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EICHMANN

Did Adolf Eichmann receive a fair trial?

Viewpoint: Yes. Adolf Eichmann received a fair trial by the standards of international law.

Viewpoint: No. The prosecution's use of the courtroom as a classroom, as well as many procedural irregularities, prevented Adolf Eichmann from receiving a fair trial.

Born in Germany and raised in Austria, Adolf Eichmann had an early life marked by repeated failures and frustrations. The young man was still seeking direction in life when, at age twenty-six, he joined the National Socialist Party of Austria in 1932. Eichmann, a high-school and trade-school dropout, quickly found a purpose and a career within the ranks of the Nazi Party. An early member of the *Schutzstaffel* (SS), the elite guard of the party, he sought assignments that satisfied his personal interest in "studying" the enemies of the Party and (later) the Nazi State. Upon returning to his native Germany in 1933, he began his steady advance from mere SS file clerk to important party official. Working first within the SS branch known as the *Sicherheitsdienst* (Security Service, or SD) and later within its successor organization, the *Reichssicherheitshauptamt* (Reich Central Security Office, or RSHA), Eichmann gained recognition as a Nazi Party specialist on European Jewry and the Jewish Question.

Between 1935 and 1939 SS-*Hauptsturmführer* (captain) Eichmann helped to forcibly "encourage" German Jews to leave the Third Reich, even working closely with Zionist Jews in Germany to facilitate immigration to Palestine. After Austria "came home to the Reich" in 1938, he was transferred to Vienna to participate in the extension of Nazi anti-Semitic policies to the newest part of "Greater Germany." In the former Austrian capital city, Eichmann was instrumental in organizing an efficient bureaucratic process for divesting Jews of their assets and summarily deporting them from the Reich. The outbreak of World War II (1939–1945) brought the SS officer promotions and new, broader responsibilities in dealing with the ever increasing number of Jews under Nazi control. In the autumn of 1941, as an SS-*Obersturmbannführer* (lieutenant colonel), he assumed control of Section IV–B4 of the RSHA. Known as the Office of Jewish Emigration, Section IV–B4 was responsible for organizing the relocation of the Jews of Europe to any site selected by their Nazi oppressors. Thus, between 1939 and 1941, Eichmann administered the "resettlement" of Jews into ghettos and other special zones established in the Reich's newly captured eastern territories. After the mass killings began in the autumn of 1941, he supervised the systematic transportation of European Jews to the death camps in the east.

Surviving records of Section IV–B4 show that Eichmann continued this lethal exercise of his organizational talent up to the close of the war. With the end of Nazi Germany in sight, however, the SS officer prudently began traveling under a false name. In fact, although twice interned by Allied authorities following the capitulation of Germany, Eichmann managed to

escape unrecognized. Not until he heard the defendants at the Nuremberg trials mention his name as a key player in the Final Solution did Eichmann decide to flee Germany. With the help of anti-Communist Catholic officials, he was smuggled out of Europe to South America in 1950. Still employing an alias, Eichmann lived a relatively quiet life with his family in Argentina until his discovery and subsequent kidnapping by members of the Israeli security service in May of 1960. Quickly smuggled out of Argentina, Eichmann was taken to Israel to face trial for his role in the terrible crimes of the Nazi regime. Even before it had truly begun, the Eichmann trial became the subject of a controversy that remains unresolved: was it possible for this former Nazi official to receive a fair trial in a court of law presided over by Israeli survivors of the Holocaust?

Viewpoint: Yes. Adolf Eichmann received a fair trial by the standards of international law.

On 23 May 1960 the prime minister of Israel, David Ben-Gurion, announced to the Israeli Knesset (Parliament), as reported by *The New York Times* (24 May 1960), that

> A short time ago one of the greatest of the Nazi criminals, Adolf Eichmann, who was responsible, together with the Nazi leaders, for what they called the final solution to the Jewish problem—that is, the extermination of 6,000,000 of the Jews of Europe—was discovered by the Israeli security services. Eichmann is already under arrest in Israel and will shortly be placed on trial in Israel under the terms of the law for the trial of Nazis and their collaborators.

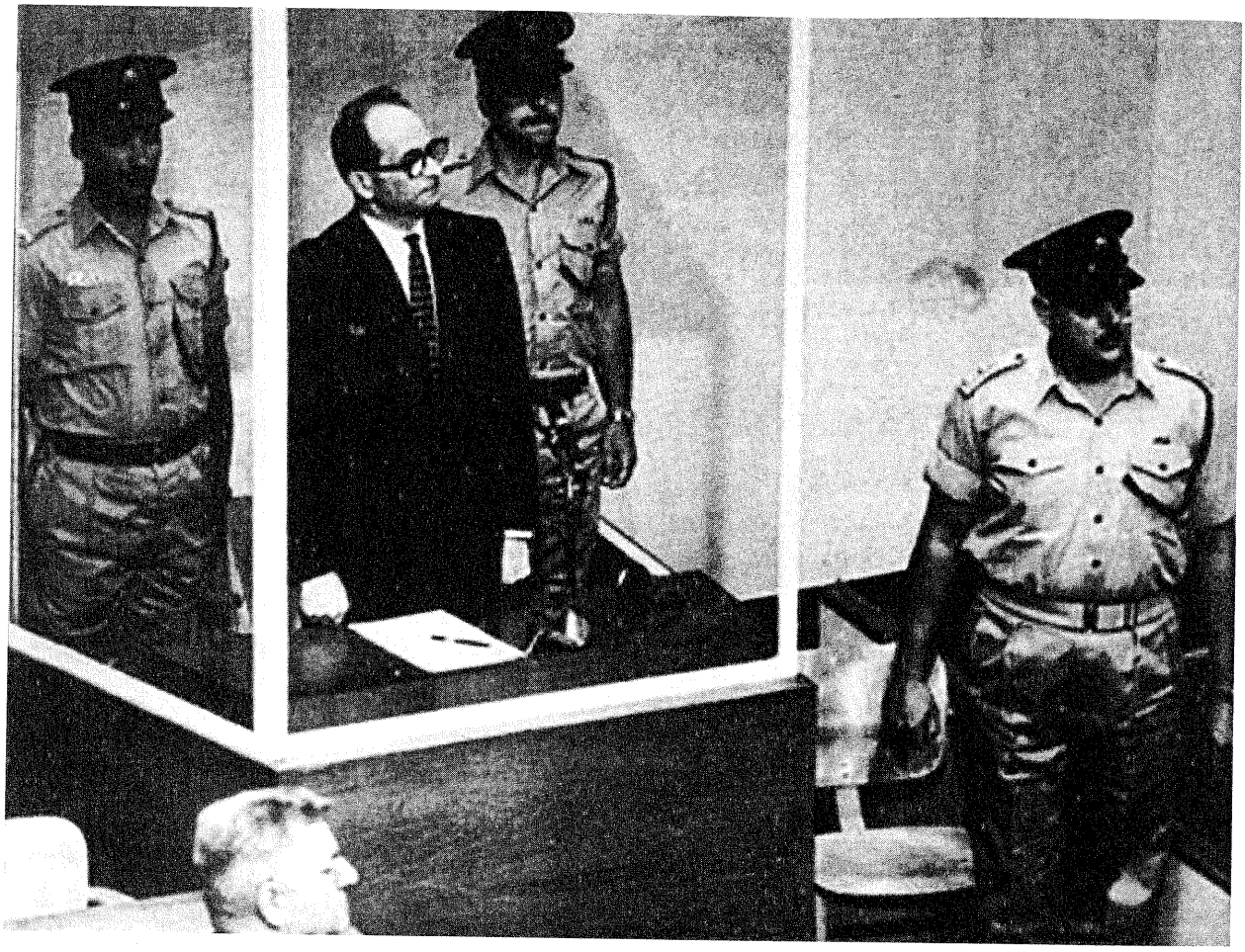
Ben-Gurion's announcement began a two-year-long process in which Adolf Eichmann, portrayed by the Israelis as the person in charge of carrying out the Nazis' "Final Solution to the Jewish Question," faced justice for crimes he perpetrated against European Jewry during World War II (1939–1945).

Immediately following the Israeli announcement of Eichmann's capture and upcoming trial, observers throughout the world began commenting on the validity of such a proceeding. Commentators voiced opinions concerning the legality of Eichmann's capture from Argentina. They questioned the ability of the Israelis to hold a fair trial. Furthermore, critics maintained that the state of Israel did not exist until 1948, three years after the end of World War II and the commission of these crimes. Finally, many commented upon the enormity of the accusations leveled at Eichmann by Israel.

The first contention, the legality of Eichmann's abduction, caused many to question the validity of the trial. Professor Herbert Wechsler wrote, "Israel's custody of Eichmann was obtained unlawfully in Argentina, where he was kidnapped by Israeli agents. This taints the trial from the beginning." Many observers throughout the world echoed Wechsler's belief. Yet, several points should be kept in mind regarding the legality of Eichmann's capture. First, Eichmann, upon his detainment, willfully and knowingly signed an affidavit positively identifying himself and agreed to return to Israel. Second, no extradition treaty existed between Argentina and Israel. Finally, Argentina had an abysmal record of extraditing Nazi war criminals to nations that enjoyed an extradition agreement with them, especially West Germany. Argentina protested the Israeli action in front of the United Nations; however, an unspecified reparation was agreed to by all parties involved, and the matter was closed. The Argentineans officially agreed to Eichmann's capture, removing the question of the illegality.

The next contention concerned the belief that Eichmann could not receive a fair trial in Israel and therefore, the Israelis should have handed him over to an international tribunal. Calls for an international tribunal were problematic and were refused by the Israelis. For them, Eichmann's crimes were aimed at Jews for no other reason than that they were Jewish. At the Wannsee Conference (1942) Eichmann and *Reichssicherheitshauptamt* (Reich Central Security Office, or RSHA) chief Reinhard Heydrich identified more than eleven million Jews throughout the world and slated them all for extermination. Therefore, Israel correctly saw it as their right as representatives of the only Jewish state to try Eichmann on their own soil, using Jewish judges and Israeli law as a framework for the trial. Many European countries held "successor trials" after the close of the Nuremberg trials, and the convictions and sentences meted out by such courts were never questioned. The Eichmann trial should be seen as another of these "successor trials."

Connected closely with the question of the impartiality, and perhaps more important of fairness, was the nature of the law that the Israelis accused Eichmann of breaking. The Nazis and Nazi Collaborators (Punishment) Law (1950) passed the Knesset with much debate ten years prior to Eichmann's capture. The law aimed at punishing those individuals suspected of crimes against Jewish people, crimes against



Adolf Eichmann listening as an Israeli court declares him guilty of war crimes on 15 December 1961

(U.S. Holocaust Memorial Museum, Washington, D.C.)

humanity, and war crimes. Many, including Eichmann's lawyer, Robert Servatius, argued that the law was invalid because it was retroactive and extraterritorial. According to Servatius, Eichmann's crimes occurred in the late 1930s and 1940s in a sovereign country (Germany) that did not deem his actions illegal. Furthermore, Israel did not exist as a sovereign nation until 1948. Therefore, he concluded, a state that did not exist at the time the crimes were committed could not punish a person under a law enacted fifteen years after the fact. Attorney General Gideon Hausner countered this contention, arguing that the laws used by the Nuremberg Tribunal in 1946 and 1947 were also retroactive. The Israelis established the 1950 law based on precedents set at Nuremberg and, consequently, the court upheld the legality of the Nazi and Nazi Collaborators Law.

The third contention regarding the trial was the broad range of charges arrayed against Eichmann. Israel charged Eichmann with seven counts of crimes against humanity, four counts of crimes against the Jewish people, one count of war crimes, and three counts of membership in criminal organizations. To apply such a broad range of charges to the defendant, Hausner portrayed Eichmann as the sole person responsible for planning and carrying out the Holocaust. Many objected to the approach taken by the prosecution. Although Eichmann played a key role in the destruction process, most notably in the areas of transportation and the deportation of Hungarian Jewry in 1944, he clearly played a less significant role in the Holocaust than the Israelis attributed to him. When the trial concluded in 1961, the court found Eichmann guilty only of crimes against humanity and crimes against Jews, discarding the membership in criminal organizations and also some specific counts of each indictment.

A reduction of the charges should not, however, have tainted the nature of the trial at all. Faced with the choice of a prosecution based on narrow, specific charges or one based on broad charges, Hausner chose the latter. His reasons were twofold. First, he wished to charge Eichmann with as many crimes as possible. Like most prosecutors, Hausner felt that charging Eichmann with a broad range of crimes helped better ensure a conviction on most, if not all, of the charges. Second, Ben-Gurion and Hausner wished to use the trial for educational and patriotic purposes, "to remind the countries of the world that the Holocaust obligated them to support the only Jewish state on earth." To

accomplish this end, Hausner used the trial as a vehicle for recounting the entire story of the Holocaust from 1933 to the end of the war. This strategy included calling 121 witnesses, many of whose testimony had little or nothing to do with the question of Eichmann's guilt. The use of such testimony caused some commentators to voice doubts about the validity of the trial. The prosecution also introduced several hundred documents as evidence that pertained to Eichmann's crimes. In essence, there were two purposes to this public trial of a Nazi fugitive. On the one hand, by using witnesses to tell the whole story of the Holocaust, the prosecution was successful in its educational and patriotic goal. On the other hand, the use of specific documentary evidence satisfied the legal criteria pertaining to the question of Eichmann's guilt.

The documentary evidence offered in Jerusalem clearly established Eichmann's pivotal role in the Nazi machinery of deportation and death. The SS officer's primary responsibility was to organize the transportation of Jews residing in any country or territory selected for Nazi attention. The staff of his Office of Jewish Emigration first calculated the number of Jews to be transported either to a ghetto, a concentration camp, or a death camp. Eichmann then contacted the *Judenrat* (Jewish Council) of the given area from which the Jews were to be transported. The *Judenrat*, in turn, would draw up lists of those to be deported. Meanwhile, Eichmann's office contacted the *Reichsbahn* (German national railway) and hired the trains necessary for the projected transport. Not only did his staff plan for every detail, providing the physical resources necessary for a smooth and efficient transport (trucks, guards, and even meals for the Germans involved). As "immigration agents" they kept meticulous records of the Jews they collected and shipped off to die.

Eichmann carried out his duties with the precision and discipline of a well-trained soldier, enabling this process to continue up to the last days of the war. Even as the German army retreated on all fronts, trainloads of Jews rolled eastward. The mass murders of European Jews, whether by gassings or (following the dismantling of the death camps in late 1944) death marches, lasted almost until the surrender of Germany early in May 1945. Records of the Office of Jewish Emigration introduced at Eichmann's trial left no room for doubt that the defendant had been instrumental in the facilitating the Final Solution.

Although decades have passed since Eichmann's capture, trial, and execution, questions still persist concerning the fairness of the proceedings, and it appears that a consensus will never emerge. Questions surrounding the circumstances of his capture played an important role in clouding the issues involved in the trial and led to many other concerns about how fair the trial could be. However, when one takes into account the thorny issues involved in extraditing Eichmann or returning him to Argentina for trial, a clearer picture develops explaining Israeli actions. Combined with the Argentinian refusal to pursue the matter further within the international community, Israeli actions regarding Eichmann's capture become less important to the matter of his guilt.

Questions also surrounded the issue of the ability of Israel to hold a fair trial for Eichmann. Little or no controversy surrounded the earlier "successor" trials, and guilty verdicts were almost never questioned. Given that fact, why should anyone have questioned the fairness of Eichmann's trial? If the perpetrators' nation was allowed to mete out justice to accused war criminals, why not the nation that represented the victims? Few questioned the impartiality of the Nuremberg judges, who represented the nations victimized by the Nazis.

Finally, many critics wondered at the enormity of the charges arrayed against Eichmann and the broad scope of the trial. The prosecution accused Eichmann of crimes he was not guilty of committing. However, Eichmann's involvement in solving the Jewish Question began in 1935 and lasted until the end of the war, and his participation in the destruction process grew larger with every year. From emigration to transportation, he was deeply involved in the fate of European Jewry in Nazi hands. Although Eichmann himself never killed anyone or commanded a death camp, his actions, especially in the sphere of transportation, played a leading role in the murder of millions of human beings. Eichmann might not have been guilty of all the charges arrayed against him, but he was guilty of the majority of them.

It is also true that Hausner and Ben-Gurion wished to use the trial for purposes other than justice. By utilizing witness testimony and emphasizing the crimes of the Holocaust in their totality, Israel brought the Holocaust into public discourse. Hausner relied heavily on documentary evidence to prove Eichmann's guilt: in effect, holding two trials at once—one broad in its scope and grandly historical in its meaning; the other based on law, legal precedent, and documentary evidence. Although the trial was not perfect, it was fair, and it succeeded in bringing to justice a leading Nazi war criminal, a man fully deserving of his sentence.

–JAMIE WRAIGHT,
UNIVERSITY OF MICHIGAN, DEARBORN

Viewpoint:
No. The prosecution's use of the courtroom as a classroom, as well as many procedural irregularities, prevented Adolf Eichmann from receiving a fair trial.

The fact of Adolf Eichmann's guilt was never really questioned. The real issues were what institutions and procedures would be utilized to determine that guilt. From the start, there were many procedural irregularities associated with the trial. Eichmann was abducted from Argentina to stand trial in Jerusalem. Israel claimed the legal right to try him, even though the state did not exist at the time of the events in question. In addition, Israel claimed jurisdiction for crimes committed beyond its border, ordinarily a violation of the territoriality principle of international law. The law under which Eichmann was tried, the Nazis and Nazi Collaborators (Punishment) Law (1950), was an ex post facto law; that is, it made a specific act a crime after it had been committed. These irregularities in the trial raise important questions about fairness, but each of these alleged deficiencies are subject to plausible rebuttals. The greatest threat to the fairness of the trial was the attempt by the prosecution to make the trial a vehicle for witness survivor testimony and, thus, push the boundaries of traditional legal forms in favor of collective memory and in support of the Jewish state. The court's struggle with the prosecution, the irregularities of the case, and its attempt to defend its own legitimacy serve to highlight the contending values and interests at stake in the trial, of which fairness was just one. Fairness is not the only consideration in determining the legitimacy of a trial and, in the case of Eichmann, arguably not the most important one.

A key concern in a traditional criminal trial is personal culpability, that is, to place the alleged wrongdoing within the personal control and responsibility of the accused. The prosecutor, Gideon Hausner, directed his efforts not on the personal responsibility of Eichmann but on the documentation of the Holocaust itself. This effort pushed the limits of ordinary criminal proceedings. Instead of producing facts that placed the accused at the scene of the crime or detailed how the accused orchestrated events from behind the scenes, Hausner introduced witness after witness who spoke about individual experiences with deportation, concentration camps, and survival with little regard for witnesses' knowledge of or experience with Eichmann. Documenting the Holocaust as an administrative massacre—describing the Nazi bureaucratic machinery and indicating Eichmann's role in it and connecting this machinery in general to the experiences of scores of survivors—calls for different evidence and a different approach to establishing guilt.

A basic feature of criminal law is "no crime without law." In other words, criminal law should be prospective in nature. Ordinarily, the fact that the charging law is an ex post facto law is enough to call into question the basic fairness and legitimacy of a trial. The concern with the prospective nature of the criminal law is largely that individuals should have prior notice that certain behavior constitutes a crime and serves as protection against an abusive government. This prohibition is not, however, an absolute one. It is plausible to claim, as the prosecution did, that Eichmann's actions were so obviously wrong morally that it can be presumed the law was already in place.

The law under which he was charged, however, led to other irregularities in the trial. Many of the typical devices available to a defendant—calling character witnesses and challenging evidence through friendly witnesses—were not available to Eichmann because the same law that served as the basis for his indictment could also be used for indicting individuals who testified on his behalf. Not only was the law retroactively applied, it was constructed in such a way as to hinder the ability of a defendant to combat the charges against him.

Other features of the law place it outside traditional parameters of criminal procedure. According to the terms of the law, ordinary evidentiary standards do not apply. The standards were relaxed in order to provide the prosecution with greater flexibility concerning the type and reliability of evidence. The law may reflect an attempt to deal with a unique set of circumstances, the Holocaust, in a unique way. Both the legislative history of the Nazis and Nazi Collaborators Law and subsequent judicial interpretation of the law indicate that it was viewed as an extraordinary law responding to a horrific crime. However one might feel about the necessity of such a law as a response to the Holocaust, it seems to run counter to some basic understandings of law, which should be based on general rules and be prospective, not retrospective, in character. This tension highlights the difficulties of evaluating an administrative massacre within a traditional trial format.

Originally the Nazi and Nazi Collaborators Law called for the chief judge of the district court to preside over the trial. The chief judge at the time, Benjamin Halevy, had presided over the emotionally charged and conten-

A NEW KIND OF MURDER

On 17 April 1961 Israeli attorney general Gideon Hausner, in his opening remarks at the trial of accused Nazi war criminal Adolf Eichmann, stated:

When I stand before you here, Judges of Israel, to lead the Prosecution of Adolf Eichmann, I am not standing alone. With me are six million accusers. But they cannot rise to their feet and point an accusing finger towards him who sits in the dock and cry: "I accuse." For their ashes are piled up on the hills of Auschwitz and the fields of Treblinka, and are strewn in the forests of Poland. Their graves are scattered throughout the length and breadth of Europe. Their blood cries out, but their voice is not heard. Therefore I will be their spokesman and in their name I will unfold the awesome indictment.

Murder has been with the human race since the days when Cain killed Abel; it is no novel phenomenon. But we have had to wait till this twentieth century to witness with our own eyes a new kind of murder: not the result of the momentary ebullition of passion or the darkening of the soul, but of a calculated decision and painstaking planning; not through the evil design of an individual, but through a mighty criminal conspiracy involving thousands; not against one victim whom an assassin may have decided to destroy, but against an entire nation.

In this trial, we shall also encounter a new kind of killer, the kind that exercises his bloody craft behind a desk, and only occasionally does the deed with his own hands. True, we have certain knowledge of only one incident in which Adolf Eichmann actually beat to death a Jewish boy, who had dared to steal fruit from a peach tree in the yard of his Budapest home. But it was his word that put gas chambers into action; he lifted the telephone, and railroad cars left for the extermination centres; his signature it was that sealed the doom of thousands and tens of thousands. He had but to give the order, and at his command the troopers took the field to rout Jews out of their neighbourhoods, to beat and torture them and chase them into ghettoes, to pin the badges of shame on their breasts, to steal their property—till finally, after torture and pillage, after everything had been wrung out of them, when even their hair had been taken, they were transported, en masse to the slaughter. Even the corpses were still of value: the gold teeth were extracted and the wedding rings removed.

We shall find Eichmann describing himself as a fastidious person, a "white-collar" worker. To him, the decree of extermination was just another written order to be executed; yet he was the one who planned, initiated and organized, who instructed others to spill this ocean of blood, and to use all the means of murder, theft, and torture.

He must bear the responsibility therefore, as if it was he who with his own hands knotted the hangman's noose, who lashed the victims into the gas-chambers, who shot in the back and pushed into the open pit every single one of the millions who were slaughtered. Such is his responsibility in the eyes of the law, and such is his responsibility according to every standard of conscience and morality. His accomplices in the crime were neither gangsters nor men of the underworld, but the leaders of the nation—including professors and scholars, robed dignitaries with academic degrees, linguists, men of enlightenment, the "intelligentsia." We shall encounter them—doctors and lawyers, scholars, bankers and economists, in those councils which resolved to exterminate the Jews, and among the officers and directors of the work of murder in all its terrible phases.

This murderous decision, taken deliberately and in cold blood, to annihilate a nation and blot it out from the face of the earth, is so shocking that one is at a loss for words to describe it. Words were created to express what man's reason can conceive and his heart can contain, and here we are dealing with actions that transcend our human grasp. Yet this is what did happen: millions were condemned to death, not for any crime, not for anything they had done, but only because they belonged to the Jewish people, and the development of technology placed at the disposal of the destroyers efficient equipment for the execution of their appalling designs.

The unprecedented crime, carried out by Europeans in the twentieth century, led to the adoption of the concept of a crime unknown to human annals even during the darkest ages—the crime of Genocide.

Source: *State of Israel, Ministry of Justice,* The Trial of Adolf Eichmann: Record of the Proceedings in the District Court of Jerusalem, *volume 1 (Jerusalem: Ministry of Justice, 1992), pp. 62–63.*

tious trial of Rudolf Kastner. The Kastner trial focused on collaboration of the Jewish leadership with Nazi leaders, and in particular with Eichmann. Halevy's conduct during the trial raised basic questions about his impartiality and his ability to preside over the trial of Eichmann. In his opinion Halevy wrote that Kastner had sold "his soul to the Devil." The "Devil" was a reference to Eichmann. He was asked to recuse himself from the Eichmann trial but refused. The law was amended to allow a supreme court justice to preside over the district court. Halevy remained as part of the three-judge panel that heard the case. The importance of the appearance of impartiality and objectivity in judicial proceedings often leads to extraordinary efforts to protect against the possibility of partiality and bias. The irregularities present here, Halevy's prior conduct toward the accused, and the unusual circumstances surrounding the amendment of the law, raise serious questions about the possible fairness of the trial.

The setting and atmosphere surrounding the trial raise additional questions about fairness. The trial was not held in the district courtroom, but in a *Beit Ha'am* (community center). Accommodating a large international press corps, spectators, witnesses, and cameras made it necessary to move to a larger and more accessible space. The symbolism behind the need to move to a larger, general-purpose facility tracks the prosecution's attempt to move beyond the normal strictures of criminal law.

Public statements from state officials about the format and purpose of the trial also raise suspicions about the fairness of the trial for the accused. In an interview with *The New York Times* prior to the trial, Israeli prime minister David Ben-Gurion emphasized that the trial was designed to focus on Jewish suffering and to bring Eichmann to face Jewish justice as part of an attempt to place the Holocaust within Jewish history and connect it to the legitimacy of a Jewish State. He saw the trial as an important opportunity "to remind the countries of the world that the Holocaust obligated them to support the only Jewish state on earth."

Hausner, the lead prosecutor, made it clear that he wanted to tell a story about the Jewish community—its victimization, suffering, and resistance—and only secondarily was concerned about the defendant. He argued that determining the guilt of the accused was only one of the purposes of the trial: "I knew we needed more than a conviction; we needed a living record of a gigantic human and national disaster." He made it a conscious goal to mold and shape the consciousness of the Israeli youth—to create sympathy for Holocaust victims and secure a bond for a new nation. The trial in essence would function as a form of political education.

The "living record" generated by the trial was based on survivor testimony; the manner in which it was presented and the degree to which it was emphasized stretched the limits of criminal jurisprudence. The point of the trial for Hausner was telling the story of the Holocaust, not just Eichmann's complicity. Doing the latter would have "simplified the legal argument" but this emphasis would have denied the victims the opportunity to speak and tell their stories. The point was to cover "the whole Jewish disaster." Time and again Hausner encouraged witnesses to speak freely and generally without regard to their knowledge of or experience with the accused. The court struggled to control Hausner and periodically intervened to remind the prosecutor and the witnesses that some connection with the accused had to be made. The basic character of the trial, however, reflected Hausner's insistence that victims tell their stories even if that meant straying from the typical concerns of a criminal trial—for example, linking testimony to the actions of the accused.

The court recognized the pressures that the Nazis and Nazis Collaborators Law, the circumstances surrounding Eichmann's crime, and the prosecution's use of survivor testimony were placing on the judicial process. They were mindful of their role in history as well as the limits of the law in the service of historical understanding. They observed that a court "cannot allow itself to be enticed into provinces which are outside of its sphere. The judicial process has ways of its own, laid down by law, and these do not change, whatever the subject of the trial." Despite the best efforts of the court, however, the subject of the trial had overtaken, to a certain extent, the legal form of the trial.

From the beginning of the trial there were those, such as German philosopher Karl Jaspers, who believed that a trial, especially one held in Jerusalem, was not the appropriate way to confront the meaning and significance of Eichmann's crime. Jaspers argued that "Something other than law is at stake here—and to address it in legal terms is a mistake." Jaspers sounds an important warning about the vulnerability of the law.

American writer Susan Sontag's observations of the trial underscore this concern. Recognizing competing functions within the trial, she suggested that there was a "contradiction between its juridical form and its dramatic function." The trial was "primarily a great act of commitment through memory and the renewal of grief, yet it clothed itself in the forms of legality and scientific objectivity." While capturing a basic tension that runs throughout the

trial and that, in particular, is reflected in Hausner's strategy, Sontag's observation misses an important theatrical element of most trials. The rules for a trial provide for and create many dramatic and theatrical opportunities. The key is the purpose served by the rules and in particular why allowances are made for theater and drama in the courtroom: to uncover the facts that support personal culpability for the accused and to shed light on the relevant rules of law. Understood in this light, the juridical function of the Eichmann trial can be said to have been compromised in favor of a larger concern with granting victims the opportunity to tell their stories. Hausner made a conscious decision to organize the trial around survivor testimony and give pride of place to victims. The possible cost of a court's sanction of such an approach is the erosion of the authority and legitimacy of the law. As the Eichmann court observed, if a trial is not bound to the procedures of the judicial process, the law and court procedures will be "impaired . . . and the trial would . . . resemble a rudderless ship tossed about by the waves."

In *Eichmann in Jerusalem: A Report on the Banality of Evil* (1964) Hannah Arendt, while commending the judges for their efforts, argued that the trial, because it focused on the victims and not the accused, failed in its most important function: "the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment." According to this standard, the Eichmann trial failed the law and, perhaps, failed justice. However, it is not clear if this standard is appropriate for understanding a trial in general and the Eichmann trial in particular. Might it be possible that the need to "render judgment" in this case required the kind of attention to the voices of the victims that became part of the prosecution's strategy? Did the need to serve justice override an exacting commitment to judicial integrity?

Ultimately, the answer to the question of the fairness of Eichmann's trial may depend upon how one characterizes the Holocaust. If the Holocaust is viewed primarily as a crime against the Jewish people, situated clearly within Jewish history, then a trial held in Jerusalem and conducted by the state of Israel seems not only acceptable, but also necessary. If, however, the Holocaust is viewed, as Arendt would have it, as a crime against humanity, then the explicit partiality of the trial calls into question its legal character and its fairness. Setting aside legal arguments for or against the structure and conduct of the trial, it is clear that all of the parties involved, including those critics of the proceedings, recognized that the trial would play a critical role in what story was told and who would tell that story.

Whatever the failure and deficiencies of the Eichmann trial, it provided a forum for the voice of Jewish victims that was denied to them in the Nuremberg Trials. Because of the decision to place such emphasis on survivor testimony, the trial called attention to the Holocaust in a way that served as a catalyst for future study and debate. As survivors began to speak through the authoritative medium of the law, popular and scholarly debate on the Holocaust began in earnest. The trial and the debate it generated helped, in a way, to make the Holocaust part of our consciousness. Weighed against the complaint of fairness to the accused, the value and legitimacy of the trial as a form of collective memory is undeniable. Whether a trial is a legitimate forum for this exercise remains an important and timely issue as countries such as Rwanda and South Africa struggle with accommodating the need for and value of victim testimony in the context of legal proceedings dedicated to the documentation of administrative massacres and state-sanctioned criminal activity. This testimony is particularly important when such trials are designed to establish the guilt of the accused, and trial procedures serve as important checks on accuracy rather than, in the case of the Eichmann trial, to document what has already been accepted as fact. It would be a mistake to describe the Eichmann trial as fair according to conventional standards of legality and criminal law. Such a mistake runs the risk of obscuring competing and, arguably, more important political, moral, and historical considerations. It also runs the risk of compromising judicial integrity and authority in future cases that look to the Eichmann trial as a precedent.

—BARRY SHARPE, TUSCULUM COLLEGE

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VICTORS' JUSTICE

Were Nazis tried for war crimes subjected to victors' justice?

Viewpoint: Yes. The prosecution of German war criminals was judicially unfair because the United States was more concerned with geopolitical issues than the rule of law.

Viewpoint: No. Trials of Nazi war criminals constituted reasonable efforts to achieve justice in the immediate postwar period.

Viewpoint: No. In spite of charges of victors' justice and the questionable inclusion of Soviet judges, the Nuremberg trials were fair.

Even before the collapse of the Nazi State, it was apparent that neither a German defeat nor a new Versailles treaty would fulfill Allied goals. The leaders of Nazi Germany could not be permitted to live. Sending Adolf Hitler into exile and imposing reparations on Germany would not suffice. From the perspective of the Allies, the Nazi regime was unprecedented. Hitler was not simply the leader of a nation against whom the Allies waged war; he and his lieutenants were criminals. With complete disregard for the rule of law, for the customs of war, and for human decency, they were directly responsible for the deaths of an estimated forty million people, many of whom, like the Jews, had been rounded up and executed with no military justification whatsoever. It seemed obvious to many soldiers and politicians, among them Dwight D. Eisenhower, Franklin D. Roosevelt, and Winston Churchill, that the best and most expedient course was to execute Hitler, Heinrich Himmler, and other top Nazi leaders summarily as they were captured and identified.

As appealing as this course might have been, the lawyers argued more persuasively that an Allied victory needed, above all, to restore the rule of law to Europe, and extrajudicial executions, however justified and satisfying, would not advance that effort. Thus were born the International Military Tribunal at Nuremberg and subsequent trials by the U.S. Army and other civil and military authorities in the aftermath of the war. Similar trials continued for half a century after World War II (1939–1945), whenever concentration camp guards, Nazi doctors, collaborationist police officers, and other Holocaust and war-crimes perpetrators were brought into the light. The principle of an international court of criminal justice was made permanent in 2002 with the establishment of the International Criminal Court in The Hague.

These trials were controversial from the beginning. Contemporaries argued that, however culpable the perpetrators of genocide and war crimes might have been as human beings, they had not violated existing law. And even if they had, an extraordinary military tribunal had no jurisdiction over such crimes. Summary executions of the key Nazi leadership and local trials under local law—for example in Poland, Germany, or the Soviet Union—would have better restored the rule of law. Above all, skeptics feared that an International Military Tribunal, for which the judges were drawn from the victorious allies and the accused were a defeated enemy, would be condemned by history as victors' justice. No matter how rigorously fair the trials, the results could be dismissed by future generations as vengeance against a

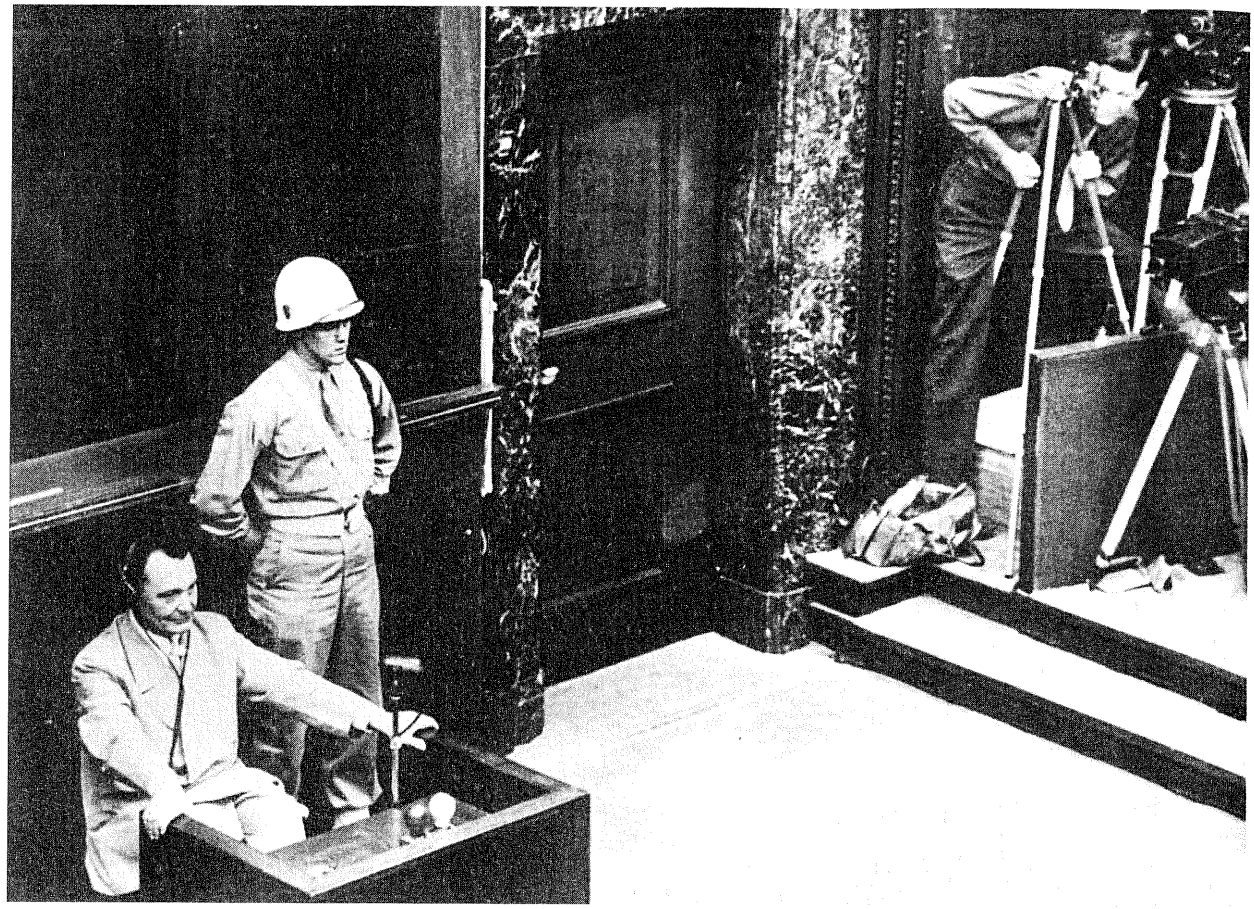
prostrate foe rather than a restoration of law and order. Even though the convening authority of the International Military Tribunal was mindful of this skepticism, and the court avoided any appearance of partiality, debate about the legitimacy of such courts continues into the twenty-first century, when accused perpetrators of other crimes against humanity find themselves facing similar courts and making similar challenges.

Viewpoint: Yes. The prosecution of German war criminals was judicially unfair because the United States was more concerned with geopolitical issues than the rule of law.

At the conclusion of the European segment of World War II in May 1945, the administration of American president Harry S Truman faced three related challenges in developing and implementing policies to manage the occupation of defeated Germany effectively. First, the administration had to collaborate with its wartime allies in administering punitive measures to the remnants of the Third Reich's leadership for the prosecution of the war, generally, and the ghastly horrors of the Holocaust that unfolded therein, specifically. Second, it had to strike a balance between justice and pragmatism in dismantling the National Socialist German Workers' (Nazi) Party and disciplining its adherents without unduly hampering either the reconstruction of the vanquished state's physical and economic infrastructure or the cultivation of democratic values among Germans populating the Western Zones of Occupation. Third, it had to foster a spirit of reconciliation between the Germans under American, British, and French occupation and their former enemies across western Europe in order to consolidate a united transatlantic front in the nascent Cold War pitting the United States against the Soviet Union. The dispensation of justice to Nazis who served in a variety of civilian and military wartime leadership positions, which transpired in the contexts of the 1945–1946 Nuremberg trials and subsequent U.S. Army and denazification trials between 1946 and 1949, was central to meeting the above challenges effectively. However, in spite of their political importance, the prosecution of German war criminals was judicially unfair because the Truman administration ceded primacy to geopolitical pragmatism over the rule of law in conducting the Nuremberg and U.S. Army trials and orchestrating the denazification process. Nonetheless, the administration's decision to proceed in that manner was both understandable and prudent given its indispensability to facilitating the processes of reconstruction and reconciliation and resultant consolidation of a Western democratic front to oppose the Soviet Union in the opening stage of the Cold War.

The conduct of World War II entailed devastating costs in terms of physical destruction and lives lost for both the victors and the vanquished. Such costs were most notably evident in the European theater, where more than 41 million soldiers and civilians died as a direct result of the war, including 6 million Jews and other victims of the unspeakable atrocities of the Holocaust. Once hostilities had ended, the populations of the triumphant Allied states—as well as the broader international community—demanded the public apportionment of blame and resultant punishment of those deemed responsible for the outbreak and prosecution of the war. The question facing Allied leaders was not whether to act punitively but how. As historian Joseph E. Persico notes, the "dilemma the victors faced at the time was simply to determine what to do after the Nazis had caused the deliberate deaths of some six million Jews and millions of others in killings divorced from any military necessity. Could the Allies merely walk away from murders so vast and so calculated?"

Understandably—and justly, given the outcome of the war, scale of its costs and nature of the Nazi regime—the Allies concurred on the need to exact justice in a relatively swift manner. However, at least initially, they disagreed on the means to that end. British prime minister Winston Churchill, for instance, suggested summary executions of Nazi leaders in order to avoid the complexities and delays of formal judicial proceedings. The United States and the Soviet Union, on the other hand, favored the use of a multilateral military tribunal to try the Third Reich's most high-profile figures. The Truman administration insisted on this approach primarily because of the centrality of the rule of law to the American domestic political system. The Soviets, for their part, were more interested in the internationalization of the proceedings, the outcome of which—guilty verdicts for the accused—would presumably be all but predetermined. Eventually, representatives of the United States, Britain, the Soviet Union, and France settled on the establishment of the International Military Tribunal (IMT), agreeing in principle in May 1945 in San Francisco and formalizing that decision at the Potsdam Conference three months later.



Hermann Göring on the stand before the International Military Tribunal, Nuremberg, 13 March 1946

(Bildarchiv Preussischer Kulturbesitz, Berlin)

The IMT, the administrative and judicial particulars of which were developed primarily by American officials, opened for proceedings at Nuremberg in November 1945. The tribunal was composed of representatives from the four victorious powers, with U.S. Supreme Court justice Robert H. Jackson serving as chief American prosecutor and Sir Geoffrey Lawrence of Britain serving as president of the court. In all, twenty-two Nazi leaders stood before the IMT on four charges associated with the planning and conduct of the war and attempted extermination of Jews and other opponents of the Third Reich: conspiracy to commit war crimes; war crimes; crimes against peace; and crimes against humanity. The accused ranged from diplomats (Foreign Minister Joachim von Ribbentrop and German ambassador to Austria and Turkey Franz von Papen) to military leaders (Chief of Staff Alfred Jodl and Field Marshal Wilhelm Keitel), political figures (Reichstag president Hermann Göring and Minister of Arms and Munitions Albert Speer), and propagandists (Gauleiter of Franconia Julius Streicher and head of German radio Hans Fritzsche), all of whom served in reasonably high-profile positions in Hitler's regime.

Those on trial were prosecuted over a twelve-month period ending in October 1946 under the unrelenting scrutiny of the international media, which ensured global publicity for—and thus enhanced the perceived legitimacy of—the proceedings. Ultimately, the trial resulted in nineteen guilty verdicts and three acquittals. Twelve defendants were sentenced to death. One, Göring, cheated the hangman by committing suicide on 15 October.

The rest, including Nazi foreign minister Ribbentrop, Chief of the Armed Forces High Command Operational Staff Jodl, Keitel, and Streicher, who published the Nazi Party's anti-Semitic newspaper, *Der Stürmer*, were hanged on 16 October. However, contrary to pretrial assumptions, former commander of the navy Karl Dönitz—Hitler's personally appointed successor as chancellor—received a ten-year sentence, Speer was given twenty years, and Papen, Fritzsche, and economics minister Hjalmar Schacht were acquitted.

The nature and variety of the sentences passed was demonstrative of the purpose of the IMT, as envisioned by American policymakers in particular. Executing the majority of the highest profile Nazis at Nuremberg served as a necessary punitive catharsis for Allied leaders' domestic constituents (most notably those in western Europe). Ultimately, that helped the Truman administration to better facilitate its subsequent shift in emphasis to the reconstruction of

defeated Germany and reconciliation between former World War II adversaries. In hindsight, the trial itself was reasonably just, especially in light of the relatively even balance between death sentences, on one hand, and jail terms and acquittals, on the other. As Persico explains, "no saint or statesman lost his life or his freedom at Nuremberg. All the men who went to prison or mounted the gallows were willing, knowing and energetic accomplices in a vast and malignant enterprise. . . . The one indisputable good to come out of the trial is that, to any sentient person, it documented beyond question Nazi Germany's crimes." Nonetheless, the fact that the process was administered by the victorious powers rather than a neutral body rendered its judicial legitimacy open to challenge in the contexts of subsequent debates among policymakers, scholars, and laypeople alike.

Notwithstanding the symbolic and practical relevance of its conduct and outcome, the IMT was by no means the only—and perhaps not even the most historically significant—example of American involvement in the prosecution of German war criminals. The United States also participated in judicial proceedings against Nazis with lower profiles than the Nuremberg defendants in the course of governing its Zone of Occupation in southern and western Germany between 1945 and 1949. These adjudication processes included a series of trials of low- and mid-level Nazi civilian officials and military officers administered by the U.S. Army at Dachau and the related development and implementation of the denazification process by the Office of Military Government for Germany, United States (OMGUS).

Concurrent with and subsequent to the events at Nuremberg, the U.S. Army conducted a series of trials under military legal auspices at Dachau, which was the site of one of the Third Reich's many notorious concentration camps. Carried out in 1945–1949, these trials were designed to punish less-high-profile Nazis than the defendants at Nuremberg—most notably concentration camp guards, policemen, minor officers, and soldiers—charged with specific crimes against Holocaust victims and captured Allied soldiers. In all, the Dachau trials resulted in 1,416 convictions and 256 acquittals. Of those convicted, 426 were sentenced to death. However, 326 of those sentences were thrown out, commuted, or reduced by American general and military governor Lucius D. Clay, who personally reviewed all death-penalty cases before the court. Clay's judicial fastidiousness, in turn, reflected his own concerns over allowing the Allies—rather than neutral third parties, if not Germans untainted by association with the Nazi Party—to try war criminals at all. As he later recalled, the "point is, don't lose the war. . . . You've always had, since the beginning of time, penalties to be paid by those who were defeated, sometimes in the form of reparations and damages, frequently in the form of punishments for those who took part. . . . This was a punishment for losing."

Clay expressed—and acted upon—similar misgivings with respect to the implementation of the denazification process in the American Zone of Occupation. In short, denazification was conceived by the Truman administration and formalized in the context of Joint Chiefs of Staff directive 1067 as a means to purge German society of any lingering remnants of National Socialism. To achieve that end, the OMGUS was charged with the daunting (and, for practical purposes, logistically unfeasible) task of removing from positions of leadership all individuals associated with a Nazi Party that had more than six million members at the end of the war. Denazification procedures entailed the distribution of elaborate questionnaires to the approximately twelve million individuals over the age of eighteen under OMGUS jurisdiction beginning in February 1946. On the basis of the questionnaires, individuals were classified as (a) major offenders; (b) offenders; (c) lesser offenders; (d) followers; or (e) nonoffenders, with those distinctions eventually to be made by German officials—albeit under American supervision—in the context of the nascent postwar German legal system. From there, class (a) and (b) offenders would be removed from positions of authority.

Ultimately, the denazification process proved unworkable—both judicially and politically and was discontinued by Secretary of Defense James Forrestal (after recommendations to that end by Clay) in August 1947 and terminated in March 1948, at which point just 600,000 cases had been processed. Judicially, denazification proceedings were often arbitrary. For instance, personal vendettas between Germans excluded many alleged Nazis from playing productive roles in society, while others found themselves in influential positions on the basis of the indispensability of their practical knowledge in the reconstruction of Germany's physical and industrial infrastructure. As historians Dennis L. Bark and David R. Gress assert, "What began as a grandiose plan to purge all Nazis from leading roles in public life and to punish severely persons who had held responsible positions in the Third Reich was, in practice, transformed into a procedure by which the major offenders were slapped on the wrist and minor offenders exonerated." Politically, the Truman administration chose to forego denazification so that it could concentrate almost exclusively on the democratization of occupied Germany as a means to counter the emerging Soviet bloc in

the East. The balance favoring geopolitical pragmatism over the rule of law thus became progressively more pronounced as the division of Europe grew increasingly unavoidable between 1946 and 1949.

In order to prevent Soviet advances beyond Moscow's control of the Eastern Zone of occupied Germany and the states of central and eastern Europe in the aftermath of World War II, the United States had to cultivate western European economic and political cohesion within an American-led military alliance. The creation of such an entity, in turn, demanded multilateral economic, political, and military cooperation and thus the willingness of western Europeans to overcome bitter interstate animosities, particularly with respect to the Germans. The success of the project hinged on the western Europeans' desperate need of immediate economic assistance for the reconstruction that would necessarily precede the process of reconciliation. As scholar Simon Serfaty explains, "Unity among the nation-states of Europe was a precondition for economic reconstruction not from one but two world wars; reconstruction was also the precondition for political unity not only within each European nation-state but among all of them as well."

American support for western European reconstruction, which was manifested in the provision of more than $12 billion in economic assistance through the Marshall Plan between 1948 and 1952, was part of a multistep bargaining process between the United States and its allies across the Atlantic. First, the Truman administration proposed and the western Europeans accepted the Marshall Plan in exchange for a pledge to administer the aid multilaterally as the first step in a long-term regional integration project. Second, the western Europeans requested that the United States maintain a long-term military presence on the Continent in order to mitigate, if not eliminate, any security threats posed by their Soviet adversaries and recently reformed but still distrusted German partners. Third, Washington complied by establishing the North Atlantic Treaty Organization (NATO) in April 1949, with the guarantee of collective defense serving as a security blanket under the cover of which the Western Europeans could deepen and widen the integration process in the future.

The reconstruction and subsequent inclusion of the American, British, and French Zones of Occupation in Germany within the NATO alliance were central to these agreements. As a result, it was essential that the United States dispense with the punitive phase of the occupation—particularly the prosecution of the Nazi leadership at Nuremburg—expeditiously and focus on the interconnected reconstruction and reconciliation processes in anticipation of the impending Cold War. This policy stance was manifested in American secretary of state James Byrnes's rhetoric in an address in Stuttgart in September 1946 and the subsequent consolidation of the American and British Zones of Occupation into a unified Bizone in January 1947. Similarly, the abandonment of denazification was conditioned by rising East-West tensions that culminated in the Soviet Union's imposition of a road and rail blockade of Berlin in June 1948 and the resultant Western Allied airlift of supplies to the American, British, and French sectors of the city over the ensuing eleven months. Breaking the blockade, in turn, helped to foster a common sense of purpose among the western Europeans that was reinforced by the establishment of a west German state (the Federal Republic of Germany)—largely at Washington's behest—in May 1949.

This essay's purpose was to consider the judicial fairness—or lack thereof—of the prosecution of German war criminals by the United States in the aftermath of World War II. It pursued that end by examining the connections between two related sets of issues: the conduct of the IMT at Nuremberg and subsequent U.S. Army and denazification trials in the American Zone of Occupation; and the geopolitical transformation of the European continent generally and the defeated German state specifically.

In light of the evidence uncovered and presented in the three main sections of the essay, the following three conclusions are instructive in the development of a clearer understanding of those connections. First, on balance, the Truman administration unquestionably ceded primacy to geopolitical imperatives over the rule of law in dispensing justice to Nazi leaders and their followers from 1945 to 1949. Second, that approach detracted from the judicial fairness of the proceedings, albeit to variant degrees. The broad range of sentences passed and carried out by the IMT, despite the general culpability of the Nazi leadership in provoking and conducting the war and carrying out the crimes of the Holocaust on its margins, indicate that there was no gross miscarriage of justice at Nuremberg. However, the central role of the victors—as opposed to neutral parties—in trying German leaders was certainly prejudicial. These arguments hold true with respect to the U.S. Army trials at Dachau as well. The denazification process, on the other hand, was rendered more defensible in theory by the transfer of legal responsibilities to Germans deemed untainted by National Socialism in trying their peers. Yet, it proved unworkable in practice and was sensibly abandoned after a mercifully short period.

Third, the positions American policymakers took in each of these judicial contexts were geopolitically prudent given their indispensability to the reconstruction and reconciliation processes that enabled the United States to consolidate a democratic Western front against the Soviet Union in the Cold War.

—ROBERT J. PAULY JR.,
MIDLANDS TECHNICAL COLLEGE

Viewpoint: No. Trials of Nazi war criminals constituted reasonable efforts to achieve justice in the immediate postwar period.

Between 1945 and 1949 the United States tried almost 1,900 Germans in more than 500 trials for violations of international law during World War II (1939–1945). Asking whether these trials were fair is a bit like asking whether trials of U.S. citizens under the American judicial system are fair. Some are and some are not, and reasonable people will disagree over which is which, according to a wide variety of criteria. And to whom were the trials fair? Moreover, courts reflect the values of their societies, and these values are not static. Condemning to death a man proved guilty of theft in eighteenth-century England might have been fair in the context of that time and place, but it is unthinkable in the twenty-first-century United States. Yet, it is reasonable to ask if the American trials of Germans suspected of crimes associated with the Holocaust constituted reasonable efforts to achieve justice in the historical context of the immediate postwar period. They were.

Germans had inflicted on the world horrors of staggering dimensions during World War II. Crimes against humanity, of which the Holocaust is the most notorious example; war crimes, including the deaths of a majority of the 5,700,000 Soviet prisoners of war taken by Germany; and World War II itself, unleashed upon Europe by German aggression, cost the lives of tens of millions of people. To be sure, the Allies had not waged a uniformly clean war. British and American bombers devastated German cities, killing hundreds of thousands of noncombatants, the Soviet secret police murdered thousands of captured Polish army officers, and the Soviet Army slaughtered huge numbers of German civilians in the last months of the war, while casual killings of German prisoners of war by Allied forces, including those of the United States, were common. The fact that Allied crimes usually went unpunished suggested to many Germans that the trials of accused German war criminals were nothing more than victors' justice. There was much hypocrisy in the approach of the United States to dealing with wartime atrocities. Yet, ideologically motivated German crimes, particularly the racist extermination of millions of Jews, Gypsies, and Slavs, had been unmatched on the Allied side, even in the Pacific war, where racial hatred of the Japanese was much in evidence. Once resistance to American forces ceased, the killing of enemy nationals by American forces also ceased. Nonresistance to German forces by Jews, Gypsies, and Slavs, on the other hand, simply made their destruction easier.

During the war some American leaders argued that the magnitude of Nazi crimes was so enormous, and the identity of those responsible for them so obvious, that the appropriate Allied response was to execute high-ranking German political and military figures summarily when they were captured and identified, a policy advocated by Secretary of the Treasury Henry Morgenthau Jr. and supported by General Dwight D. Eisenhower, supreme Allied commander in Europe, who urged the execution of the entire German general staff without trial. Secretary of War Henry Stimson, however, argued that summary execution would be likely to create Nazi martyrs in the eyes of the German people, and that it would be far better to hold trials that would create a record of Nazi criminality that the German people would be forced to confront. This position eventually prevailed and became the official policy of the United States and the other leading Allied powers. In assessing the fairness of American war-crimes policy toward Germany, therefore, it would be well to remember that there was a widely supported alternative to the trials that might have been adopted—the firing squad, with no trials at all.

The centerpiece of Allied war-crimes justice in regard to Nazi Germany, largely the work of U.S. planners, was the "Trial of the Major War Criminals before the International Military Tribunal," opened in Nuremberg, in November 1945 and concluded at the beginning of October 1946. Twenty-two defendants were tried (one, Martin Bormann, in absentia) before a panel of eight judges from Britain, France, the Soviet Union, and the United States. The indictment included four counts: conspiracy; crimes against peace; war crimes; and crimes against humanity. Critics of the trial have argued that it was unfair to charge the defendants with conspiracy, an offense generally not recognized under Continental, including German, law, and that crimes against peace, the waging of aggressive war, and crimes against humanity, such as genocide, had

not been forbidden by international law at the time those acts had been committed. The inclusion of conspiracy at the insistence of the United States was an unfortunate and unnecessary complication. Yet, it is hard to argue plausibly that aggressive war was not an offense under international law in 1939, in light of the Kellogg-Briand Pact of 1928, which outlawed war as an instrument of national policy and to which Germany was a signatory. In addition to the claim that exterminating millions of human beings because of their racial or ethnic identities was not a crime because it had not been specified as such in positive law is to be guilty of the worst kind of pettifoggery. Murder does not cease to be murder if committed on a colossal scale. War crimes, defined in the Charter of the International Military Tribunal as "violations of the laws or customs of war" and including acts such as the ill-treatment and murder of prisoners of war and the murder or enslavement of civilian populations, were clearly offenses under international law that had been codified in treaties such as The Hague Convention of 1907 and the Geneva Convention of 1929. To be sure, as many Germans were quick to point out, Allied countries had also been guilty of some of the same offenses, a fact demonstrating Allied hypocrisy rather than German innocence.

The Nuremberg trials were not an exercise in thinly camouflaged lynch law, in spite of the fact that the victors were trying the vanquished. Defendants were represented by German attorneys of their choice, many of them highly competent, and were allowed to express themselves freely in their own defense; Hermann Göring did so with great skill, to the embarrassment of American chief prosecutor Robert H. Jackson. Former admiral Karl Dönitz's defense attorney, Otto Kranzbuehler, with the support of U.S. judge Francis Biddle, was allowed to secure and introduce into evidence a statement by U.S. admiral Chester Nimitz attesting to the fact that the United States had employed its submarines in a way no less brutal than had Germany, sinking enemy merchant ships without warning and making no effort to assist survivors. U.S., British, and French judges overruled Soviet objections and permitted defense testimony pointing to the responsibility of the Soviet Union for the killing of thousands of captured Polish officers, whose bodies had been discovered by the Germans in the Katyn Forest in April 1943. That nineteen of the defendants were found guilty and twelve of them sentenced to hang was not because of unfair trial procedures and rulings but because of the overwhelming evidence of their guilt, primarily in the form of some four thousand incriminating official German documents, many of them bearing the signatures of the defendants. Only with the benefit of many years of hindsight is it possible to question the justice of specific verdicts and sentences. Julius Streicher, editor of the virulently anti-Semitic newspaper *Der Stürmer,* had held no official position in the Nazi regime during World War II and seems to have been hanged primarily for his crudely racist ideas and offensive personality. However, the excessive harshness of Streicher's punishment was counterbalanced by the leniency shown to the educated, refined, and seemingly penitent Albert Speer, wartime minister for armaments and war production, who was sentenced to only twenty years in prison. One might, of course, question the fairness of Speer's punishment to the memory of the many thousands of slave laborers who perished in German armaments plants.

The 22 defendants tried by the largely American-devised International Military Tribunal were a tiny fraction of the total number of Germans who stood trial in postwar U.S. courts. An additional 185 defendants were judged in 12 exclusively American proceedings at Nuremberg between 1946 and 1949. These trials dealt with the responsibility of lower-ranking Germans for a wide range of offenses: conducting murderous medical experiments on human subjects; employment of slave labor in industry; the production of poison gas for use in the Holocaust; the perversion of law by jurists; the violation of the laws of war by military commanders; the extermination of Jews by SS killing squads in the Soviet Union; and participation in unleashing aggressive war. The vast majority of Germans tried by U.S. courts, more than 1,600, was tried by army courts in 489 proceedings between 1945 and 1948, most of which were held in the former Nazi concentration camp at Dachau. These cases dealt primarily with the operation of specific concentration camps and the murder of American prisoners of war. It is difficult and dangerous to attempt generalizations on so many trials, but the quality of justice dispensed by the subsequent Nuremberg courts was, as a rule, higher than that of the army tribunals. The subsequent Nuremberg proceedings were conducted before panels of three civilian judges, most of whom were retired justices of state supreme courts. Stanley Kramer's 1961 motion picture, *Judgment at Nuremberg,* and Spencer Tracy's role as the fictional "Judge Dan Haywood" were suggested by Case III, the "Justice Case," in which former Nazi legal officials and judges were tried for having destroyed the moral and ethical content of the German legal system and having used the forms of justice to enslave and exterminate vast numbers of victims. Again, the prosecution built its case largely on documentary evidence that the defendants and their attorneys could hardly refute. Instead, the defendants argued that if they had not been willing to cooperate with

TWENTY-ODD BROKEN MEN

On 21 November 1945 American jurist Robert H. Jackson opened the International Military Tribunal at Nuremberg with an eloquent address. Aside from delineating the charges against the accused, he carefully established the validity of the legal proceedings.

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave 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.

This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times—aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. It is a cause of that magnitude that the United Nations will lay before Your Honors.

In the prisoners' dock sit twenty-odd broken men. . . .

What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. We will show them to be living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life. They have so identified themselves with the philosophies they conceived and with the forces they directed that any tendencies to them is a victory and an encouragement to all the evils which are attached to their names. Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.

Source: *Michael R. Marrus, ed.,* The Nuremberg War Crimes Trial 1945–1946: A Documentary History *(Boston & New York: Bedford, 1997), pp. 79–83.*

Adolf Hitler's regime, people even less principled than they would have taken their place and that, in any case, what they had done was not in violation of existing international law. The judges found the first argument untruthful and illogical, and the second an interpretation of international law that would prevent its necessary development. Four of the defendants were sentenced to life imprisonment, six to shorter terms, and four were acquitted. Those who might have believed that the defendants in the Justice Case had been unfairly victimized by an overly broad understanding of international law were likely to have felt more comfortable with the outcome of Case VII, the "Hostage Case." Here the defendants were twelve high-ranking German army officers accused of having violated the laws of war by killing huge numbers of civilians in reprisal for guerrilla attacks on German forces. One of the defendants had ordered that one hundred Serbs be killed for every German soldier injured or killed by partisans. Even the prosecution conceded that, in some situations, reprisals were justified under the laws of war but argued that the Germans had reacted with disproportionate savagery. The judges showed some sympathy for the difficult problem the defendants had faced in dealing with guerrilla warfare and although expressing abhorrence of the deaths of innocent civilians, argued that it was their responsibility to apply international law as it was written, not as they would like it to be. Two of the defendants were acquitted, while those found guilty were given relatively mild sentences in light of the loss of civilian life that they had caused. Two were given terms of life in prison, and the remaining defendants received sentences of twenty years or less. However one

might regard the verdicts and punishments meted out by the U.S. Nuremberg tribunals, it is beyond serious dispute that the accused received trials in which both law and evidence had been carefully weighed.

The trials conducted by the U.S. Army were in a different category. The numbers of defendants tried were often much larger, and verdicts and punishments were determined by regular army officers, most of whom had no formal legal training. Attorneys serving as prosecutors and defenders often had little or no experience in trying criminal cases. The most controversial of these many trials was held at Dachau in 1946. In what was popularly known as the "Malmedy massacre trial," seventy-three former members of the Waffen-SS (the combat arm of the elite Nazi organization) were tried for their role in the murder of American prisoners of war and Belgian civilians during the Battle of the Bulge (1944–1945). Following deliberation by the army judges that averaged less than two minutes per defendant, all were found guilty and more than half were sentenced to death. Yet, it was alleged by defense attorneys that many of the confessions on which the convictions had been largely based had been gotten from the Germans by beatings and psychological pressure, and there was some credible evidence to support this allegation. The Malmedy massacre trial appeared to be far from fair. However, the judges did not have the last word on the fate of the defendants. Both the subsequent Nuremberg trials and the Dachau trials were subject to reviews in which the fairness of the proceedings and the appropriateness of punishments were examined. As a result, many sentences were substantially reduced. In the case of the Malmedy massacre trial, all of the death sentences were eventually commuted to prison terms, and prison terms were, themselves, later shortened. By the end of 1956 all of the Malmedy defendants had been set free. Sentences in many trials were commuted in an effort to be fair to Germans whose guilt, in some cases, appeared to be less glaring as wartime emotions cooled. It is also clear that part of the motivation behind the reduction of sentences by United States authorities was to improve relations with West Germany, which came to be regarded as an important ally against the Soviet Union in the escalating Cold War.

At the start of the first Nuremberg trial, Jackson observed that the willingness of the United States and its allies to "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." At Nuremberg and in the hundreds of American trials that followed, vengeance and incompetence occasionally held their own against reason, but the system of American war-crimes justice moved cautiously and with restraint, and questionable verdicts and sentences were often substantively corrected in the post-trial review process. In light of the magnitude of the program, the complexity of the undertaking, and the overwhelming horror of Nazi Germany's offenses, the trials as a whole were fair.

–JAMES J. WEINGARTNER,
SOUTHERN ILLINOIS UNIVERSITY

Viewpoint:
No. In spite of charges of victors' justice and the questionable inclusion of Soviet judges, the Nuremberg trials were fair.

Perhaps the single greatest criticism of the International Military Tribunal (IMT) at Nuremberg involved the charge of victors' justice. Compounding that issue was the inclusion of the Soviet Union as a member of that judicial tribunal, especially in light of certain shadows that hovered above the record of Soviet activities from 1939 to 1945. Were the victors entitled to accuse and try the vanquished just because they had won, especially when at least one of those victors might have itself been guilty of equally horrendous crimes? Generally, an argument could be made that both Allied and Axis powers had committed atrocities during World War II (1939–1945) and more particularly that the U.S.S.R.'s aggression against Finland, Latvia, Estonia, Lithuania, and Poland, the latter three through secret alliance with Nazi Germany, certainly strained the credibility of that state as a prosecutor for war crimes at Nuremberg.

Many questions surfaced regarding the inclusion of the Soviet Union in a war-crimes tribunal, not the least among which were accusations of Soviet crimes of war (for example, the Katyn Forest massacre of 1940), rising postwar political tensions, fear of Soviet attempts to hijack the legal process, and apprehension that their presence would substantiate criticism of the process as simple victors' justice rather than a fair and impartial hearing on Nazi war crimes.

Yet, in fact, the rationale for inclusion of the Soviet Union, along with the United States, the United Kingdom, and France, was equally compelling. Exclusion could have been used by Moscow as an anti-Western propaganda tool, which would certainly have undermined the integrity of the IMT process. Exclusion would clearly have violated wartime agreements and policies established for the postwar period. Exclusion would

have been counter to President Franklin D. Roosevelt's postwar intentions of containment by integration regarding the Soviet Union. Inclusion involved the Soviets in an international process concerning the accused, thus preventing an unlimited, unilateral system of victor's revenge by the Soviet Union that was almost certain to have followed. Above all, inclusion was justified by the Soviet Union's war record and the unparalleled losses suffered by the Soviets at the hands of the Nazis. Finally, inclusion represented a clear attempt on the part of the Allies at international justice, even though the membership of the tribunal, out of necessity, had to be limited to only four states. Inclusion of the U.S.S.R. certainly complicated the process but was necessary to the cause of justice.

The issue of inclusion of the U.S.S.R. as a member of the IMT became more of a controversy from the perspective of the late twentieth and early twenty-first centuries than it was in 1945. As the tribunal process took form and unfolded, there were certainly procedural problems with the Soviets, but the larger question of inclusion seems to have been a moot point, even with the suggestion that it might aggravate the claim of victors' justice. More-immediate concerns arose about differences in judicial philosophies and personalities. However, the former were smoothed over, and oddly, on an individual level, the Soviets proved to be "charming, courteous and friendly." Even later, when serious doubts were raised as Soviet policies were scrutinized, the tendency was to focus on the issues at hand, accusations of Nazi war crimes.

That there was to be a tribunal of any kind was not settled until 1945, and, curiously, it was the Soviets who insisted on a legal framework. As late as that year there was still a good deal of support for the idea of simply shooting Nazi leaders as they were captured. The semblance of a Carthaginian peace, in this instance, was not rejected completely by either Roosevelt or Winston Churchill. Indeed, it seems to have been Joseph Stalin's insistence that there must be trials and that "they should not be rigged," that convinced Churchill, who had traveled to Moscow in October 1944, of the necessity of a trial. According to historian Martin Gilbert, it was to be "a judicial rather than a political act." Roosevelt later responded that "it should not be too judicial." He did not want to involve the press and photographers until the guilty were dead.

The notion of a judicial framework had already appeared but with no designation regarding membership. In 1941 representatives from nine European governments in exile established an "Inter-Allied Commission on the Punishment of War Crimes" and issued from London the so-called Declaration of St. James, which insisted on "the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes." Reference to a legal tribunal was also made in the Moscow Declaration (1 November 1943) and at two wartime conventions, the Teheran Conference (November 1943) and the Yalta Conference (February 1945). In all of the latter three cases there was no question that the U.S.S.R. would be an equal participant in a legal solution to Nazis accused of war crimes. In those days how could there be a question? Stalin and the Soviet Union were integral parts of "The Big Three" along with Churchill and Great Britain and Roosevelt and the United States. Moreover, the Soviets had incurred substantial losses at the hands of the Nazis, much of this loss clearly in the form of what was suspected as war crimes, and to an extent equal to or surpassing any of the other Allies. Beyond those difficulties, exclusion would have meant breaking major agreements made at Teheran and Yalta.

The first actual meeting of the legal representatives of the victorious Allies took place in London, July 1945, the so-called London Conference. Four Allied states were present with the addition of France. Brief as it was, the conference marked the first meetings, and disagreements, between the national delegations. Compromises were made concerning charges and procedure, but no serious consideration was given to treating the Soviet Union as anything but an equal partner. The culmination of all of the general discussions concerning a legal solution was the Charter of the International Military Tribunal signed on 8 August 1945 forming the basis for the "just and prompt trial and punishment of the major war criminals of the European Axis." Article I of that document listed the United States, the United Kingdom, France, and the Soviet Union as the tribunal's four members. There was no major controversy.

No less important than these formal agreements were the intentions of President Roosevelt. Beyond the obvious practicality of retaining the U.S.S.R. as an ally against Germany and gaining its help against Japan, Roosevelt unfolded a policy of integration with Stalin and the Soviet Union for the sake of a stable postwar world. Put simply, if Stalin and the Soviets were made fundamental participants in the postwar order, they would be less inclined to cause trouble. Inclusion of the Soviets in the legal solution was a necessary part of Roosevelt's policy of containment by integration. Despite the president's death (12 April 1945), that policy held, at least as regarded the IMT.

Beyond the essential importance of integrating the Soviets into an accepted Allied legal solution, the Soviet presence on the IMT, more or less, prevented the Soviet Union from initiat-

ing a national campaign of revenge through national trials and procedures that clearly would have taken place and would have amounted to victors' justice of the worst kind, rigged show trials akin to Stalin's purges of the 1930s. The potential for Soviet excesses (indeed, extreme behavior by any of the four members) was checked by participation in the tribunal. The bare semblance of an international tribunal was also strengthened by the inclusion of the Soviets. Anglo-American law, Continental European law, and Soviet law all contributed to the legal basis of the tribunal. It was certainly not a universal representation, but it was clearly diverse enough to be called international.

Finally, embryonic Cold War suspicions also came into play. Exclusion of the Soviet Union almost certainly would have been used by the Soviets to discredit the tribunal and the western democracies. And from the beginning the American, British, and French members of the tribunal feared a Soviet attempt to hijack the proceedings legally. Curiously, it seems, the Soviets were even more afraid of an Anglo-American effort to control the trial entirely.

More than any of the other three Allies on the tribunal, the Soviets were themselves vulnerable to accusations of war crimes that both questioned their presence on the tribunal and clearly gave substance to accusations of victors' justice. The potential extent of those suspicions nearly impeached the Allied prosecution when the Soviets unwisely attempted to further the case against the Nazis by reference to the discovery of the bodies of some eleven thousand Polish military officers found in mass graves in the Katyn Forest. Only in the 1990s would the former Soviet Union acknowledge Soviet guilt in the Katyn massacre, but during the Nuremberg trials the evidence was ambiguous enough that the tribunal determined to drop the question. The guilt of the Axis prisoners was, after all, the issue at hand for the tribunal. Testimony by American admiral Chester M. Nimitz, procured by the defense in the case of German admiral Karl Dönitz, clearly suggested that acts involving the survivors of ships attacked by submarines, portrayed as crimes of war by the prosecution, were committed by the Allies as well in other theaters of the war, further suggesting victors' justice. As victors, the prosecution had the distinct advantage of determining the focus of the tribunal, which, in reflection on the previous examples, was substantial.

General debate over the question of victors' justice will, no doubt, continue, and for good reason. The judgment of the IMT at Nuremberg can be justified by the absence of an alternative legal apparatus and by the magnitude of the crimes committed by individuals acting on behalf of the Nazi State that demanded legal action. The argument that the judgment was flawed, "good justice but bad law," is generally conceded. In hindsight, one of the most prescient justifications for the tribunal was written at the time by Professor A. N. Trainin, a Russian legal authority: "There might come a time when there will be a permanent international tribunal of the United Nations organization to try all violations of international law." In the absence of such a platform he argued that the IMT "has a definite purpose in view, that is, to try criminals of the European Axis." The more particular question of whether inclusion of the Soviet Union on the IMT added substance to that accusation is a different matter. From the perspective of 1945, there was no question that the Soviets would be part of the legal proceedings: they were long-suffering members of the victorious alliance, and indeed a legal course of action was in large part at their insistence. From that perspective, the IMT represented not a collection of vengeful allies so much as a symbol of vain hopes for a united postwar world. Despite the issue of victors' justice, the IMT represented one of the few successful acts of a truly united postwar world until 1991 and the beginning of the breakup of the U.S.S.R. The inclusion of the Soviet Union as a member of the IMT was fundamental to that success.

–G. MICHAEL STATHIS,
SOUTHERN UTAH UNIVERSITY

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