

Tyranny on Trial

WHITNEY R. HARRIS*

It is a distinct privilege to present the final address to this conference sponsored by the Section of the International Law of the American Bar Association.

We are here to commemorate the sixtieth anniversary of the great international criminal trial at Nuremberg at the end of the Second World War, and to assess the contribution of that historic event to the development of international law. Far more important than the convictions or acquittals of the twenty-two defendants in that trial are the principles of law declared and enforced against them. Although those men are all now dead, the principles by which they were judged live on, and must have the respect of history if civilization is to survive.

Those principles, declared and applied at Nuremberg, grew out of the thrust of war upon the civilized world in the twentieth century. They were not edicts conceived and inscribed by monks in medieval palaces. They were rules of criminal conduct declared and applied to save humanity from the inhumanity of man. They were not conceived in theory, they were compelled by facts-facts too extreme and horrible to bear repetition in the future-if there is to be a future-for man upon this planet Earth.

And hence, in a final statement to this conference, where legal principles have been brilliantly declared and discussed, and for which there is no need for repetition, let me speak for a few minutes about some of the incredible facts uncovered at Nuremberg which provided the basis for those principles.

In all of history, the Twentieth Century, and particularly the first half of the Twentieth Century, witnessed the gravest inhumanities and killings that man has ever perpetrated on man. It is hard to believe that the long road of civilization which man has trod since the

*Mr. Harris was a member of the prosecuting team at the International Military Tribunal at Nuremberg. He personally prepared and presented the case against the Chief of the Gestapo, Ernst Kaltenbrunner. Later, as a professor at the Southern Methodist University School of Law, Whitney Harris wrote his classic treatise on Nuremberg, *Tyranny on Trial*, now in its 3rd edition.

Having graduated Phi Beta Kappa and magna cum laude from the University of Washington, Mr. Harris went on to receive his law degree at the University of California, graduating Order of the Coif. He then served with distinction in the United States Navy during World War II.

Whitney Harris has been the Executive Director of the American Bar Association, after having chaired its International Law section and before going on to chair its Administrative Law section. He has written other books, including one on family law and one on legal services and procedures, as well as numerous articles.

dawn of history could have led to the dreadful conflicts of World War I, from 1914 to 1918, and of World War II, from 1939 to 1945. The tragedies of these wars passed from the battlefields of Verdun, where thousands of soldiers died in miserable muddy trenches under unremitting rifle and cannon fire, to Hiroshima and Nagasaki, where thousands of civilians were pulverized by atom bombs. There must be an end to war, or there will be an end to civilization. The Nuremberg Trial of 1945-46 was man's first effort to subject tyranny and war to the rule of law.

On October 30, 1943, President Franklin Roosevelt, Prime Minister Winston Churchill and Premier Joseph Stalin stated in the Moscow Declaration that Germans would be held individually responsible for crimes committed by them in the course of the war. The leaders declared that at the time of the granting of any armistice those German officers and men and members of the Nazi Party who were responsible for or took a consenting part in atrocities, massacres or executions would be sent back to the countries in which their deeds had been committed in order that they might be judged and punished according to the laws of the liberated countries, and that others, whose offenses had no particular geographical location, would be punished by joint decision of the governments of the Allies. The statement concluded: "Most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done."

On March 24, 1944, President Roosevelt declared: "In one of the blackest crimes in all of history—begun by the Nazis in the days of peace and multiplied by them a hundred times in time of war—the wholesale systematic murder of the Jews of Europe goes on unabated every hour . . . It is therefore fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished.

I served as a line officer in the Navy during World War II. Towards the end of the war I was assigned for duty with the Office of Strategic Services or OSS and was sent to London in charge of the investigation of war crimes in the European Theatre. I established an office on St. James close by British Intelligence. Justice Jackson arrived in London with a small staff to negotiate the agreement for the trial of the alleged German war criminals and established an office on Mount Street. From time to time I was able to bring incriminating documents to his staff obtained in work with OSS. When Justice Jackson decided to transfer his staff to Nuremberg, in August, 1945, I was invited to join as a prosecutor.

The Charter of the International Military Tribunal declared three categories of crime within its jurisdiction: crimes against peace, war crimes and crimes against humanity. Of these the first two categories were relatively easy to prove.

Hitler's acts of aggression had been open and notorious. They had been foretold in *Mein Kampf*. He had described in conferences with his top associates his intention to seize territory in Europe by military action. He gained his way in Austria and Czechoslovakia by threat of force. He defeated Poland and France by the use of force. And his attack on Russia was blatant aggression.

The defense to this count was *nullem crimen sine lege* and defense counsel argued this principle throughout the trial, pointing out that this was the first time in history in which the charge had been made in a criminal case. As we know, especially in light of the Briand-Kellogg Treaty, the Tribunal had little difficulty in deciding this count against the defendants.

And war crimes, including the mistreatment of prisoners of war, reprisals against partisans, the devastation of villages, and the execution of hostages, which had long been recognized as cognizable in international law, gave the Tribunal few problems. There were, in addition, criminal orders unique in warfare. One of these was the *Nacht and Nebel Erlass*,

the Night and Fog Decree, under which a person in occupied territory could be secretly apprehended and executed or spirited away to Germany. Keitel considered this order the worst blight on the military. Special treatment was the code name for screening POW camps for politically undesirable prisoners, such as Communist functionaries, who were turned over to the Gestapo for execution. The *Kugel Erlass*, or Bullet Decree, ordered recaptured escaped Russian officers to be sent to Mauthausen concentration camp as K prisoners where they were killed by shooting in the back of the neck. Proving these offenses was not always easy, but once proven, there was no problem of conviction under established principles of international law.

But crimes against humanity were unique in world law and proof of this charge fell largely to the American prosecution. We knew, of course, that the Nazis had established concentration camps for the incarceration, without trial, of political opponents, and that Hermann Goering had been responsible for establishing these camps in Prussia. And we understood that the Nazis had persecuted Jews and other political opponents. But at the beginning of the trial we had no hard evidence on the scope of these crimes or how, and by whom, they had been committed.

Because the Nazi repressive agencies, the Gestapo and SD, were combined with Nazi intelligence in the Reich Main Security Office, or RSHA, and I had acquired knowledge of German intelligence in OSS, I was assigned to prepare the case against the Gestapo and SD; and the chief of the RSHA, Ernst Kaltenbrunner. I was provided an office in the cold and drafty Palace of Justice, a German secretary, and a second-hand typewriter, and told to go to work. My task was to write briefs, supported by document books, establishing a prima facie case against these defendants. A principle source of documentary evidence was the several hundred captured German documents which had been translated and filed in our document room. But I searched through abandoned Gestapo offices and interrogated potential witnesses in the effort to prove the criminality of these defendants.

Shortly after I had been given this assignment I found an interesting letter in the document room. It had been written by a man named Becker to Walter Rauff, the head of the motor vehicles department of the Gestapo. In this letter Becker complained about the malfunctioning of a gas van which he was operating in the Eastern territories. It had been written from an Einsatzkommando. At that time I knew nothing about Einsatzkommandos or the criminal activities of the Gestapo and SD on the Eastern front.

While preparing the case against Kaltenbrunner I learned that British Intelligence had taken prisoner a man by the name of Otto Ohlendorf and had him under interrogation in London. Ohlendorf was the head of Office III of the RSHA which dealt with intelligence inside Germany. I had no idea that he might be able to shed light on war crimes, but I thought that it would be useful to bring him to Nuremberg where I could learn more from him about this organization of which Kaltenbrunner was the chief. The British sent him to Nuremberg, and I began the interrogation by asking him what his activities had been during the war. He said that he had served as the Chief of Office III of the RSHA except for the year 1941. Naturally, I asked, "What did you do during that year?" He replied, "In 1941 I was the Chief of Einsatzgruppe D." This instantly brought recall of the Becker letter which had been written from an Einsatzkommando, and I was inspired to ask, "Well, Ohlendorf, how many men, women and children did your group kill that year?" And he answered, "Ninety thousand."

After this admission, we were able to develop how four Einsatzgruppen operated in the Eastern territories, rounding up Jews and murdering them in anti-tank ditches or in the open fields.

Ohlendorf testified at the trial and was questioned by the Soviet judge, General Nikitchenko:

Q: "In your testimony you said that the Einsatz Group had the object of annihilating the Jews and commissars, is that correct?"

A: Yes

Q: And in what category did you consider the children? For what reason were the children massacred?

A: The order was that the Jewish population should be totally exterminated.

Q: Including children?

A: Yes

Q: Were all the Jewish children murdered?

A: Yes"

Any contention that these murders were carried out by subterfuge and without force was belied by the account of two such mass murders witnessed by Herman Graebe, the German manager and engineer in charge of the branch office of the Solingen firm in the Ukraine from September, 1941 until January, 1944. Graebe's interest in the mass execution arose from the fact that in addition to Poles, Germans and Ukrainians, he employed Jews on the various construction projects under his supervision. He described a mass execution which he witnessed on October 5, 1943, at Dubno, Ukraine:

"I drove to the site accompanied by my foreman, and saw near it great mounds of earth, about fifty meters long and two 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 militia-men 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 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 heaps of shoes of about 800 to 1,000 pairs, great piles 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 nearby 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 some children of about 1, 8 and 10, and two grown-up daughters of about 20 and 24. 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 in delight. The couple was 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 called out 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 with black hair, who as she passed close to me, pointed to herself and said, "Twenty-three." I walked around the mound

and found myself confronted by a tremendous grave. People were closely wedged together and were lying on top of each other so that only their heads were visible. Nearly all had blood running over their shoulders from their heads. The pit was already two-thirds full. I estimated that it already contained about 1,000 bodies. I looked for the man who did the shooting. He was an SS-man who sat at the edge of the narrow end of the pit, his feet dangling into the pit. He had a tommy-gun on his knees and was smoking a cigarette. The people, completely naked, went down some steps which were cut in the clay wall of the pit and clambered over the people lying there to the place to which the SS-man directed them. They lay down in front of the dead or injured people; some caressed those who were still alive and spoke to them in a low voice. Then I heard a series of shots. I looked into the pit and saw that the bodies were twitching or the heads were lying motionless on top of the bodies which lay before them. . . . I left with my foreman and drove in my car back to Dubno.

In my book, *Tyranny on Trial*, first published in 1954, a diagram is displayed containing a report by Stahlecker, the Chief of Einsatzgruppe A, showing the number of Jews exterminated in the Baltic states, each number encased in the diagram of a coffin. The report stated that in the first four months of operations the Einsatz Group had murdered 135,000 Communists and Jews. Estonia was shown as already Judenfrei-free of Jews.

An especially dramatic moment of the trial was the cross-examination of Hermann Goering by Justice Jackson. Goering had assumed the role of leader of the defendants. He occupied the first seat in the prisoners' dock. He was irritated by the apparent disinterest in the proceedings of Rudolf Hoess, who sat next to him. But at every opportunity he sought to stimulate the other defendants to challenge the prosecution in every possible way. It was, therefore, of great interest to the press when Goering was brought under cross-examination by Justice Jackson. I was Jackson's assistant in this dramatic moment of the case and sat beside him at the prosecutor's podium. Among the issues we raised was Goering's role in the terrible program of November 9, 1938 which has come to be known as Kristalnacht, the Night of Broken Glass.

This was the Nazi reaction to the murder of a secretary in the German Embassy in Paris by a German Jew named Grynspan. During the night Jewish stores were destroyed in Germany. Thousands of Jews were taken into custody and sent to concentration camps.

Goering met with Hitler and Goebbels to consider further repressive measures. Goering proposed imposing a fine of one billion Reichmarks on the Jews whose property had been destroyed so that all insurance benefits to which they would be entitled would, instead, be paid to the State. At a meeting in the Reich Air Ministry, Goering declared that Jews should be forced out of the economy. Their property should be seized and only interest paid upon its under-valuation. "We must agree on a clear action," he said, "that will be profitable to the State." And he closed the meeting with these prophetic words: "I'd like to say again that I would not like to be a Jew in Germany . . . If in the near future, the German Reich should come into conflict with foreign powers, it goes without saying that we in Germany should first of all let it come to a showdown with the Jews . . ." Goering admitted making those statements. And he did not deny that in a letter dated July 31, 1941, shortly after the invasion of the Soviet Union, he had charged Reinhard Heydrich with the complete solution of the Jewish question in the German sphere of influence in Europe, some six months before Heydrich disclosed to high-ranking civil servants, meeting in a villa at Wannsee, Berlin, that the final solution of the Jewish question in Europe was to be, in fact, the annihilation of the Jewish race.

The Einsatzgruppen followed the German Armies as they advanced on the Eastern front, seizing Jews from their homes and taking them and other Nazi undesirables such as Gypsies into the fields to be murdered. But as the war progressed the Nazis found need for permanent installations to house, exploit for labor, and finally to murder these victims of Nazi insanity. Concentration camps already existed to imprison perceived enemies of the state. Now something more formidable was required—extermination centers to eradicate the unwanted who had not been killed in the fields. The extermination camps were Treblinka, Sobibor, Majdanek, Chelmno, Belzec and Auschwitz. Of them all, Auschwitz murdered the most.

We had already rested our case when we received the dramatic word that the British had captured Rudolf Hoess. I asked that he be brought to Nuremberg where I interviewed him at length.

The British Broadcasting Company recently produced a multi-part series on Auschwitz Concentration Camp which was shown in the United States on the History Channel. I appeared in the film for the purposes of describing the Commandant of Auschwitz, Rudolf Hoess.

In the summer of 1941 Heinrich Himmler called Hoess to Berlin where he told Hoess that he was to convert Auschwitz into a facility for the destruction of Jews who would be sent there by Adolf Eichmann, head of the Jewish section of the Gestapo. Himmler explained to Hoess that if the Germans did not destroy the Jews in the course of the war Germany would be destroyed by the Jews. Hoess actually believed this absurdity. He returned to Auschwitz. The thought of not complying with the draconian order never occurred to him. He built Auschwitz into the foremost extermination plain in history, in which, he told me, two and a half million human beings had been exterminated.

On the first day of October, 1946, the eight judges constituting the Nuremberg Tribunal took their seats at the bench facing the prisoners' dock, which was empty. Before it, defense counsel occupied their chairs. To the left were the prosecution tables, occupied by the four Allied prosecutors and the principal members of their staffs. I sat at the American table. Behind us the visitors' gallery was packed with members of the press and visitors. The defendants were to be brought into the courtroom, one at a time, to hear the sentences pronounced against them.

At ten minutes before three, the paneled door in the back of the prisoner's dock slid slightly open. The defendant Hermann Goering stepped out of the elevator which had brought him from the ground floor where the other defendants waited. Goering put on a set of headphones which had been handed to him by one of the white-helmeted American guards. The president of the Tribunal began to speak. Goering signaled that he was unable to hear through the headphones, and there was an awkward delay while the technicians sought to correct the difficulty. A new set of headphones was produced, and once again Goering quietly awaited the words which were to decide his fate.

"Defendant Hermann Wilhelm Goering, on the counts of the Indictment on which you have been convicted, the International Military Tribunal sentences you to death by hanging."

The number two Nazi turned on his heel and passed through the paneled door into the waiting elevator. The door closed, and there was a hum of whispered voices in the courtroom as those present awaited the arrival of the next defendant, Hoess. Rudolf Hoess, who had flown his Messerschmitt to England in a futile effort to persuade the British to abandon the fight with Germany, was sentenced to imprisonment for life. The other defendants appeared in turn and received their sentences. Twelve, including Martin Bormann who had

been tried *in absentia*, and my defendant, Ernst Kaltenbrunner, received death sentences; three were acquitted; and the remaining seven received varying terms of imprisonment. The Tribunal declared as criminal organizations the Leadership Corps of the Nazi Party, the Gestapo, the SD, and the SS.

Appeals were taken by all of the defendants to the Allied Control Council, except Kaltenbrunner.

The appeals were uniformly denied at a meeting of the Council on October 10. I had been designated by Justice Jackson as his personal representative at the executions and was present in the Palace of Justice on the fateful night of October 15-16, 1946, when Hermann Goering cheated the hangman by taking poison at the eleventh hour, and the remaining defendants were hanged.

In the early morning hours of the next day two trucks, carrying eleven caskets, left the prison compound of the Palace of Justice bound for Dachau Concentration Camp, near Munich, where, during all of that day the bodies were burned in ovens which had been designed, and used, for Dachau prisoners. It was reported that in the evening the eleven urns containing the ashes were taken away to be emptied into the River Isar. The dust of the dead was carried along in the current of the stream to the Danube- and thence to the sea.

The defendants who had received sentences of imprisonment were transferred to Potsdam prison which had been designed for some 600 prisoners, but was now reserved for the seven from Nuremberg. As the years passed, the defendants completed their terms and were released. The last prisoner was Rudolf Hess, who had been sentenced to life. On August 17, 1987, forty-one years after the final judgment of the Tribunal, Hoess managed somehow to commit suicide. With his death the Hitler tyranny ended.

The tyrant and his chief cohorts were gone. They had sought to achieve greatness in history. But they inscribed their names in sand, and clean waters fell upon the beach and washed them out. They had intended to establish a new order for Europe. But they built upon pillars of hate, and what they stood for could not stand.

Hitler and his confederates who led Germany to disaster in the Twentieth Century are all dead. They were the principal actors in a fearsome drama. But as Prospero foretold, "they were all spirits, and melted into air, into this air . . ." The tyrant Hitler and his associates in crime will some day be forgotten, forgotten; too, will be their crimes. It is enough that tomorrow's world remembers what today's world has learned through the bitter experience of this fallen regime—that tyranny leads to inhumanity, and inhumanity to death.

Nuremberg stands firmly against the resignation of man to the tyranny of evil leaders. Because of Nuremberg-and the effort which it represents of man's attempt to elevate justice and law over inhumanity and war-there is hope for a better tomorrow. We may enter the atomic age determined that tyranny shall not extend its sway, nor war become its game-replacing our faith in the cause of justice, in the freedom of man, and in the mercy of God.

