by interested persons and members of the press was encouraged; there were hundreds of seats in the large courtroom for spectators and reporters; the courtroom was packed; hundreds of reporters from all over the world attended the trial; and the events of the trial were headline news or given major coverage in newspapers and magazines all around the world for months. More books and scholarly articles have been written on the Nuremberg Trial than on any trial in history.

No trial in history involved as much manpower as the Nuremberg Trial. The number of lawyers and legal staff personnel was unprecedented. The United States prosecution team alone consisted of 640 persons, including 150 lawyers. Nor has any trial in history been accompanied by such elaborate security precautions. During the trial the Palace of Justice was surrounded by hundreds of troops and five tanks armed with 75 mm guns; and scores of military police constantly patrolled the premises of the courthouse. On September 30, 1946, the day the verdicts were returned, this formidable protective force was reinforced by 1,000 additional troops. These precautions were necessary. The trial was, after all, taking place in Germany itself, and the defendants were, as Joseph Persico says in his *Nuremberg: Infamy on Trial* (1994), "the worst criminals mankind had ever known."

The indictment agreed upon by the prosecutors for the four signatories to the London Charter alleged the defendants were guilty of stupendous, inconceivable crimes. The defendants, it was charged, had planned and started and savagely waged the most terrible and destructive war in human history; and while they were in power, it was further charged, the defendants, exercising Nazi state or party authority, had committed mass murders, genocide, religious and racial persecution, and other crimes of colossal depravity, for over ten years.

The indictment, 65 printed pages long, contained four counts. Counts 1 and 2 charged Crimes Against Peace--that is, (1) conspiring to wage aggressive war, and (2) waging a war of aggression. Count 3 charged War Crimes--killings of hostages, killings and ill-treatment of prisoners of war, killings and ill-treatment of civilian populations, use of slave labor, and other violations of the laws of warfare. Count 4 charged Crimes Against Humanity--the persecution of the Jews, mass murder, genocide, extermination camps, gas chambers, mass enslavement, deportations, and wide-scale looting and plundering of public and private property.

In charging crimes of unspeakable hideousness committed over a decade as a matter of national policy, the indictment recited the worst crimes in human history ever prosecuted in court. "In its concise, factual phrases it catalogues crimes so vast, so nightmarish," a contemporary newspaper wrote, "that it would seem at first impossible to convey the sense of them to the imagination."

There were 21 individual defendants present in court, all of whom had held high rank in the Nazi party or government. In addition, there were seven Nazi organizations named as defendants, including the Gestapo (the Nazi secret

police), the SS (which ran the concentration camps), and the SA (the Storm Troopers).

There can be no doubt about the guilt of those defendants who were convicted. The evidence against them produced at the trial was overwhelming and conclusive. By the time the trial ended, Joseph Persico writes, "[t]he four counts of the indictment had been proven indisputably and repeatedly, mostly through documentary evidence that the Germans had generated themselves."

What chief U. S. prosecutor Robert Jackson called "the Teutonic passion for thoroughness in putting things on paper" was, therefore, a disastrous mistake on the part of the Nazis because by keeping written records of their deeds the Nazis had guaranteed their own convictions. Among the hundreds of thousands of documentary pages examined by Allied prosecutors there was, for example, Robert E. Conot tells us, an official file on the killings of mental defectives and inmates of homes for the elderly which contained this ghastly notation: "*Hardly any mistakes have occurred so far. Thirty thousand attended to. Another hundred thousand to one hundred and twenty thousand waiting. Keep the circle of those in the know as small as possible. Today we will deal only with clear cases, one hundred percent executions. Later on this will be enlarged.*"

There were reports to Heinrich Himmler, the sinister head of the SS, which, Persico recounts, "described how an enterprising SS team had filled a van with inmates of an asylum, had run the exhaust pipe into the back of the van, and then had driven to a graveyard. By the time the vehicle reached its destination, the passengers were asphyxiated and ready for burial." Some of these reports on the gas wagons bore a spine-chilling postscript: "*Give my best to Frau Himmler and all the little Himmlers.*"

There were also the Todesbücher, the "death books," at Mauthausen, one of the concentration camps where the Nazis committed mass murder of prisoners. According to the death books, Persico notes, at Mauthausen "people, during a given hour, died in alphabetical order, one minute apart, all from heart attacks; the next hour all from strokes, the next hour from another imaginary cause."

Except for Hess and Frick, all the individual defendants took the stand and testified in their defense. None of the defendants claimed the massacres committed by the Nazis had not occurred. As Persico notes: "Not a single defendant at Nuremberg ever denied that the mass killing had taken place, only that he had lacked personal knowledge and responsibility."

The trial evidence belied the defendants' protestations of innocence.

For example, the evidence showed, in the words of journalist Kingsbury Smith, who attended the trial, that defendant Kaltenbrunner had been "Gestapo chief and director of the greatest mass murder Europe has seen since the Dark Ages."

The evidence showed that defendant Sauckel, to again quote Kingsbury Smith, "had been the slave-labor director and one of the worst of the blood-stained men of Nazidom ... [a] man who drove millions into bondage on a scale unknown since the pre-Christian era ..." (In his closing arguments, prosecutor Robert Jackson accurately summarized the evidence against Sauckel by calling him "the cruelest slaver since the Pharoahs.")

The evidence showed that defendant Goering had founded the infamous Gestapo as a ruthless and murderous secret police unrestrained by law or courts.

The evidence showed that when defendant Seyss-Inquart took over as Nazi governor of occupied Holland in 1940 there were 140,000 Dutch Jews; when the Allies liberated Holland five years later only 8,000 Dutch Jews remained alive. In a letter written to Adolf Hitler's secretary in February 1944, Seyss-Inquart proudly reported: *"We have cleaned up the Jewish question in the Netherlands ... The Jews have been eliminated from the body of the Dutch people ... About 8-9,000 Jews have avoided transport by submerging [in hiding]. By and by they are being seized and sent to the East; at the moment, the rate of seizures is 5-600 a week. The Jewish property has been confiscated and is undergoing liquidation."*

And the evidence showed that defendant Frick, a Nazi lawyer and Minister of the Interior under Hitler, wrote the laws the Nazis enacted that legalized terrifying repression and persecution in Hitler's Germany. Frick's speciality was, as Ann Tusa and John Tusa put it in *The Nuremberg Trial* (1990), "envisag[ing] the monstrous and cloak[ing] it in 'law.'"

Four of the convicted defendants had held high military rank: Field Marshal Keitel and Colonel General Jodl (both hanged), and two Grand Admirals, Doenitz and Raeder (both imprisoned). Their convictions proved significantly that even professional soldiers obeying orders can be convicted and punished for offenses such as War Crimes and Crimes Against Humanity. Keitel had signed and enforced orders for the murder of captured Allied fliers, paratroopers, and commandos, for the murder of Soviet commissars and Soviet prisoners of war, and for the shootings of hostages. He had even ordered some Soviet Army prisoners branded. Jodl too had approved orders for the murder of

captured Allied soldiers.

CHRONOLOGY OF THE TRIAL OF THE CENTURY

1945

- May 2 President Truman appoints U. S. Supreme Court Justice Robert H. Jackson as "Chief Counsel for the Prosecution of Nazi Criminality."
- Aug. 8 In London, the U.S., England, France, and the U.S.S.R. sign the London Charter, an international agreement establishing the International Military Tribunal (IMT) for the trial and punishment of the major war criminals of the European Axis countries.
- Oct. 18 First formal (private) session of the IMT, in Berlin. The eight judges (two from each of the four signatories to the London Charter) take their oaths. The indictment is officially filed.
- Oct. 19 The defendants are served with copies of the indictment in their prison cells in Nuremberg.
- Oct. 25 One of the defendants, Robert Ley, who had destroyed labor unions and crushed organized labor in Nazi Germany, commits suicide in his cell.
- Nov. 14 First public session of IMT, now sitting permanently in the Palace of Justice in Nuremberg.
- Nov. 20 The trial begins. The indictment is read in open court. (The IMT will sit continuously for 10 months and 10 days, until Oct. 1, 1946. There will be 216 days of testimony.)
- Nov. 21 The defendants plead not guilty. Chief U. S. prosecutor Robert Jackson begins the opening statements for the prosecution.

1946

- Jan. 3 Testimony of Otto Ohlendorf, head of Einsatzgruppe D, which massacred 90,000 Jews in Russia in 1941-42.
- Mar. 4 Prosecution completes presentation of its case.
- Mar. 8 Defense begins its case.
- Mar. 18 Prosecutor Robert Jackson begins a 2-day cross-examination of defendant Hermann Goering.
- Apr. 15 Testimony of Rudolf Franz Ferdinand Hoess, commandant of Auschwitz, called to the stand by defendant Kaltenbrunner.
- July 20 Robert Jackson begins his closing argument for the prosecution.
- Aug. 31 Presentation of evidence and arguments of lawyers are concluded. The defendants are allowed to make personal pleas to the IMT.
- Sept. 1 The IMT begins deliberations.

Sept. 30 The IMT delivers its verdicts today and on the following morning. Eighteen of the 21 individual defendants are found guilty; 3 are acquitted.

Oct. 1 In the afternoon the 18 convicted defendants are sentenced. Eleven of the top Nazis are sentenced to death; 3 are sentenced to life imprisonment; and the remaining 4 Nazis are sentenced to fixed terms of imprisonment ranging from 10 to 20 years.

Oct. 15 Two hours before his scheduled execution, Goering commits suicide in his cell.

Oct. 16 Between 1:16 a.m. and 2:57 a.m. the 10 remaining Nazi leaders sentenced to death by the IMT are hanged, one by one, in a gymnasium in their Nuremberg prison.

THE TRIAL OF THE CENTURY--AND OF ALL TIME, PART TWO

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There were two blockbuster witnesses at the Nuremberg Trial. When each of these two witnesses testified, the usual whispering and murmur of activity in the courtroom died away until you could hear a pin drop, spectators gasped silently, and all eyes focused in horrified fascination on the testifying witness. The first of these star witnesses testified on January 3, 1946. He was SS General Otto Ohlendorf, who had commanded *Einsatzgruppe D*, a special 500-man military formation of SS troops, Gestapo policemen, and Nazi intelligence agents which systematically massacred Jews in the Ukraine after the German invasion of the U. S. S. R. (Ohlendorf was hanged for his crimes in 1951.) Ohlendorf was, in the words of Robert E. Conot, "a gem of veracity." Unlike most Nazi mass killers, Ohlendorf freely admitted what he had done. Ohlendorf answered some of the questions asked him as follows:

"What was the ultimate objective of Group D?"

"The instructions were that in the Russian operational areas of the Einsatzgruppen the Jews, as well as the Soviet political commissars, were to be liquidated."

"And when you say 'liquidated,' do you mean killed?"

"Yes. I mean killed."

* * *

"Do you know how many persons were liquidated by *Einsatz* Group D under your direction?"

"In the year between June 1941 and June 1942 the Einsatzcommando reported ninety thousand persons liquidated."

"Did that include men, women, and children?"

"Yes."

"On what pretext, if any, were they rounded up?"

"On the pretext that they were going to be resettled."

"Will you continue?"

"After the registration, the Jews were collected at one place; and from there they were later transported to the place of execution, which was, as a rule, an antitank ditch or a natural excavation. The executions were carried out in a military manner by firing squads under command."

The other star witness who electrified the courtroom was SS Lt.-Col. Rudolf Franz Ferdinand Hoess, commandant of Auschwitz concentration camp from 1940 until 1943. He testified (as a defense witness!) on April 15, 1946.

(Hoess, who was hanged for his crimes in 1947, is not to be confused with one of the defendants on trial at Nuremberg, Rudolf Hess, once Hitler's Deputy Fuhrer.) Like Ohlendorf, Hoess frankly acknowledged the truth about the mass murder he had committed. "Here, in Hoess," Ann Tusa and John Tusa have written, "were personified all the Nazi virtues of duty, hard work, obedience; and all the worst of Nazi callousness and bestiality. Here was a human being who had unleashed horror on a scale beyond imagination." It was Hoess who had constructed gas chambers capable of holding 2,000 people each. Some his testimony was as follows:

"Didn't you exterminate about three million Jews in Auschwitz?"

"No. I never said three million."

"What did you say?"

"Two million."

"You said two and half million were gassed."

"Yes."

"And half a million died because of disease and epidemics?"

"Yes."

"Is that three million all together, or isn't it?"

"Yes. But not three million were exterminated."

As spectators gaped, Hoess also acknowledged the truth of an affidavit he had signed, which stated: *"I commanded Auschwitz until 1 December 1943, and estimate that at least 2,500,000 victims were executed and exterminated there by gassing and burning, and at least another half-million succumbed to starvation and disease, making a total dead of 3,000,000. This figure represents about seventy or eighty percent of all persons sent to Auschwitz as prisoners."*

Another reason the Nuremberg Trial is a landmark is that it advanced and bolstered the cause of international protection of human rights, especially where the human rights violations are committed by governments. Large-scale violations of basic human rights were recognized as criminal acts under international law, and individuals who had committed such violations while clothed with the power of a modern state were brought to justice and punished.

Furthermore, the fundamental due process principle that even heinous offenders are entitled to a fair trial and an adequate defense was spectacularly reaffirmed by the way the Nuremberg defendants were treated by the IMT. If there was anything repugnant to Nazis, it was giving a criminal defendant a fair trial. Denying a man or woman charged with crime a fair trial on the charges was not only Nazi practice, but also a Nazi principle. One of the defendants, Goering, for example, who like other Nazis had contempt for criminal

defendants and their attorneys, had boasted in 1934: "We deprive the enemies of the people of legal defense... We National Socialists wittingly oppose false gentleness and false humanitarianism... We do not recognize the fallacious quibbles of lawyers or the monkey tricks of judicial subtleties."

The Allies, on the other hand, gave the Nazis what the Nazis never gave anybody and what they would never have given the Allies—a fair trial conducted in a dignified atmosphere, presided over by impartial judges. The defendants were represented by competent, diligent, court-appointed counsel, and the trial was conducted in what prosecutor Robert Jackson called "solemn grandeur." There were times when testimony about Nazi horrors plunged the courtroom into great sadness and sepulchral gloom; there were interludes when the courtroom sagged with boredom; there were rare moments of humor when the judges, the attorneys, the defendants, and even the white-helmeted military police guards would laugh or smile. But the tone in the IMT courtroom was usually one of deliberation, civility, calmness, grave earnestness, and respect for rights of the accused. There can be no greater contrast than that between the respectful judicial decorum of the Nuremberg Trial and the inhumane show trials, the hideous caricatures of justice featuring shouting, sardonic judges and browbeaten accuseds, that the Nazis gave their defendants.

And while the Nuremberg defendants were confined in close custody and under strict surveillance before and during the trial, they were never subjected to the torture and cruelties that Nazis regularly inflicted on their prisoners. There were no Gestapo cellars in Allied prisons.

The everlasting achievement of the Nuremberg Trial is that it firmly established, as a governing rule of law, what has been called "the Nuremberg principle," applicable to criminal proceedings generally. The Nuremberg principle has two parts. First, the fact that the crime charged was committed by a government officer or agent, whether high or low, is no defense to the criminal charge, and also is not a matter that mitigates punishment. Second, the fact that the crime charged was committed pursuant to a government order or to superior orders is not a defense to the crime charged, although it may be considered in mitigation of punishment.

The ten hangings, which officially brought the Nuremberg Trial proceedings to a close, continue to exert a morbid appeal. The eleventh Nazi condemned to death, Goering, committed suicide in his cell two hours before the executions were scheduled to begin.

The executions, in a brightly lighted prison gymnasium where three looming black wooden gallows had been erected, were witnessed by a handful of Allied military officers and eight journalists, one of whom, Kingsbury Smith of International News Service, wrote a famous newspaper article, "The Execution of Nazi War Criminals, 16 October 1946," based on his eyewitness observations. Although Smith discreetly omitted mentioning it, the experienced Army hangman, Master Sgt. John C. Woods, botched the executions. A number of the hanged Nazis died, not quickly from a broken neck as intended, but agonizingly from slow strangulation. Ribbentrop and Sauckel each took 14 minutes to choke to death, while Keitel, whose death was the most painful, struggled for 24 minutes at the end of the rope before expiring.

To the witnesses, however, what was most striking about the executions was not the death agonies of the Nazis, but the stern, unadorned, Old Testament righteousness of the hangings. As Robert E. Conot wrote of the ten executions: "It was a grim, pitiless scene. But for those who had sat through the horrors and tortures of the trial, who had learned of men dangled from butcher hooks, of women mutilated and children jammed into gas chambers, of mankind subjected to degradation, destruction, and terror, the scene conjured a vision of stark, almost biblical justice."

In 2000, a miniseries based on the Nuremberg Trial appeared on TV. The miniseries, entitled *Nuremberg*, was inspired by the Persico book, and starred Alec Baldwin as prosecutor Robert Jackson. Surprisingly, perhaps, the miniseries was, with some exceptions, historically accurate. The testimony of Hoess, the Auschwitz commandant, for example, which so stunned the IMT courtroom, was depicted quite truthfully. In fact, many of the courtroom scenes in the miniseries came verbatim from the Nuremberg Trial's published transcript. Perhaps the best scenes in the miniseries were when Alec Baldwin reenacted, quite accurately, Robert Jackson's splendid opening and closing speeches for the prosecution—speeches that authoritative lawyers regard as the greatest ever delivered at a criminal trial.

Remarkably, the actors who portrayed the trial defendants bore an amazing physical resemblance to the Nazi leaders actually tried. The miniseries was also correct in implying that Goering was able to commit suicide with a poison capsule only because of assistance given him by Capt. Jack G. Wheelis, one of the military police guards. Since the publication of Ben E. Swearingen's book *The Mystery of Hermann Goering's Suicide* (1985), historians have generally come to accept Swearingen's conclusion that Wheelis, an immature,

impressionable U. S. Army officer from Texas whom Goering showered with gift watches and jewelry, probably, out of mistaken sympathy for Goering, allowed Goering access to stored luggage where the poison was hidden, and then looked the other way as Goering went through the luggage.

History, it must be pronounced, has vindicated the Nuremberg Trial judge who, according to Telford Taylor, *The Anatomy of the Nuremberg Trials* (1992), wrote in his personal diary before the trial ended: "The historian of the future will look back to [the Nuremberg Trial] with fascinated eyes. It will have a glamour, an intensity, an ever-present sense of tragedy that will enthrall the mind engaged upon its consideration."

The official legal citation to the Nuremberg Trial, the most monumental trial of the 20th century, indeed of all time, is *United States v. Goering*, 6 F. R. D. 69 (Int'l Mil. Trib. 1946).

Table

NUREMBERG TRIAL INDIVIDUAL DEFENDANTS

Note: All the defendants sentenced to death were executed except Goering, who committed suicide.

- (1) Hermann Goering, convicted on all 4 counts, sentenced to death.
- (2) Joachim Ribbentrop, convicted on all 4 counts, sentenced to death.
- (3) Wilhelm Keitel, convicted on all 4 counts, sentenced to death.
- (4) Ernst Kaltenbrunner, convicted on 3 counts, sentenced to death.
- (5) Alfred Rosenberg, convicted on all 4 counts, sentenced to death.
- (6) Hans Frank, convicted on 2 counts, sentenced to death.
- (7) Wilhelm Frick, convicted on 3 counts, sentenced to death.
- (8) Julius Streicher, convicted on 1 count, sentenced to death.
- (9) Fritz Sauckel, convicted on 2 counts, sentenced to death.
- (10) Alfred Jodl, convicted on all 4 counts, sentenced to death.
- (11) Arthur Seyss-Inquart, convicted on 3 counts, sentenced to death.
- (12) Rudolf Hess, convicted on 2 counts, sentenced to life imprisonment.
- (13) Walter Funk, convicted on 3 counts, sentenced to life imprisonment.
- (14) Erich Raeder, convicted on 3 counts, sentenced to life imprisonment.
- (15) Albert Speer, convicted on 2 counts, sentenced to 20 years imprisonment.
- (16) Baldur von Schirach, convicted on 1 count, sentenced to 20 years imprisonment.
- (17) Konstantin von Neurath, convicted on all 4 counts, sentenced to 15 years

imprisonment.

(18) Karl Doenitz, convicted on 2 counts, sentenced to 10 years imprisonment

(19) Hans Fritsch, acquitted and released.

(20) Hjalmar Schacht, acquitted and released.

(21) Franz Von Papen, acquitted and released.