

# The Nuremburg Trials: Viewing the Rule of Law's Response to the Holocaust Through the Trial Lawyer's Lens<sup>1</sup>

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*It is impossible in summation to do more than outline with bold strokes the vitals of this trial's mad and melancholy record, which will live as the historical text of the Twentieth Century's shame and depravity ... Of one thing we may be sure. The future will never have to ask with misgiving, what could the Nazis have said in their favor. History will know that whatever could be said, they were allowed to say. They have been given the kind of a trial which they, in the days of their pomp and power, never gave to any man.*

Justice Robert H. Jackson, U.S. Chief Counsel, in his closing argument to the International Military Tribunal at Nuremberg, July 26, 1946.

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ANALYZED by legal scholars, cited as precedent for modern international law and medical ethics,<sup>2</sup> and depicted in movies,<sup>3</sup> the Nuremberg Trials impart wisdom, reveal uncomfortable truths about the human condition, and document profound historical events. Over 75 years later, what possible story about the Nuremberg Trials remains left to tell?<sup>4</sup>

The echo of the Nuremberg Trials still reverberates forcefully today. On the one hand, the Nuremberg Trials bore witness to the power of the rule of law to exact justice for the Nazis’ “crimes against peace,” and in the process, revealed “evidence of the extermination of

the [European Jewry] as a policy.”<sup>5</sup> On the other hand, the story about the *process* of implementing the rule of law at Nuremberg likewise reveals the trial lawyer’s time-tested “craftsmanship” to facilitate justice: “... the technical drafting of indictments, responses, pleadings, memoranda, indices of documents, and all the rest that constitute ordinary litigation ... [Nuremberg] was a real trial ... ”<sup>6</sup>

In short, the Nuremberg Trials reduced “history to the courtroom ... in order to make the evil of Nazism manageable, to package it into something firmly under our control ... ”<sup>7</sup> This article briefly explores just a few aspects of how the use of cutting-edge technology, collaboration, and “the basic, technical elements of ‘lawyering’ ”<sup>8</sup> brought justice to the principal Nazi war criminals at the end of World War II.

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<sup>2</sup> Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 *IND. INT’L & COMP. L. REV.* 1, 1 (1992) (hereinafter, “Lippman”).

<sup>3</sup> See, e.g., *Nuremberg* (2000) (TV miniseries); *Judgment at Nuremberg* (1961) (depicting the 1947 Judges’ Trial—one of the twelve subsequent Nuremberg Trials).

<sup>4</sup> While the Nuremberg Trials have been studied extensively, along with “the most esoteric subjects and events that took place in Europe during the Nazi era,” historians and scholars “for the most part, have neglected the role of law in confronting the

horrors of Nazism” and “the entire jurisprudential history of the prosecution of Nazi war criminals remains a matter of deep ignorance and neglect among Anglo-American Scholars.” Michael J. Bazylar and Frank M. Terkheimer, *FORGOTTEN TRIALS OF THE HOLOCAUST*, 303 (2014).

<sup>5</sup> *Id.* at 3 n. 5 (2014).

<sup>6</sup> Kenneth Anderson, Book Review, *Nuremberg Sensibility: Telford Taylor’s Memoir of the Nuremberg Trials*, 7 *HARVARD HUMAN RIGHTS J.*, 281, 286 (1994) (hereinafter, “Anderson”).

<sup>7</sup> *Id.* at 289.

<sup>8</sup> *Id.* at 286.

## I. The Nuremberg Trials: A Summary

On May 2, 1945, President Harry Truman appointed then-sitting Associate U.S. Supreme Court Justice Robert H. Jackson “to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers ... as the United States may agree with any if the United Nations to bring to trial before an international military tribunal.”<sup>9</sup>

Although thirteen separate trials were held at Nuremberg from 1945 to 1949, the first and most famous is often referred to as “The Major War Criminals’ Trial” (the “Nuremberg Trial”) before the International Military Tribunal (“IMT”).<sup>10</sup> From November 20, 1945 to September 2, 1946, Jackson, his staff, and their Allied counterparts from Great Britain, France, and the Soviet Union led the prosecution of 22 defendants—surviving economic, military, and

political leaders of the Nazi regime, and six Nazi organizations.<sup>11</sup> In response to the charges of (1) waging an aggressive war, (2) committing war crimes, (3) committing crimes against humanity, and (4) conspiracy, they all plead “not guilty,” often including the now-famous phrase “in the sense of the Indictment.”<sup>12</sup>

## II. The Rule of Law at Work in the First Nuremberg Trial

### A. The Purpose of Nuremberg: Justice and Deterrence through Education

The goal of the Nuremberg Trial has been characterized as two-fold: (1) to bring justice to the individual perpetrators, and (2) to educate—to teach the German public and the world about the atrocities perpetrated by the Nazi regime and to teach future generations the importance of the rule of law as a deterring force: “to make statesmen responsible to law.”<sup>13</sup>

<sup>9</sup> Executive Order No. 9547 (May 2, 1945). “Providing for Representation of the United States in Preparing and Prosecuting Charges of Atrocities and War Crimes Against the Leaders of the European Axis Powers and Their Principal Agents and Accessories.”

<sup>10</sup> International Court of Justice, NUREMBERG TRIAL ARCHIVES OF THE INTERNATIONAL MILITARY TRIBUNAL OF NUREMBERG, at 8 (hereinafter, “*IMT Archives*”).

<sup>11</sup> *Id.* at 11-15.

<sup>12</sup> Nuremberg Trial Proceedings, Vol. 2, at 96 (Nov. 21, 1945), available at <https://avalon.law.yale.edu/imt/11-21-45.asp>; *see also*

<https://www.roberthjackson.org/nuremberg-trial-audio-video-2/> (audio recording).

<sup>13</sup> *IMT Archives*, *supra* note 10, at 16-17; Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS, 42 (2012) (hereinafter, “*Taylor*”); Justice Robert R. Jackson, *Report to the President from Justice Robert H. Jackson* (June 7, 1945) (hereinafter “*Jackson*”).

## B. Invoking The Rule of Law Instead of Victor's Justice

As early as November 1942, and with the war still raging, debate among the Allied countries arose over how to punish the highest-ranking Nazi leaders after the war: whether to summarily execute them or establish an international tribunal to prosecute them.<sup>14</sup> Great Britain advocated for a “summary-execution” plan and rejected outright the establishment of any “tribunal for the trial of archcriminals ... on the ground that their ‘guilt was so black’ that it was ‘beyond the scope of any judicial process.’”<sup>15</sup>

However, the United States and Soviet Union’s unequivocal opposition to summary execution, the eventual deaths by suicide of Adolf Hitler and Joseph Goebbels, and the inherent difficulty in drawing a “principled line” between those who would face execution versus a trial, led to the demise of the British summary-execution plan.<sup>16</sup> So

important was the rule of law to the prosecution that, in his opening statement, Justice Jackson warned about the alternative:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.<sup>17</sup>

## C. Process and Procedure

Justice Jackson laid bare the extraordinary work done to reach the first day of trial in his opening: “Less than 8 months ago nearly all our witnesses and documents were in enemy hands. The law had not

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*Report (June 7, 1945)*”), available at [https://www.roberthjackson.org/wp-content/uploads/2015/01/Report\\_to\\_the\\_President\\_on\\_the\\_Prosecution\\_of\\_Axis\\_War\\_Criminals.pdf](https://www.roberthjackson.org/wp-content/uploads/2015/01/Report_to_the_President_on_the_Prosecution_of_Axis_War_Criminals.pdf) (last accessed December 12, 2023).

<sup>14</sup> *Taylor*, *supra* note 13, at 28-33.

<sup>15</sup> *Id.* at 29.

<sup>16</sup> *Id.* at 32-33.

<sup>17</sup> Hon. Robert H. Jackson, “Opening Statement before the International Military Tribunal” (Nov. 21, 1945), (hereinafter “*Jackson Opening Statement*”), available at <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/> (last accessed December 12, 2023); *see also Jackson Report (June 7, 1945)*, *supra* note 13; Justice Robert R. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial* (Oct. 7, 1946) (hereinafter, “*Jackson Report (Oct. 7, 1946)*”), available at [https://www.roberthjackson.org/wp-content/uploads/2015/01/Justice\\_Jackson\\_s\\_Final\\_Report.pdf](https://www.roberthjackson.org/wp-content/uploads/2015/01/Justice_Jackson_s_Final_Report.pdf) (last accessed December 12, 2023).

been codified, no procedures had been established, no tribunal was in existence, no usable courthouse stood here, none of the hundreds of tons of official German documents had been examined, no prosecuting staff had been assembled, nearly all of the present defendants were at large, and the four prosecuting powers had not yet joined in common cause to try them.”<sup>18</sup> A few noteworthy insights into these preparations are described below.

Initially, an appropriate (and available) venue was a key consideration. Located in southeastern Germany, the city of Nuremberg was chosen because of its symbolic import: the Nazi party held its massive, annual rallies from 1933 to 1938 in Nuremberg, and in 1935, the Nazi party passed the infamous Nuremberg Race Laws there.<sup>19</sup> Practically, the Palace of Justice and its adjoining prison remained largely intact, and the city itself fell within the U.S. military occupation zone after the war.<sup>20</sup>

The procedural “mechanisms of an ordinary criminal trial”<sup>21</sup> were also a strategic focus. Still months from trial, Justice Jackson reported to President Truman on the status of his assignment. Opening his June 7, 1945 report, Jackson detailed the mundane, but critical,

procedural minutiae necessary to prosecute the case, explaining that he “worked out a plan for preparation, briefing, and trial of the cases; instructed those engaged in collecting or processing evidence ... expedite[d] the examination of captured documents, and the interrogation of witnesses and prisoners; ... and arranged cooperation and mutual assistance ... with Counsel appointed to represent the United Kingdom in the joint prosecution.”<sup>22</sup>

Similarly, the multitude of languages—English, French, German, and Russian, with other languages necessary to accommodate witnesses, including Dutch, Czech, Bulgarian and Polish—posed a major challenge.<sup>23</sup> To that end, the Nuremberg Trial relied on state-of-the-art technology to facilitate “simultaneous” interpretation with IBM’s Filene-Findlay System.<sup>24</sup> A set of ear-phones connected to a dial that allowed the user to manually set the desired language they wanted to hear, and interpreters spoke into microphones at the same time to

<sup>18</sup> *Jackson Opening Statement*, *supra* note 17.

<sup>19</sup> *Taylor*, *supra* note 13, at 61.

<sup>20</sup> *Id.*

<sup>21</sup> *Anderson*, *supra* note 6, at 288.

<sup>22</sup> *Jackson Report (June 7, 1945)*.

<sup>23</sup> *IMT Archives*, *supra* note 10, at 49.

<sup>24</sup> *Id.* at 49-51.

deliver the interpretation.<sup>25</sup> A signal system of yellow and red lights was installed, allowing an interpreter to signal if the speaker needed to slow his or her speech (yellow) or needed to stop and repeat because it was inaudible (red).<sup>26</sup>

Perhaps unsurprisingly, even the “litigator’s delay” emerged briefly. In concluding his initial report to President Truman, Justice Jackson laid the groundwork for what sounded like an early motion to continue the trial. Rhetorically positing “when can this trial start and how long will it take[?] I should be glad to answer if the answer were within my control,” Jackson rationalized that “literally tons of orders, records, and reports” had to be translated, had to physically organize and select useful evidence, and “integrate[d] it into a case.”<sup>27</sup>

#### **D. Trial Strategy: Reducing “History to the Courtroom”<sup>28</sup>**

##### **1. Using Rhetoric to Persuade**

Justice Jackson’s November 20, 1945, opening statement offers a

textbook example of persuasion through rhetoric.<sup>29</sup> As Jackson’s deputy chief prosecutor Telford Taylor observed, “nothing said at Nuremberg thereafter matched its force, perception, and eloquence.”<sup>30</sup> The first three sentences of Jackson’s opening capture its noble essence and foreshadowed the prosecution’s dual goals:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>31</sup>

<sup>25</sup> National WWII Museum, “Translating and Interpreting the Nuremberg Trials,” (Nov. 30, 2020), available at <https://www.nationalww2museum.org/war/articles/translating-and-interpreting-nuremberg-trials> (last accessed December 11, 2023).

<sup>26</sup> *Id.*

<sup>27</sup> *Jackson Report (June 7, 1945)*.

<sup>28</sup> *Anderson, supra* note 6, at 289.

<sup>29</sup> See, e.g., Patrick Iyampillai, *A Grave Responsibility: A Rhetorical Critique of the Opening Statement at Nuremberg Using the Narrative Perspective*, 3 *STETSON J. ADVOC. & L.* 135 (2016).

<sup>30</sup> *Taylor, supra* note 13, at 167,

<sup>31</sup> *Jackson Opening Statement, supra* note 17.

## 2. Strategic Evidentiary Decisions

To meet their burden of proof, the Allied prosecution relied primarily on captured German documents. Calling just 33 witnesses collectively in their case-in-chief, the prosecution introduced some 4,000 German documents as exhibits.<sup>32</sup> However, neither the American nor the British prosecutors called any witnesses to testify live who were survivors of Nazi persecution, and the Soviet prosecutors called just two. Despite much criticism for the decision, Justice Jackson believed—that while survivors “would always be chargeable with bias, faulty recollection, and even perjury,” the Germans’ own documents could not.<sup>33</sup>

However, a document-intensive, multi-lingual trial quickly proved dull, and the prosecution quickly concluded that adding “drama, emotion, and excitement to a primarily documentary case”<sup>34</sup> was needed to sustain the tribunal’s attention. Just nine days after the trial started, the prosecution played

*Nazi Concentration Camps*, a film taken by American and British troops as they liberated the concentration camps Dachau, Buchenwald, and Bergen-Belsen.<sup>35</sup> Although the film held little evidentiary value at that point in the trial, its impact was both *immediate*—causing at least three defendants to cry and “harden[ing] sentiment against the defendants,” and *lasting*—the disturbing footage remains in the public’s collective memory to this day.<sup>36</sup> Even before the advent of modern TV and social media, this realization by the Allied Prosecution early in the trial serves as a potent lesson about the need to creatively incorporate visual and demonstrative aids into any trial strategy.

Despite the tedium, the Allied prosecution’s strategy proved successful. In its October 1, 1946, judgment, the tribunal wrote that “[t]he case ... against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.”<sup>37</sup>

<sup>32</sup> *Jackson Report (Oct. 7, 1946)*, *supra* note 17.

<sup>33</sup> See “Nuremberg Trial Testimony of Avrom Sutzkever,” available at <https://perspectives.ushmm.org/item/nuremberg-trial-testimony-of-avrom-sutzkever> (last accessed December 12, 2023).

<sup>34</sup> Telford Taylor Panel, *1945-1995: Critical Perspectives on the Nuremberg Trials and*

*State Accountability*, 12 N.Y. L. SCH. J. HUM. RTS. 453, 513 (1995) (hereinafter, “*Telford Taylor Panel*”); *IMT Archives*, *supra* note 10, at 33-34; *Taylor*, *supra* note 13, at 186-187.

<sup>35</sup> *Id.*

<sup>36</sup> *IMT Archives*, *supra* note 10, at 34; *see also Taylor*, *supra* note 13, at 186-187; *Telford Taylor Panel*, *supra* note 34, at 513-514.

<sup>37</sup> *Jackson Report (Oct. 7, 1946)*, *supra* note 17.

### 3. The Importance of Witness Control in Cross-Examination

Defendant Herman Goering, a World War I fighter pilot ace who joined the Nazi party in 1922, was second only to Adolf Hitler during the reign of the Nazi regime. Known for his extraordinary intellect, charm, and flamboyance—adorned in garish uniforms of his own design, Goering was a larger-than-life personality, both literally and figuratively.<sup>38</sup>

At trial, Goering was the first defendant to plead not guilty and the first to testify. Four months into trial, Goering and Justice Jackson faced each other in a cross-examination that many thought would determine the trial's outcome.<sup>39</sup> Initially, Jackson's strategy was to first confront Goering with his own inculpatory documents.<sup>40</sup> Yet, Goering's direct examination convinced Jackson to alter his strategy by starting with "a soft approach and broad questions" that Jackson thought "would produce damning admissions."<sup>41</sup> Jackson's cross-examination of Goering, by all counts, was a disaster.<sup>42</sup>

On the first day of his two-and-a-half-day cross-examination, Justice Jackson soon lost control of Goering, who bullied and spoke over him. Even worse, the tribunal repeatedly admonished Jackson for interrupting Goering's testimony:<sup>43</sup>

**MR. JUSTICE JACKSON:** Let's omit that. I have not asked for that. If you will just answer my question, we shall save a great deal of time. Your counsel will be permitted to bring out any explanations you want to make.

You did prohibit all court review and considered it necessary to prohibit court review of the causes for taking people into what you called protective custody?

**GOERING:** That I answered very clearly, but I should like to make an explanation in connection with my answer.

**MR. JUSTICE JACKSON:** Your counsel will see to that. Now, the concentration camps and the protective custody...

<sup>38</sup> *Taylor, supra* note 13, at 335.

<sup>39</sup> *Id.* at 340.

<sup>40</sup> *Id.* at 335.

<sup>41</sup> *Id.* at 336.

<sup>42</sup> *Id.* at 335-340.

<sup>43</sup> See *The Avalon Project*, Trial Transcript, Vol. 9 at 420 (March 18, 1946), available at [https://avalon.law.yale.edu/subject\\_menus/imtproc\\_v9menu.asp](https://avalon.law.yale.edu/subject_menus/imtproc_v9menu.asp) (last accessed December 12, 2023).

**THE PRESIDENT:** Mr. Justice Jackson, the Tribunal thinks the witness ought to be allowed to make what explanation he thinks right in answer to this question.

So flustered was Jackson that he eventually accused the Tribunal of losing control too:<sup>44</sup>

**MR. JUSTICE JACKSON:** Let me say that I agree with Your Honor that as far as the United States is concerned, we are not worried by anything the witness can say about it—and we expected plenty. The point is, do we answer these things or leave them, apart from the control of the Trial? And it does seem to me that this is the beginning of this Trial's getting out of hand, if I may say so, if we do not have control of this situation ...

As recounted by those in the courtroom, Jackson botched his cross-examination because he failed to understand the “nature” of his witness.<sup>45</sup> Reflecting on Jackson's cross-examination, Defendant Albert Speer insightfully concluded that Jackson and Goering “just represent two entirely

opposite worlds—they don't even understand each other,” with Jackson expecting Goering to deny that he helped plan the invasion of Holland, and Goering freely admitting to it “as if it is the most natural thing in the world to invade a neutral country if its suits your strategy.”<sup>46</sup> Fortunately, the documentary evidence proved more than sufficient to establish Goering's guilt.

### **E. The Verdict: A Testament to The Rule of Law**

On October 1, 1946, the Tribunal convicted 19 of the 22 defendants on one or more of the charges, acquitting three of the defendants. Of those convicted, the Tribunal sentenced three to life in prison, four to prison terms ranging from 10 to 20 years, and twelve to death.<sup>47</sup> While the death sentences were carried out by hanging, Hermann Goering committed suicide by ingesting cyanide shortly before his planned execution. As to the indicted organizations, the tribunal found the Leadership Corps of the Nazi Party, the SS (the *Schutzstaffel*—Nazi paramilitary organization), the Gestapo (the *Geheime Staatspolizei*—secret Nazi police), and the SD (the

<sup>44</sup> *Trial Transcripts*, *supra* note 43, at Vol. 9 at 510 (March 20, 1946); *see also Taylor*, *supra* note 13, at 338-339.

<sup>45</sup> *Taylor*, *supra* note 13, at 342-343.

<sup>46</sup> *Id.*

<sup>47</sup> *Jackson Report (Oct. 7, 1946)*, *supra* note 17.

*Sicherheitsdienst*—intelligence agency of the SS) all guilty.<sup>48</sup>

### F. Trial Statistics

Justice Jackson's final report to President Truman included a lengthy accounting of trial-related statistics.<sup>49</sup> He explained that more than 1,000 Allied lawyers, secretaries, interpreters, translators, court reporters, and other staff prepared and put on a trial lasting 216 trial days. The Tribunal heard testimony from 33 prosecution witnesses, 19 defendants, 61 live defense witnesses, and 143 defense witnesses who testified by "interrogatories," resulting in a 17,000-page trial transcript. Of some 100,000 captured German documents, 4,000 were introduced, and of 25,000 photographs brought to the trial site, more than 1,800 were prepared for use at trial. Importantly, he likewise recommended deputy chief prosecutor Telford Taylor as his successor, who presided over the

12 "Subsequent Nuremberg Trials" to prosecute war criminals and other similar offenders, different from those dealt with by the IMT.<sup>50</sup>

### III. Conclusion

The first Nuremberg Trial achieved its two-fold objectives. Not only did the Allied prosecutors achieve convictions, but also with its document-intensive strategy, the prosecution educated the German people, and the world, about the scope of the Nazi regime's premeditated atrocities. In so doing, they created a "merciless expose of the cruel and sordid methods" by which "Nazi aggressions, persecutions, and atrocities" were inflicted.<sup>51</sup> The legacy of the Nuremberg Trials—"the role of law in confronting the horrors of Nazism"—still casts a long shadow with the last Holocaust trial rendering a guilty verdict in December 2022 and charges against a former Sachsenhausen camp guard brought in September 2023.<sup>52</sup> For the trial lawyer, the

<sup>48</sup> *Taylor*, *supra* note 13, at 583-585.

<sup>49</sup> *Jackson Report (Oct. 7, 1946)*, *supra* note 17.

<sup>50</sup> *Lippman*, *supra* note 2, at 9-11; *IMT Archives*, *supra* note 10, at 57-64.

<sup>51</sup> *Jackson Report (Oct. 7, 1946)*, *supra* note 17.

<sup>52</sup> "A 98-year-old German man is charged as an accessory to murder at a Nazi concentration camp," *AP News*, Sep. 1, 2023; Bertrand Benoit, "Former Nazi Camp Secretary, 97, Found Guilty in What Could be Final Holocaust Trial", *Wall St. J.*, Dec. 20, 2022. Importantly, the Nuremberg Trials account for just thirteen of *thousands* of criminal trials that "touched on the crimes

rich “inner architecture” of the Nuremberg Trials serves as a compelling reminder that the “technical elements of ‘lawyering’”—incorporating the newest technology, collaboration, the power visual aids and rhetoric—are as effective today as they were more than 75 years ago.<sup>53</sup>

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of the Holocaust” with trials taking “place in every European country that had fallen under Nazi rule, from Norway to Albania ...” Lawrence Douglas, “The Era of Nazi War Crime Trials Is Over,” *Wall St. J.*, Aug. 27, 2020; see also Bazylar and Terkheimer, *supra* note 4 (detailing ten trials of the prosecutions of Nazi-era perpetrators “to reveal ... not just an intimate description of the Holocaust in operation but an illustration of how different legal systems, over almost six decades, confronted the

German plan to exterminate European Jewry.”); Judy Feigin, United States Department of Justice, *The Office of Special Investigations: Striving for Accountability in the Aftermath of the Holocaust*, iv (2010) (describing the more than 50-year history and role of the OSI in identifying and seeking removal from the U.S. of “those who assisted the Nazis and their allies in the persecution of civilians.”).

<sup>53</sup> *Anderson, supra* note 6, at 282, 286.