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The Holocaust at Nuremberg: What the Record Reveals

MICHAEL J. BAZYLER*

I. INTRODUCTION

Historians continue to debate the degree to which the International Military Tribunal (“IMT”) proceedings at Nuremberg concerned the Holocaust. Everyone agrees that the atrocities committed against Jews were *not* the main object of the trial. Historian Gary Bass aptly sums up the dichotomy between how Nuremberg is remembered today and the actual reason why the IMT was created: “[I]t is often forgotten that the Allied efforts to punish Germany were undertaken mostly out of anger at the Nazi instigation of World War II.”¹ He adds:

One of the great ironies of Nuremberg’s legacy is that the tribunal is remembered as a product of Allied horror at the Holocaust, when in fact America and Britain, the two liberal countries that played major roles in deciding what Nuremberg would be, actually focused far more on the criminality of Nazi aggression than on the Holocaust.²

The official goal of the Allies was to do what was necessary to end the war and bring about a complete peace between the belligerents. Once the war ended and the top Nazis were put on trial at Nuremberg, they were not tried for the mass murder of the Jews. Rebecca West, reporting from Nuremberg to the British public for the *Daily Telegraph*, completely omitted the Jewish victims. As Margaret Stetz points out: “Not once does West speak of the suffering of the Jews as targets of organized genocide. The voices of the Jewish dead go unheard in her re-

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1. GARY J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 148 (Princeton Univ. Press 2000) (footnote omitted).

2. *Id.*

porting.”³

The Russian and French prosecutors responsible for getting convictions for crimes against humanity, the criminal court where mass murder of Jews fits best, introduced evidence of the persecution of the Jews as part of their case. That was inevitable since the Nazi obsession with their “Jewish Problem” made it impossible to ignore when presenting the case against Göring, Streicher, Frank, Rosenberg, et al. So many of the “smoking gun” documents used against the defendants had the word Jew — *Jude* — all over the place. Nevertheless, of the approximately seventeen thousand transcript pages recording the proceedings of the first Nuremberg trial, only a small portion dealt with the murder of the Jews.

In recent years, there has been much debate about the impact of the IMT trial and the subsequent twelve Nuremberg proceedings before American judges on the historiography of the Holocaust. Two of the most prominent disputants have been Holocaust historians Michael Marrus and Donald Bloxham. Michael Marrus, in his own words, argues that “notwithstanding the centrality of other issues in the American trial plan, the varied objectives of the Allied powers and the eventual outcome of the proceedings, Nuremberg was a major landmark in the presentation of the dreadful fate of the Jewish people at the hands of the Nazis.”⁴ He adds: “At Nuremberg, the Jewish case was overwhelming, and largely unchallenged. . . . [M]ore than 800 Nazi documents and the testimony of thirty-three witnesses were devoted, in whole or in part, to the question.”⁵

3. Margaret D. Stetz, *Rebecca West and the Nuremberg Trials*, 13 PEACE REVIEW 229, 234 (2001).

4. Michael R. Marrus, *A Jewish Lobby at Nuremberg: Jacob Robinson and the Institute of Jewish Affairs, 1945-1946*, 27 CARDOZO L. REV. 1651 (2006). For an excellent account of three Jewish advocates at Nuremberg: Hersh Lauterpacht, Raphael Lemkin, and Jacob Robinson, see Michael R. Marrus, *Three Roads From Nuremberg*, TABLET, Nov. 20, 2015. Marrus explains: “Each of them was a lawyer; each was an émigré from an Eastern Europe ravaged by the slaughter of Jewish people during the war, and each, in his own way, drew an important conclusion drawn from the catastrophe that his community of origin had undergone. . . . At Nuremberg, each man offered a different perspective on the Jewish catastrophe. And to an important degree, they stand for three directions that continue to be followed to this day: Robinson was concerned with what he called ‘the Jewish case,’ while Lemkin’s focus was on genocide and Lauterpacht’s was on human rights.” *Id.*

5. Michael R. Marrus, *The Holocaust at Nuremberg*, 26 YAD VASHEM STUD. 1, 3–4, 31–32 (1998). The Wiener Library in London has twenty-nine boxes of exhibits collected from the IMT trial, and all translated into English, which pertain directly to the persecution of the Jews. The documents are divided into four categories, also available in digital form, and identified as follows:

In contrast, Bloxham contends that the IMT trial and the subsequent Nuremberg trials failed to adequately represent the nature of Jewish suffering and ultimately provided a disservice to the memory of the Holocaust. According to Bloxham:

The war crimes trials did little to clarify the conceptualization of Nazi criminality in the public sphere anywhere. Sometimes they actually muddied the waters by drawing attention away from the victims of Nazi genocide and onto much more ambiguous symbols of suffering. Indeed, the trials had the peculiar effect of helping to elide the fate of the [Jewish] victims.⁶

My objective is not to enter this debate.⁷ Rather, as my contribution to this symposium, I aim to show that during the IMT trial, the genocide of the Jews—later commonly known as the Holocaust—was a running theme of the Nuremberg trial. Those who examine the IMT proceedings will find much about the fate of Jewish people in territories under Nazi occupation. However, as I have acknowledged in another work, “[t]he focus of the IMT trial was *not* the Jewish genocide.”⁸

To illustrate my point, I will examine each stage of the IMT proceedings.

Section A: "Racism and Antisemitic Propaganda" (Including: Anti-Jewish research. Indoctrination. Promotion of anti-Semitism abroad. Denial of anti-Jewish activities. Reactions to the foregoing).

Section B: "Discrimination" (Including: Stigmatisation. Disfranchisement. Segregation. Denial of justice. Forced emigration. Collective fines. Boycott April 1933. November Pogrom 1938. Status of ‘Non-Aryans’ and partners of ‘mixed marriages’. Reactions to the foregoing).

Section D [sic]: "The Final Solution" (including: Registration and arrests for extermination purposes. Deportation. Executions. Mass extermination. Prevention of emigration. Barter with Jewish lives. Intervention on behalf of Jews. Reaction to the foregoing). 1655/1579-2578a; "Post-War Testimonies and Reports" 1655/2581a-2820.

Section E [sic]: "Life in Camps and Ghettos" (Including: Slave Labour, Medical Experiments, Euthanasia and Resistance).

6. DONALD BLOXHAM, *GENOCIDE ON TRIAL: WAR CRIME TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 2* (Oxford Univ. Press 2001).

7. Laura Jockusch has also provided valuable input with her research and analysis. See Laura Jockusch, *Justice at Nuremberg?: Jewish Responses to Nazi War-Crime Trials in Allied Occupied Germany*, 19 *JEWISH SOC. STUD* 107 (2012).

8. MICHAEL J. BAZYLER & FRANK M. TUERKHEIMER, *FORGOTTEN TRIALS OF THE HOLOCAUST 3* (N.Y. Univ. Press 2014). Jockusch also points to another omission in the historiography of the Nuremberg proceeding which she and Michael Marrus seek to correct: “[I]t is a striking fact that so far historians of Allied postwar justice have mainly focused on Jews as the Nazis’ *murdered victims*. As Holocaust *survivors*, *actors*, and *agents*, Jews have received little to no attention in the scholarship on Nuremberg.” Jockusch, *supra* note 7, at 110. And she concludes: “The presence of the [many] Jewish actors at the Palace of Justice clearly complicates the claim of Jewish absence and marginality at Nuremberg.” *Id.* at 119.

II. PREPARING FOR TRIAL

A. Wartime

During the war, the Allies became aware of the mass killings of Jews and, subsequently, the extermination camps in German-occupied Poland. While not much was publicly said about the mass killings, there were official mentions. For example, on December 17, 1942, British Foreign Secretary Anthony Eden issued a statement on behalf of eleven Allied governments, including the United States and the Soviet Union:

The attention of the Governments of Belgium, Czechoslovakia, Greece, the Netherlands, Norway, Poland, the United States of America, Great Britain, the U.S.S.R., Yugoslavia, and the French National Committee, has been drawn to numerous reports from Europe, that the German authorities, not content with denying to persons of Jewish race in all territories over which their barbarous rule has been extended the most elementary human rights, are now carrying into effect Hitler's oft-repeated intention to exterminate the Jewish people in Europe. From all the occupied countries, Jews are being transported, in conditions of appalling horror and brutality, to Eastern Europe and Poland which has been made the principal Nazi slaughterhouse. The Ghettos established by the German invaders are being systematically emptied of all Jews except a few highly skilled workers required for war industries. None of those taken away are ever heard of again. The able-bodied are slowly worked to death in labour camps, the infirm are left to die of exposure or starvation, or are deliberately massacred in mass-executions. The number of victims of these bloody cruelties is reckoned in many hundreds and thousands of entirely innocent men, women and children.

The above-mentioned Governments, and the French National Committee, condemn in the strongest possible terms this bestial policy of cold-blooded extermination. They declare that such events can only strengthen the resolve of all freedom-loving peoples to overthrow the barbarous Hitlerite tyranny. They reaffirm their solemn resolution to ensure that those responsible for these crimes shall not escape retribution, and to press on with the necessary practical measures to this end.⁹

The "Joint Declaration on Germany's Cold-Blooded Extermination of Jews in Europe" was read in the House of Commons and U.S. Con-

9. Joint Declaration on Germany's Cold-Blooded Extermination of Jews in Europe, Declaration (Dec. 17, 1942), *in* THE MASS EXTERMINATION OF JEWS IN GERMAN OCCUPIED POLAND 12 (Hutchinson & Co. 1942) (emphasis added).

gress, and widely reported by the American and British press and radio. Ten days earlier, the Polish government, in-exile in London, publicly issued a Note titled, “The Mass Extermination of Jews in Occupied Poland.”¹⁰ The Introduction to the Note explains:

In the Note of May 3rd, 1941, presented to the Governments of the Allied and Neutral Powers, the Polish Government gave a comprehensive survey of the acts of violence perpetrated against the population of Poland, of offences against religion and cultural heritage and destruction of property in Poland. An extract of this Note, together with a large amount of corroborating material, has been published in the form of a White Book.

Since the publication of the White Book, however, many increasingly brutal acts of violence and terror have been committed by German authorities in Poland. In recent months these persecutions have been directed with particular violence against the Jewish population, who have been subjected to new methods calculated to bring about the complete extermination of the Jews, in conformity with the public statements made by the leaders of Germany.

In the hope that civilized world will draw the appropriate conclusions, the Polish Government desire [sic] to bring to the notice of the public, by means of the present White Paper, these renewed German efforts at mass extermination, with the employment of fresh horrifying methods.¹¹

An English publisher distributed the twenty-eight-page Note (including appendices) as a handbook. As to the number of Jews that already been killed by that time, the Note concludes:

It is not possible to estimate the exact numbers of Jews who have been exterminated in Poland since the occupation of the country by the armed forces of the German Reich. But all the reports agree that the total number of killed [sic] runs into many hundreds of thousands of innocent victims—men, women and children—and that of the 3,130,000 Jews in Poland before the outbreak of war, over a third have perished during the last three years.¹²

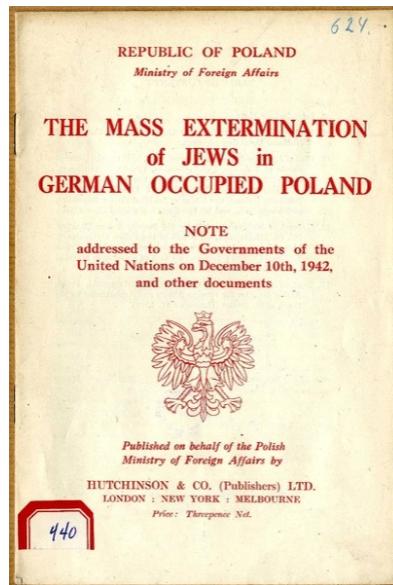
10. See generally Note from Edward Raczynski, Minister of Foreign Affairs, Republic of Poland, to the Governments of the United Nations (Dec. 10, 1942), in *THE MASS EXTERMINATION OF JEWS IN GERMAN OCCUPIED POLAND* 4 (Hutchinson & Co. 1942) (emphasis added). To put the Declaration and Note into perspective, they were issued eleven months after the Wannsee Conference of January 20, 1942, where heads of the main German ministries were secretly informed by Reinhard Heydrich, head of the Reich Security Head Office (RSHA), of the Nazi plan to murder all eleven million Jews of Europe.

11. *Id.* at 3 (emphasis added).

12. *Id.* at 10 (emphasis added).

The eventual fate of the Jewish population of Poland was far worse. Of the 3.3 million Polish Jews, only ten percent ultimately survived.¹³ John Michalczyk quotes from an interview with Jan Karski, a non-Jewish Polish diplomat who personally witnessed the brutalities committed by Germans against Polish Jews in German-occupied Poland, that he, Karski, could not get the world to believe what he had witnessed. Karski recalled the response he received from U.S. Supreme Court Justice Felix Frankfurter, a distinguished Jewish-American jurist:

Young man, I am no longer young. Men like me and you must be totally honest. And I am telling you: I don't believe you . . . My mind and my heart are made in such a way that I cannot accept it. No! No! No! I am a judge of men. I know humanity. I know men. It is impossible.¹⁴



B. Trial Preparation

During trial preparations, American prosecutors focused on prose-

13. At the time the Note was issued, one million Polish Jews had already been murdered, but there were still two million Jews alive in Poland, although living in desperate circumstances. Two more million perished afterward. See HALIK KOCHANSKI, *THE EAGLE UNBOWED: POLAND AND THE POLES IN THE SECOND WORLD WAR* xxii (Harv. Univ. Press 2012).

14. JOHN J. MICHALCZYK, *FILMING THE END OF THE HOLOCAUST: ALLIED DOCUMENTARIES, NUREMBERG AND THE LIBERATION OF THE CONCENTRATION CAMPS* 16 (Bloomsbury 2014).

cuting the defendants for the killing of various victim groups, including the Jews. Marrus explains:

As part of their preparation for the London meeting, the American prosecutorial team produced several drafts of the offenses with which the Nuremberg defendants were to be charged. The challenge here was to engage the full range of Nazi criminality, including not only aggressive wars and breaches of the “laws and customs of war,” but also “atrocities and persecutions,” as they were frequently termed. These barbarities were understood to be integral to Nazism and thus might have been sanctioned by German law at the time. Repeatedly, the American drafts referred to “persecutions on racial or religious grounds”—language, once again, that found its way into Article 6(c). As Jackson explained, he had been specifically urged by émigré groups to prosecute crimes “committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.”¹⁵

On the British side, one of the major proponents of holding a criminal trial was the brilliant legal scholar Hersch Lauterpacht. An Eastern European-born Jew who immigrated to Britain before the start of the war and went on to be knighted by the Queen, Lauterpacht was schooled in interwar Poland, and later in Vienna. By the time of the war, Lauterpacht held the prestigious chair as the Whewell Professor of Law at Cambridge University. Writing in 1942, he argued that for international law of war to have any meaning, it must be enforced when violated.¹⁶ According to Marrus, Lauterpacht “had strongly pressed for a war-crimes trial in 1943 and . . . had been keen to have the court consider atrocities committed against European Jewry.”¹⁷

In the Soviet Union, another Jewish law scholar, Professor Aron Trainin of Moscow University, set out the legal underpinning for putting the leading Nazis on trial for violating international law. Trainin’s 1944 text, *Hitlerite Responsibility Under Criminal Law*,¹⁸ was translated into English and widely read and studied by those who later created the tribunal at Nuremberg. Trainin, however, as far as we know, never

15. *The Holocaust at Nuremberg*, *supra* note 5, at 6.

16. 5 HERSCH LAUTERPACHT, INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT: WAR AND NEUTRALITY, PARTS IX–XIV, at 491–92 (Sir Elihu Lauterpacht ed., Cambridge Univ. Press 2004).

17. *The Holocaust at Nuremberg*, *supra* note 5, at 6–7.

18. See generally A.N. TRAININ, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW (A.Y. Vishinski ed., Andrew Rothstein trans., Hutchinson & Co. 1945) (the book was also translated into French and German).

pressed for a trial focused on the murder of the Jews.

C. *The Trial Indictment*

The pre-trial Indictment speaks in Count One (titled “The Common Plan or Conspiracy”) of the conspirators’ “program of relentless persecution of the Jews, designed to exterminate them,” and concludes: “[I]t is conservatively estimated that 5,700,000 have disappeared, most of them deliberately put to death by the Nazi conspirators. Only remnants of the Jewish population remain.”¹⁹ The entire Section D(3)(d) of the Indictment reads:

Implementing their “master race” policy, the [Nazi] conspirators joined in a program of relentless persecution of the Jews, designed to exterminate them. Annihilation of the Jews became an official State policy, carried out both by official action and by incitements to mob and individual violence. The conspirators openly avowed their purpose. For example, the Defendant ROSENBERG stated: “Anti-Semitism is the unifying element of the reconstruction of Germany.” On another occasion he also stated: “Germany will regard the Jewish question as solved only after the very last Jew has left the greater German living space . . . Europe will have its Jewish question solved only after the very last Jew has left the Continent.” The Defendant LEY declared: “We swear we are not going to abandon the struggle until the last Jew in Europe has been exterminated and is actually dead. It is not enough to isolate the Jewish enemy of mankind—the Jew has got to be exterminated.” On another occasion he also declared: “The second German secret weapon is anti-Semitism because if it is consistently pursued by Germany, it will become a universal problem which all nations will be forced to consider.” The Defendant STREICHER declared: “The sun will not shine on the nations of the earth until the last Jew is dead.” These avowals and incitements were typical of the declaration of the Nazi conspirators throughout the course of their conspiracy. The program of action against the Jews included disfranchisement, stigmatization, denial of civil rights, subjecting their persons and property to violence, deportation, enslavement, enforced labor, starvation, murder, and mass extermination. The extent to which the conspirators succeeded in their purpose can only be estimated, but the annihilation was substantially complete in many localities of Europe. *Of the 9,600,000 Jews who*

19. *Indictment*, VOL. I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 34 (Nuremberg, 1947).

*lived in the parts of Europe under Nazi domination, it is conservatively estimated that 5,700,000 have disappeared, most of them deliberately put to death by the Nazi conspirators. Only remnants of the Jewish population of Europe remain.*²⁰

III. AT TRIAL

A. Jackson's Opening Address

The extermination of the Jews was part of Jackson's Opening Statement, and it included a separate section titled "Crimes Against the Jews":

Let there be no misunderstanding about the charge of persecuting Jews. What we charge against these defendants is not those arrogances and pretensions which frequently accompany the intermingling of different peoples and which are likely, despite the honest efforts of government, to produce regrettable crimes and convulsions. It is my purpose to show a plan and design, to which all Nazis were fanatically committed, to annihilate all Jewish people. These crimes were organized and promoted by the Party leadership, executed and protected by the Nazi officials, as we shall convince you by written orders of the Secret State police itself.

The persecution of the Jews was a continuous and deliberate policy.²¹

Jackson summarized the measures taken against the Jewish populations of German-occupied territories:

As the German frontiers were expanded by war, so the campaign against the Jews expanded. The Nazi plan never was limited to extermination in Germany; always it contemplated extinguishing the Jew in Europe and often in the world. In the west, the Jews were killed and their property taken over. But the campaign achieved its zenith of savagery in the East. The Eastern Jew has suffered as no people ever suffered. Their sufferings were carefully reported to the Nazi authorities to show faithful adherence to the Nazi design. I shall only refer to enough of the evidence of these to show the extent of the Nazi design for killing Jews.

If I should recite these horrors in words of my own, you would

20. *Id.* at 33–34 (emphasis added). The other three counts—crimes against peace, crimes against humanity and war crimes—also mentioned crimes against Jews. Jockusch, *supra* note 7, at 109.

21. *Second Day, Wednesday, 21 November 1945*, II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 118 (Nuremberg, 1947) (Opening Statement of Justice Robert Jackson).

think of me as intemperate and unreliable. Fortunately, we need not take the word of any witness but the Germans themselves. I invite you now to look at a few of the vast number of captured German orders and reports that will be offered in evidence, to see what a Nazi invasion meant. . . .

. . . .

I shall not dwell on this subject longer than to quote one more sickening document which evidences the planned and systematic character of the Jewish persecutions. I hold a report written with Teutonic devotion to detail, illustrated with photographs to authenticate its almost incredible text, and beautifully bound in leather with the loving care bestowed on a proud work. It is the original report of the SS Brigadier General Stroop in charge of the destruction of the Warsaw Ghetto, and its title page carried the inscription, "The Jewish Ghetto in Warsaw no longer exists." It is characteristic that one of the captions explains that the photograph concerned shows the driving out of Jewish 'bandits'; those whom the photograph shows being driven out are almost entirely women and little children. It contains a day-by-day account of the killings mainly carried out by the SS organization. . . .

We charge that all atrocities against Jews were the manifestation and culmination of the Nazi plan to which every defendant here was a party. I know very well that some of these men did take steps to spare some particular Jew for some personal reason from the horrors that awaited the unrescued Jew. Some protested that particular atrocities were excessive, and discredited the general policy. While a few defendants may show efforts to make specific exceptions to the policy of Jewish extermination, I have found no instance in which any defendant opposed the policy itself or sought to revoke or even modify it.

Determination to destroy the Jews was a binding force which at all times cemented the elements of this conspiracy. On many internal policies there were differences among the defendants. But there is not one of them who has not echoed the rallying cry of [N]azism: "*Deutschland Erwache, Juda Verrecke!*" (Germany Awake, Jewry Perish!).²²

According to Jackson:

Five million seven hundred thousand Jews are missing from the countries in which they formerly lived, and over 4,500,000 cannot be accounted for by the normal death rate nor by immigration; nor are they included among displaced persons. History does not record

22. *Id.* at 123–27 (emphasis added).

a crime ever perpetrated against so many victims or one ever carried out with such calculated cruelty.²³

B. Witnesses for the Prosecution

During the trial, the prosecutors presented considerable evidence about the mass murder of the Jews, including witness evidence. In all, 240 witnesses testified, many through sworn declarations, and 2,630 documents were entered into evidence. Many of these referred to the extermination and persecution of the Jews.²⁴ SS General Otto Ohlendorf testified that his instructions as a commander of an *Einsatzgruppen* unit was to “liquidate” all Jews his men encountered. In addition, Ohlendorf acknowledged responsibility for the murder of ninety thousand Jews in the Ukraine.

On January 3, 1946, prosecutors called SS Officer Dieter Wisliceny to the stand. Wisliceny, an Eichmann associate, described how he had helped to organize the deportation of Jews to extermination camps.

LT. COL. BROOKHART: . . . What became of the [Hungarian] Jews to whom you already referred—approximately 450,000?

WISLICENY: They were, without exception, taken to Auschwitz and brought to the final solution.

LT. COL. BROOKHART: Do you mean they were killed?

WISLICENY: Yes, with exception of perhaps 25 to 30 percent who were used for labor purposes.²⁵

Wisliceny also testified about the extermination policy, as it was related to him by Eichmann:

LT. COL. BROOKHART: Was any question asked by you as to the meaning of the words “final solution” as used in the order?

WISLICENY: Eichmann went on to explain to me what was meant by this. He said that the planned biological annihilation of the

23. *Id.* at 119. The figure of 5.7 million came from calculations by the World Jewish Congress, provided to Justice Jackson. Jockusch, *supra* note 7, at 115.

24. According to Jockusch, “94 witnesses [] spoke in the courtroom—30 of them also testifying on crimes against Jews—[but] only three Jew[ish]” witnesses. Jockusch, *supra*, note 7, at 108. Why the lack of Jewish witnesses? Jockusch gives the obvious answer: In the minds of the Allied prosecutors, “Jewish witnesses might be more vengeful and less reliable than others, thus providing more harm than benefit.” *Id.* at 122.

25. *Twenty-sixth Day, Thursday, 3 January 1946, Afternoon Session*, IV TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 369 (Nuremberg, 1947) (testimony of Dieter Wisliceny). After Nuremberg, Wisliceny was turned over to the Czechs for trial, found guilty, and then hanged.

Jewish race in the Eastern Territories was disguised by concept and wording "final solution."

LT. COL. BROOKHART: Did you make any comment to Eichmann about his authority?

WISLICENY: Yes. It was perfectly clear to me that this order spelled death to millions of people. I said to Eichmann, "God grant that our enemies never have the opportunity of doing the same to the German people," in reply to which Eichmann told me not to be sentimental; it was an order of the Führer's and would have to be carried out.

LT. COL. BROOKHART: Do you know whether that order continued in force and under the operation of Eichmann's department?

WISLICENY: Yes.

LT. COL. BROOKHART: How long?

WISLICENY: This order was in force until October 1944. At that time Himmler gave a counter order which forbade the annihilation of the Jews.

LT. COL. BROOKHART: Who was the Chief of the *Reichssicherheitshauptamt* at the time the order was first issued?

WISLICENY: That would be Heydrich.

LT. COL. BROOKHART: Did the program under this order continue with equal force under Kaltenbrunner?

WISLICENY: Yes; there was no diminution or change of any kind.²⁶

Wilhelm Höttl, who held a significant position within the SS, testified by affidavit as to the estimated number of Jews that were killed. His estimate was approximately four million deaths from various concentration camps and another two million from other methods, such as the Gestapo and mobile killing units. The estimated numbers, according to Höttl's affidavit, came directly from Adolf Eichmann. Eichmann had prepared a report for Himmler since Himmler was curious to know the exact number of Jews killed. Eichmann told Höttl, even though the number was supposed to be a Reich secret.

Erich von dem bach Zelewski was a General of the *Waffen-SS* and later became the Chief of Anti-Partisan Combat Units in the East. Zelewski testified to the unnecessary killing of large civilian populations in the East. Zelewski also testified that the principal task of the *Einsatzgruppen* and SS units was the annihilation of the Jews, gypsies, and political commissars in the region.

26. *Id.* at 359-60.

On April 15, 1946, Rudolf Höss, Commandant of Auschwitz, testified.²⁷ Höss was put on the stand by defense counsel to describe the actions of Ernst Kaltenbrunner; however, this decision badly misfired. Instead of helping Kaltenbrunner, Höss, speaking directly and matter-of-factly, implicated not only *Gestapo* Chief Kaltenbrunner, but also a number of the other defendants for their actions at Auschwitz as they related to the extermination of Jews and other victims.

As part of their evidence of the Nazis' "crimes against humanity," the Russian prosecution submitted data concerning the extermination of hundreds of thousands of Jews in the Baltic countries. They also put on the stand two live witnesses, both Jewish, who provided eyewitness accounts of the extermination of Jews in both Poland and Lithuania.²⁸

Samuel Reizman (or Rajzman), one of the Jewish organizers of the revolt in the Treblinka death camp, testified that Treblinka had thirteen gas chambers in which Jews were executed. Most persons sent there, he said, were murdered within ten minutes of their arrival.

27. See generally *One Hundred and Eighth Day, Monday 15 April 1946, Morning Session, XI TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946*, at 396–422 (Nuremberg, 1947) (testimony of Rudolf Höess).

28. See generally *One Hundred and Ninty-seventh Day, Wednesday, 7 August 1946, Afternoon Session, XX TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946*, at 484–86 (Nuremberg, 1947) (testimony of Izrael Eizenberg). In total, only three Jews testified as live witnesses before the IMT. In addition to the two Jewish survivors put on the stand by the Soviet team on February 27, 1946 (Samuel Reizman and Abraham Sutzkever), a third Jewish witness, Izrael Eizenberg, was put on the stand by the British on August 7, 1946. Eizenberg was a Polish Jew now residing in occupied Germany who had earlier survived the massacres of Jews in the Lublin district. Eizenberg's direct testimony was quite brief and was meant to prove that the SS committed murders of civilians. Eizenberg earlier had given more detailed testimony through an affidavit. Eizenberg was questioned by F. Elwyn Jones, a junior British prosecutor.

MAJOR JONES: Witness, I notice you have a scar on your face. Will you tell the Tribunal how it was caused?

EIZENBERG: Yes, I can tell the Tribunal. In October 1942—at the end of October 1942—I was shot at in Maidanek Camp together with many other Jews. The bullet hit my left cheek and I lay there from 9:30 in the evening until 4:30 in the morning. When people were removing the corpses, I was taken away with another man whose name was Stagel; we were the only survivors.

MAJOR JONES: And how many were killed on that occasion?

EIZENBERG: At 9:30 in the evening groups composed of about 1,000 or more people were conducted to a field. I was among them. Then they fired at us and I remained, lying on the field until 4:30 in the morning.

MAJOR JONES: Now, just answer this last question, who were the killers?

EIZENBERG: They were SS men in SS uniforms.

MAJOR JONES: I have no further questions, My Lord.

RAJZMAN: Transports arrived there every day; their number depended on the number of trains arriving; sometimes three, four, or five trains filled exclusively with Jews—from Czechoslovakia, Germany, Greece, and Poland. Immediately after their arrival, the people had to leave the trains in 5 minutes and line up on the platform. All those who were driven from the cars were divided into groups—men, children, and women, all separate. They were all forced to strip immediately, and this procedure continued under the lashes of the German guards' whips. Workers who were employed in this operation immediately picked up all the clothes and carried them away to barracks. Then the people were obliged to walk naked through the street to the gas chambers . . . The whole process of undressing and the walk down to the gas chambers lasted, for the men 8 or 10 minutes, and for the women some 15 minutes. The women took 15 minutes because they had to have their hair shaved off before they went to the gas chambers.

THE PRESIDENT: Do you mean that there was only 10 minutes between the time when they were taken out of the trucks and the time when they were put into the gas chambers?

RAJZMAN: As far as men were concerned, I am sure it did not last longer than 10 minutes.

MR. COUNSELLOR SMIRNOV: Including the undressing?

RAJZMAN: Yes, including the undressing.²⁹

Reizman also testified that Kurt Franz, assistant commander of the camp, was promoted following the execution of the one millionth Jew.

In order to prevent the transports of Jews from discovering, upon their arrival, that Treblinka was a death camp, the Germans erected a façade of a regular railroad station, although the camp had no rail connections aside from the train leading to it. Signs were posted on the station indicating that it was on the route to Vienna and other points. When Reizman was asked how he survived and what happened to his family, he responded:

RAJZMAN: I was already quite undressed, and had to pass through this *Himmelfahrtstrasse* [euphemistically called “the street to heaven”] to the gas chambers. Some 8,000 Jews had arrived with my transport from Warsaw. At the last minute before we moved toward the street an engineer, Galevski, an old friend of mine, whom I had known in Warsaw for many years, caught sight of me. He was

29. *Seventieth Day, Thursday, 28 February 1946, Afternoon Session, VIII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 325–26 (Nuremberg, 1947) (testimony of Samuel Reizman).*

overseer of workers among the Jews. He told me that I should turn back from the street; and as they needed an interpreter for Hebrew, French, Russian, Polish, and German, he managed to obtain permission to liberate me.

MR. COUNSELLOR SMIRNOV: You were therefore a member of the labor unit of the camp?

RAJZMAN: At first my work was to load the clothes of the murdered persons on the trains. When I had been in the camp 2 days, my mother, my sister, and two brothers were brought to the camp from the town of Vinegrova. I had to watch them being led away to the gas chambers. Several days later, when I was loading clothes on the freight cars, my comrades found my wife's documents and a photograph of my wife and child. That is all I have left of my family, only a photograph.³⁰

Abraham Sutzkever (Suzkever), the great Russian-Yiddish poet who went to live in Israel after the war, was trapped in the Vilna ghetto after the Nazis entered Vilna in 1941.³¹ He testified on February 27, 1946, the same day as Reizman, a few hours earlier. Sutzkever testified that tens of thousands of Jews were murdered shortly after the Germans entered Vilna, and described the horrors of ghetto life in that city. He reported that the Nazis apparently took special delight in killing Jewish infants. Thousands of them, including Sutzkever's own two-day-old son, were murdered. Sutzkever wanted to give his testimony in Yiddish, but was forced to do so in Russian.³² Sutzkever described the murder of

30. *Id.* at 328.

31. Sutzkever later escaped the ghetto and joined a partisan unit. He died in 2010 at age 96. Joseph Berger, *Abraham Sutzkever, Jewish Poet and Partisan, Dies*, N.Y. TIMES, Jan. 23, 2010. His most famous poem, written in 1942, *A Wagon of Shoes*, is about a wagon with a pile of shoes clattering through the Vilna streets. It reads:

*Tell me the truth, oh, shoes,
Where disappeared the feet?
The feet of pumps so shoddy,
With butondrops like dew—
Where is the little body?
Where is the woman, too?
All children's shoes—but where
Are all the children's feet?*

32. A portion of Sutzkever's poignant testimony, which he gave standing as a tribute to the Jewish victims, is available on YouTube. Jockusch quotes an excerpt from Sutzkever's diary, written in Yiddish upon his arrival at Nuremberg (and which she translates): "I feel a tremendous responsibility and I pray that the souls of the martyrs will lament from my words. I want to speak in Yiddish . . . in the language of the nation whom the men at the dock tried to extinguish Our mother tongue must be heard. . . . It shall triumph in Nuremberg as a symbol of our immortality." Jockusch, *supra* note 7, 107. Sutzkever was told that the tribunal lacked a suitable Yiddish interpreter, and so he would have to give his testimony in Russian. Jockusch wonders: "How

the Jews of Vilna in gruesome detail and the humiliation imposed on the Jews by the German occupier:

SUZKEVER: When the Germans seized my city, Vilna, about 80,000 Jews lived in the town. Immediately the so-called Sonderkommando . . . broke into the Jewish houses at any time of day or night, dragged away the men, instructing them to take a piece of soap and a towel and herded them into certain buildings near the village of Ponari, about 8 kilometers from Vilna. From there hardly one returned. When the Jews found out that their kin were not coming back, a large part of the population went into hiding. However, the Germans tracked them with police dogs. Many were found, and any who were averse to going with them were shot on the spot.

I have to say that the Germans declared that they were exterminating the Jewish race as though legally.

. . . .

On 17 July 1941 I witnessed a large pogrom in Vilna on Novgorod Street . . . They surrounded this district with Sonderkommandos. They drove all the men into the street, told them to take off their belts and to put their hands on their heads like this [*demonstrating*]. When that order had been complied with, all the Jews were driven along into the Lukshinaia prison. When the Jews started to march off, their trousers fell down and they couldn't walk. Those who tried to hold up their trousers with their hands were shot then and there in the street. When we walked in a column down the street, I saw with my own eyes the bodies of about 100 or 150 persons who had been shot in the street. Blood streamed through the street as if a red rain had fallen.

. . . .

. . . I must state that the Germans organized the ghetto only to exterminate the Jewish population with greater ease. The head of the ghetto was the expert on Jewish questions, Muhrer, and he issued a series of mad orders. For instance, Jews were forbidden to wear watches and they could not pray in the ghetto. When a German passed by, they had to take off their hats but could not look at him.

. . . .

. . . The same Muhrer, when he visited the ghetto, went into the shops where the Jews were working for him and ordered all workers to fall down on the ground and bark like dogs.³³

can it be that the first international court to prosecute 'crimes against humanity,' in a monumental 11-month trial that is now widely remembered as the birthplace of 'Holocaust consciousness,' lacked Yiddish translators?" *Id.*

33. *Sixty-ninth Day, Wednesday, 27 February 1946, Morning Session, VIII TRIAL OF THE*

The Soviets also put on the stand Severina Shmaglevskaya, a non-Jewish Polish prisoner at Auschwitz, who testified how Jewish “[w]omen carrying children in their arms or in carriages, or those who had larger children, were sent into the crematory together with their children.”³⁴ She explained:

The children were separated from their parents in front of the crematory and were led separately into gas chambers.

At that time, when the greatest number of Jews were exterminated in the gas chambers, an order was issued that the children were to be thrown into the crematory ovens or the crematory ditches without previous asphyxiation with gas.

. . . .

The children were thrown in alive. Their cries could be heard all over the camp. It is hard to say how many there were.³⁵

The French, likewise, presented evidence of the mass murder of the Jews. One of their most effective witnesses (in fact, one of the most powerful witnesses at Nuremberg) was Marie Claude Vallant-Couturier, a thirty-three-year-old non-Jewish woman arrested by the Germans in France and sent to Auschwitz as a political prisoner. Mme. Vallant-Couturier testified about extermination measures she observed there:

M. DUBOST: What do you know about the convoy of Jews which arrived from Romainville about the same time as yourself?

MME. VAILLANT-COUTURIER: When we left Romainville the Jewesses who were there . . . were left behind. They were sent to Drancy and subsequently arrived at Auschwitz, where we found them again 3 weeks later, 3 weeks after our arrival. Of the original 1,200 only 125 actually came to the camp; the others were immediately sent to the gas chambers. Of these 125 not one was left alive at the end of 1 month.

The transports operated as follows:

When we first arrived, whenever a convoy of Jews came, a selection was made; first the old men and women, then the mothers and the children were put into trucks together with the sick or those whose constitution appeared to be delicate. They took in only the young women and girls as well as the young men who were sent to the men’s camp.

MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 302–05 (Nuremberg, 1947) (testimony of Abraham Sutzkever).

34. *Id.* at 319 (testimony of Severina Shmaglevskaya).

35. *Id.*

Generally speaking, of a convoy of about 1,000 to 1,500, seldom more than 250—and this figure really was the maximum—actually reached the camp. The rest were immediately sent to the gas chamber.

At this selection also, they picked out women in good health between the ages of 20 and 30, who were sent to the experimental block; and young girls and slightly older women, or those who had not been selected for that purpose, were sent to the camp where, like ourselves, they were tattooed and shaved.

There was also, in the spring of 1944, a special block for twins. It was during the time when large convoys of Hungarian Jews—about 700,000—arrived. Dr. Mengele, who was carrying out the experiments, kept from each convoy twin children and twins in general, regardless of their age, so long as both were present. So we had both babies and adults on the floor at that block. Apart from blood tests and measuring I do not know what was done to them.

M. DUBOST: Were you an eye witness of the selections on the arrival convoys?

MME. VAILLANT-COUTURIER: Yes, because when we were working in the Sewing Block in 1944, the block where we lived directly faced the stopping place of the trains. The system had been improved. Instead of making the selection at the place where they arrived, a side line now took the train practically right up to the gas chamber; and the stopping place, about 100 meters from the gas chamber, was right opposite our block though, of course, separated from us by two rows of barbed wire. Consequently, we saw the unsealing of the cars and the soldiers letting men, women, and children out of them. We then witnessed heart-rending scenes; old couples forced to part from each other, mothers made to abandon their young daughters, since the latter were sent to the camp, whereas mothers and children were sent to the gas chambers. All these people were unaware of the fate awaiting them. They were merely upset at being separated, but they did not know that they were going to their death. To render their welcome more pleasant at this time—June–July 1944—an orchestra composed of internees, all young and pretty girls dressed in little white blouses and navy blue skirts, played during the selection, at the arrival of the trains, gay tunes such as “The Merry Widow,” the “Barcarolle” from “The Tales of Hoffman,” and so forth. They were then informed that this was a labor camp and since they were not brought into the camp they saw only the small platform surrounded by flowering plants. Naturally, they could not realize what was in store for them. Those selected for the gas chamber, that is, the old people, mothers, and children, were escorted to a red-brick building.

M. DUBOST: These were not given an identification number?

MME. VAILLANT-COUTURIER: No.

M. DUBOST: They were not tattooed?

MME. VAILLANT-COUTURIER: No, they were not even counted.

M. DUBOST: You were tattooed?

MME. VAILLANT-COUTURIER: Yes, look. [*The witness showed her arm.*] They were taken to a red brick building, which bore the letters “Baden,” that is to say “Baths.” There, to begin with, they were made to undress and given a towel before they went into the so-called shower room. Later on, at the time of the large convoys from Hungary, they had no more time left to play-act or to pretend; they were brutally undressed, and I know these details as I knew a little Jewess from France who lived with her family at the “Republique” district.³⁶

Vaillant-Couturier also told of a night when she was “awakened by terrifying cries.”³⁷ The next day, she learned the cries occurred because the Nazis had run out of gas and “had thrown the children into the furnaces alive.”³⁸

C. Testimony of Defendants

When the defendants took the stand, they invariably were asked about the persecution and extermination of the Jews. All feigned knowledge, or at least, direct involvement, including Hermann Göring, the lead defendant. British prosecutor Sir David Maxwell Fyfe, on cross-examination, sought to pin down Göring about the policy to exterminate the Jews of Europe. Göring, the second highest-ranking Nazi after Hitler, denied even knowing of the policy.

SIR DAVID MAXWELL-FYFE: Will you please answer my question: Do you still say neither Hitler nor you knew of the policy to exterminate the Jews?

GÖRING: As far as Hitler is concerned, I have said that I do not think so. As far as I am concerned, I have said I did not know, even approximately, to what extent these things were taking place.

SIR DAVID MAXWELL-FYFE: You did not know to what de-

36. *Forty-fourth Day, Monday, 28 January 1946, Morning Session*, VI TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 214–16 (Nuremberg, 1947) (testimony of Marie Claude Vaillant-Couturier).

37. *Id.* at 216.

38. *Id.*

gree, but you knew there was a policy that aimed at the extermination of the Jews?

GÖRING: No, a policy of emigration, not liquidation of the Jews. I knew only that there had been isolated cases of such perpetrations.³⁹

In 1977, Nuremberg defendant Albert Speer, who had received the lenient sentence of twenty years and was now free, explained in an affidavit that his main guilt for which he took responsibility at Nuremberg was the murder of the Jews: “[I,] for my person, have in the Nuremberg Trial, confessed to the collective responsibility and I am also maintaining this today still. I still see my main guilt in my having approved of the persecution of the Jews and of the murder of the millions of them.”⁴⁰ Speer also summarizes, in his 1977 affidavit, the testimony of the other defendants about the murder of the Jews (though all of them denied that they knew of the extermination plan):

In his final address to the Court, Goering spoke of the serious crimes which had been uncovered during the trial and he condemned the atrocious mass murders which he said escaped his comprehension. Streicher also condemned the mass murders of the Jews in his

39. *Eighty-seventh Day, Thursday, 21 March 1946, Afternoon Session, IX TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946*, at 619 (Nuremberg, 1947) (testimony of Hermann Göring).

40. Affidavit of Albert Speer (June 15, 1977), jewishvirtuallibrary.org. Speer began his affidavit:

Hatred of the Jews was Hitler’s motor and central point perhaps even the very element which motivated him. The German people, the German greatness, the Empire, they all meant nothing to him in the last analysis. For this reason, he wished in the final sentence of his testament, to fixate us Germans, even after the apocalyptic downfall in a miserable hatred of the Jews.

. . . .

So long as Hitler had temperamental outbursts of hate, there was yet hope for a change towards more moderate directions. Therefore, it was the resoluteness and coldness which made his outbreaks against the Jews so convincing. In other areas when he announced horrifying decisions in a cold and quiet voice, those around him, and I myself knew that things had now become serious. And with just this cold superiority he declared also, when we occasionally had lunch together, that he was set to destroy the Jews in Europe.

Id. As to the absence of a written order to exterminate the Jews, Speer explained:

Hitler’s method of work was that he gave even important commands to his confidants verbally. Also in the leader’s records of my interviews with Hitler completely preserved in the German Federal Archives - there were numerous commands even in important areas which Hitler clearly gave by word of mouth only. It therefore conforms with his method of work and must not be regarded as an oversight, that a written order for the extermination of the Jews does not exist.

Id.

final address. For Fritzsche, also in his final address, the murder of five million was a horrifying warning for the future. These words of the accused's support my contention that in the Nuremberg Trial the accused as well as the defence have recognised as a fact that the mass murders of the Jews had taken place.⁴¹

D. Film

Much has been written about the film *Nazi Concentration Camps*, made specially by the American prosecution team for the trial.⁴² The film was screened on November 29, 1945, the ninth day of the trial. It showed disturbing images of endless heaps of dead bodies, and scenes of misery encountered by American and British troops upon the liberation of the camps. The footage was shocking, which no eyewitness testimony or document could match in impact. Jackson, in his Opening Address, explained to the court: "We will show you these concentration camps in motion pictures, just as the Allied armies found them when they arrived. . . . Our proof will be disgusting and you will say I have robbed you of your sleep"⁴³ Confronting head-on an accusation that Allied charges of German atrocities might be exaggerated (as was done, it turned out, during the First World War), Jackson added: "I am one who received during this war most atrocity tales with suspicion and skepticism. But the proof here will be so overwhelming that I venture to predict not one word I have spoken will be denied."⁴⁴ Lawrence Douglas calls the screening of the film one of "the Nuremberg trial's most spectacular moments," and adds that, "[t]his use of film in a juridical setting was unprecedented."⁴⁵ *Nazi Concentration Camps*, however, was not about the Holocaust; the Jews are mentioned once in the film.

Almost unknown, however, is that the Americans showed another film on December 13, 1945, entitled *Atrocities Against the Jews*. An unknown German filmed *Atrocities Against the Jews* in 1941 with an 8-mm home camera. The ninety-second long grainy, silent film shows naked and half-naked Jews, many of them women and girls, being chased through the cobbled streets of Lvov, Poland during a roundup of Jews.

41. *Id.*

42. For an excellent study of the relationship of film, memory and the Holocaust, see MICHALCZYK, *supra* note 14.

43. Justice Robert Jackson, Opening Statement, *quoted in* LAWRENCE DOUGLAS, MEMORY OF JUDGEMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 21 (Yale Univ. Press 2000).

44. *Id.* at 21–22.

45. *Id.* at 20, 23.

Other scenes show nude bodies, Jews being forcibly dragged on the ground and Jews lined up along buildings.⁴⁶ According to testimony given by American co-prosecutor James B. Donovan, in charge of visual evidence and who introduced the film: “The film offers undeniable evidence, made by Germans themselves, of almost incredible brutality to Jewish people in the custody of the Nazis, including German military units.”⁴⁷ Following the screening, the American prosecution then read from an entry in the diary of Hans Frank, the Nazi overlord of occupied Poland. Memorializing a statement Frank made at a cabinet session on December 16, 1941, the diary entry reads: “As far as the Jews are concerned, I want to tell you quite frankly that they must be done away with in one way or another.”⁴⁸

The Soviets, during the course of their case, likewise presented *Film Documents of the Atrocities Committed by German Fascists in the USSR*, a film showing atrocities in the East, and which included images of Jewish victims.⁴⁹ While the film did not focus on Jews, it did have images of fleeing victims with numbered tattoos and Stars of David.⁵⁰ However, the Jews among the murder victims shown are never referred to as such. Instead, they are referred to as Soviet citizens, under the Soviet policy of “Do not divide the Dead!”⁵¹

46. ATROCITIES AGAINST THE JEWS (film by an unknown German 1941) (available online through the Steven Spielberg Film and Video Archive at the United States Holocaust Memorial Museum website: www.ushmm.org).

47. MICHALCZYK, *supra* note 14, at 98. Commander Donovan later negotiated the spy swap of Rudolf Abel and Francis Powers during the Cold War, as played by actor Tom Hanks in the feature film *Bridge of Spies*.

48. *Id.* at 99.

49. See generally KINODOKUMENTY O ZVERSTRAKH NEMETSKO-FASHISKI ZAKHVATCHIKOV [trans. Atrocities by the German Fascist Aggressors in the USSR] (Central Studio for Documentary Film, Moscow, Feb. 19, 1946).

50. Michalczyk explains: “The Soviets were the first to grasp the power of film as visual testimony to the war crimes committed by the Nazis. Soon after the invasion of Russia on June 22, 1941, Soviet cameramen produced newsreel footage of the massacres of innocent civilians left in the wake of the Nazi occupation; these were shown across theatres across Russia to portray the victory of the Red Army and the violence the Nazis perpetrated on civilians. Eventually the compiled footage would make its way to the Nuremberg Trials.” MICHALCZYK, *supra* note 14, at 2. Michalczyk observes the superiority of Soviet filmmaking: “[T]heir documentation of Nazi atrocities with significant family references made the American and British footage pale in comparison.” *Id.* at 3.

51. See BAZYLER & TUERKHEIMER, *supra* note 8, at 35–37. Michalczyk explains: “It is important to see specifically the absence of Jews in the listing of victims in the film presented by the Soviets as evidence of Nazi atrocities; only Soviet civilians or prisoners of war can be counted among those executed by the Nazis. . . . The Soviets did not wish to identify the Jews as a subgroup of the Soviets and placed them instead in the general toll of Nazi victims.” Michalczyk, *supra* note 14, at 108–09.

E. Closing Statements

In their summations, both the French and British prosecutors spoke about the mass murder of the Jews. One of the most effective examples of bringing the Holocaust into the IMT courtroom was done by Chief British Prosecutor Hartley Shawcross. In his closing argument, Shawcross read from an affidavit of German engineer Hermann Graebe, who was the manager of a German building firm in Nazi-occupied Ukraine. In his affidavit, Graebe described witnessing one instance of the mass murder of European Jews. The account that Shawcross chose to feature in his closing argument focused on the mass extermination of the Jews not through the industrial process created at Auschwitz and other concentration camps and death camps, but at the murder-by-bullets conducted by the *Einsatzgruppen* killing commando squads beginning with the German invasion of the Soviet Union in June 1941.

On October 5, 1942, when I visited the building office at Dubno, my foreman told me that in the vicinity of the site Jews from Dubno had been shot in three large pits, each about 30 meters long and 3 meters deep. About 1,500 persons had been killed daily. All the 5,000 Jews who had still been living in Dubno before the pogrom were to be liquidated. As the shooting had taken place in his presence, he was still much upset. Thereupon, I drove to the site accompanied by my foreman and saw near it great mounds of earth, about 30 meters long and 2 meters high. Several trucks stood in front of the mounds. Armed Ukrainian militia drove the people off the trucks under the supervision of an SS man. The militiamen acted as guards on the trucks and drove them to and from the pit. All these people had the regulation yellow patches on the front and back of their clothes, and thus could be recognized as Jews. My foreman and I went directly to the pits. Nobody bothered us. Now I heard rifle shots in quick succession from behind one of the earth mounds. The people who had got off the trucks—men, women, and children of all ages—had to undress upon the orders of an SS man, who carried a riding or dog whip. They had to put down their clothes in fixed places, sorted according to shoes, top clothing, and underclothing. I saw a heap of shoes of about 800 to 1,000 pairs, great piles of underlinen and clothing. Without screaming or weeping, these people undressed, stood around in family groups, kissed each other, said farewells, and waited for a sign from another SS man, who stood near the pit, also with a whip in his hand. During the fifteen minutes that I stood near I heard no complaint or plea for mercy. I watched a family of about eight persons, a man and a woman both about fifty with their children of about one, eight and ten, and two grown-up daughters of

about twenty to twenty-nine. An old woman with snow-white hair was holding the one-year-old child in her arms and singing to it and tickling it. The child was cooing with delight. The couple were looking on with tears in their eyes. The father was holding the hand of a boy about ten years old and speaking to him softly; the boy was fighting his tears. The father pointed to the sky, stroked his head, and seemed to explain something to him. At that moment the SS man at the pit shouted something to his comrade. The latter counted off about twenty persons and instructed them to go behind the earth mound. Among them was the family, which I have mentioned. I well remember a girl, slim and with black hair, who, as she passed close to me pointed to herself and said "Twenty-three [years old]." I walked around the mound and found myself confronted by a tremendous grave. People were closely wedged together and lying on top of each other so that only their heads were visible. Nearly all had blood running over their shoulders from their heads. Some of the people shot were still moving. Some were lifting their arms and turning their heads to show that they were still alive. The pit was already two-thirds full. I estimated that it already contained about 1,000 people.⁵²

IV. THE JUDGMENT

The Holocaust appeared in the Judgment in a section titled "Persecution of the Jews."

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. . . .

. . . .

. . . In the summer of 1941, [] plans were made for the "final solution" of the Jewish question in Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of section B-4, of the Gestapo, was formed to carry out the policy.

. . . The effectiveness of the work of the Einsatzgruppen is shown by the fact that in February 1942, Heydrich was able to report that Estonia had already been cleared of Jews and that in Riga the number of Jews had been reduced from 29,500 to 2,500. Altogether the Einsatzgruppen operating in the occupied Baltic States killed

52. BAZYLER & TUEKHEIMER, *supra* note 8, at 4-5. Shawcross's summation can be viewed on the United States Holocaust Memorial Museum website.

over 135,000 Jews in 3 months.

....

Units of the security police and SD in the occupied territories of the east, which were under civil administration, were given a similar task. . . .

....

. . . The massacres of Rowno and Dubno, of which the German engineer Graebe spoke, were examples of one method, the systematic extermination of Jews in concentration camps, was another. Part of the "final solution" was the gathering of Jews from all German occupied Europe in concentration camps. Their physical condition was the test of life or death. All who were fit to work were used as slave laborers in the concentration camps; all who were not fit to work were destroyed in gas chambers and their bodies burnt. Certain concentration camps such as Treblinka and Auschwitz were set aside for this main purpose. With regard to Auschwitz, the Tribunal heard the evidence of Hoess, the commandant of the camp from May 1, 1940 to December 1, 1943. He estimated that in the camp of Auschwitz alone in that time 2,500,000 persons were exterminated, and that a further 500,000 died from disease and starvation. . . .

....

. . . Beating, starvation, torture, and killing were general. The inmates were subjected to cruel experiments at Dachau in August 1942, victims were immersed in cold water until their body temperature was reduced to 28° Centigrade, when they died immediately. Other experiments included high altitude experiments in pressure chambers, experiments to determine how long human beings could survive in freezing water, experiments with poison bullets, experiments with contagious diseases, and experiments dealing with sterilization of men and women by X-rays and other methods.

. . . There was testimony that the hair of women victims was cut off before they were killed, and shipped to Germany, there to be used in the manufacture of mattresses. The clothes, money, and valuables of the inmates were also salvaged and sent to the appropriate agencies for disposition. After the extermination the gold teeth and fillings were taken from the heads of the corpses and sent to the Reichsbank. After cremation, the ashes were used for fertilizer, and in some instances attempts were made to utilize the fat from the bodies of the victims in the commercial manufacture of soap.

. . . Adolf Eichmann, who had been put in charge of this program by Hitler, has estimated that the policy pursued resulted in the killing of 6,000,000 Jews, of which 4,000,000 were killed in the ex-

termination institutions.⁵³

V. CONCLUSION

In light of this testimony and other evidence, it must be said that there is an important non-legal legacy to the IMT trial (and to the twelve subsequent Nuremberg trials): the discovery and preservation for posterity of critical evidence of the Holocaust. But since the trials were taking place in the immediate shadow of the war, when knowledge of what the Nazis had done was just coming out, invariably some facts and figures that came out from Nuremberg proved wrong. Although the historiography of the Holocaust that came out of the trials was imperfect, it was invaluable. A January 1945 joint memorandum to President Roosevelt by his Secretary of War Henry Stimson and Secretary of State Edward Stettinius observed: "The use of the judicial method will . . . make available for all mankind to study in the future years an authentic record of Nazi crimes and criminality."⁵⁴ Already in 1946, this legacy was recognized: "[I]f it had not been for the trial and the diligent efforts of the staff of able lawyers and investigators, acting promptly and in response to the necessities of legal technique, the important documents in which the defendants convicted themselves might never have been uncovered."⁵⁵ This has "g[iven] historians much of the data which the world will require for proper evaluation of the causes and events of World War II."⁵⁶

The first great book on the history of the Holocaust, Raul Hilberg's *The Destruction of the European Jews*, was made possible only because its historian author was able to mine the documents unearthed by the prosecution team to conduct their case at Nuremberg. Hilberg found these documents in 1951 in Alexandria, Virginia, where they filled 28,000 linear feet of shelf space in a former torpedo tube factory converted into a federal records center. As Hilberg later recollected, "What

53. *Judgement, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG*, 14 NOVEMBER 1945–1 OCTOBER 1946, at 247–52 (Nuremberg, 1947). Höss' estimate of 2.5 million persons exterminated at Auschwitz, cited by the Judgment, proved to be an overestimate. The death toll number at Auschwitz accepted today is 1.1 million, of whom one million murdered were Jews. See *THE HOLOCAUST ENCYCLOPEDIA* 44 (Walter Laqueur ed., Yale Univ. Press 2001).

54. Memorandum to Roosevelt, Jan. 22, 1945, in LAWRENCE DOUGLAS, *MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 18 (Yale Univ. Press 2001).

55. Charles Wyzanski, Jr., *Nuremberg in Retrospect*, *ATLANTIC MONTHLY*, December 1946, at 57.

56. *Id.*

I found inside was absolutely extraordinary. . . . It took but one glance at all these documents to realize that their contents could not be read by one individual in a lifetime.”⁵⁷ Since Hilberg, countless scholars have followed his paper trail to research and write histories of that era.

Today these documents, saved and preserved by the IMT prosecutors and their staff seventy years ago, are available for the whole world to examine through digitization and posting on the Internet.

57. RAUL HILBERG, *THE POLITICS OF MEMORY: THE JOURNEY OF A HOLOCAUST HISTORIAN* 71–72 (1996).