

The Judicialization of International Atrocity Crimes: The Kharkov Trial of 1943

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“We will remember the 15th of December. On this day we stopped speaking about a future trial for the criminals. We began to judge them.”

Soviet-Jewish war correspondent and novelist Ilya Ehrenburg
in “Red Star” newspaper, December 18th, 1943

I. INTRODUCTION

In the brutal history of humanity, few tragedies compare to the scale of death and destruction brought by Germany in the years between 1941 and 1945 to the territories of present-day Russia, Belarus, and the Ukraine. During the forty-seven months of what is known in the region as The Great Patriotic War, approximately thirty million Soviet civilians and soldiers lost their lives.¹ Twenty million of these were civilians.² Over sixty years later, more than 2.4 million are still officially considered missing in action, while six of the 9.5 million buried in mass graves remain unidentified.³ As to economic losses, David M. Glantz, an American expert on the German-Soviet theater of the Second World War, notes: “The degree of damage to the Soviet Union’s economy and military productive capability caused by the German invasion was equivalent to the amount of damage the United States would have suffered if an invading power conquered the entire region from the east coast across the Mississippi River into the eastern Great Plains.”⁴ Historian Norman M. Naimark put it this way: “Anyone who has read the historiography of the German occupation of Russia cannot fail to be overwhelmed by the brutality of the Nazi occupiers, the Wehrmacht [the regular German armed forces] included.”⁵

1. NORMAN A. GRAEBNER, RICHARD DEAN BURNS & JOSEPH M. SIRACUSA, *AMERICA AND THE COLD WAR, 1941–1991*, at 145 (2010); David M. Glantz, *The Soviet-German War 1941–45: Myths and Realities*, STROM THURMOND INST. GOV’T & PUB. AFFAIRS 4 (Oct. 11, 2001), http://sti.clemson.edu/index.php?option=com_docman&task=doc_details&gid=189&Itemid=310.

2. Sheila Fitzpatrick, *Postwar Soviet Society: The ‘Return to Normalcy’, 1945–1953*, in *THE IMPACT OF WORLD WAR II ON THE SOVIET UNION* 131 (Susan J. Linz ed., 1985).

3. Irina Titova, *Medvedev Orders Precise Soviet WWII Death Toll*, HUFFINGTON POST (Jan. 27, 2009), http://www.huffingtonpost.com/2009/01/27/medvedev-orders-precise-s_n_161433.html.

4. See Glantz, *supra* note 1, at 14. On the German side, almost four million German soldiers and at least one million German civilians lost their lives by the time the Red Army, in April 1945, captured Berlin and triumphantly raised the Soviet flag over the ruins of Hitler’s Reich’s Chancellery. *Id.*

5. NORMAN M. NAIMARK, *THE RUSSIANS IN GERMANY: A HISTORY OF THE SOVIET ZONE OF OCCUPATION, 1945–1949*, at 7 (1995).

When describing what befell upon them, the people of the region often reference the brutal hordes of Mongol invaders in Europe during the twelfth and thirteenth centuries. Such an analogy is a fair one. Similar to the Mongol style of warfare, Hitler ordered the German military on its Eastern Front not to follow the international rules of warfare that had been developed by Europeans over the centuries to minimize civilian casualties, as well as special status recognition of captured enemy soldiers.⁶

Prior to the start of military operations in June 1941, Hitler announced to his generals: “The war against Russia will be such that it cannot be fought in knightly fashion. This struggle is one of ideologies and racial differences and will have to be conducted with unprecedented, unmerciful and unrelenting hardness.”⁷ Pursuant to Hitler’s instructions, the German generals issued specific orders to their regiments regarding how the upcoming invasion of the Soviet Union was to be conducted.⁸ This included the so-called “commissar order,” instructing the troops to take severe and decisive measures against “Bolshevik agitators” (the Soviet political commissars), partisans, saboteurs, and Jews.⁹ These orders provided the purported legal basis under German law for the mass executions of suspected political opponents and eventually Soviet Jews.¹⁰ It also permitted the German military to conduct a policy whereby three million Soviet soldiers would die of starvation or cold in German POW camps.¹¹

In the Ukraine, some of the fiercest battles between the German forces and the Red Army took place around Kharkov, Ukraine’s second largest city.¹² As a result of these battles, the Kharkov region became the only

6. STEPHEN HART, RUSSELL HART & MATTHEW HUGHES, *THE GERMAN SOLDIER IN WORLD WAR II* 94 (2000); Anthony Coates, *Is the Independent Application of Jus in Bello the Way to Limit War?*, in *JUST AND UNJUST WARRIORS* 183 (David Rodin & Henry Shue eds., 2008).

7. MARTIN GILBERT, *THE SECOND WORLD WAR: A COMPLETE HISTORY* 160 (2004).

8. Yitzhak Arad, *The Destruction of the Jews in German-Occupied Territories of the Soviet Union*, in *THE UNKNOWN BLACK BOOK: THE HOLOCAUST IN THE GERMAN-OCCUPIED SOVIET TERRITORIES* xiv (Joshua Rubenstein & Ilya Altman eds., 2008).

9. *Id.*

10. *Id.*

11. *See id.*; TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 19 (2005) (“Of these [captured Soviet soldiers in the course of the war], 3.3 million died from starvation, exposure and mistreatment in German camps . . .”).

12. *See generally* DAVID M. GLANTZ, *KHARKOV 1942: ANATOMY OF A MILITARY DISASTER THROUGH SOVIET EYES* (2010); Kharkiv, *ENCYCLOPEDIA.COM*, <http://www.encyclopedia.com/doc/1E1-Kharkiv.html> (last visited Feb. 13, 2012).

Soviet territory that changed hands four times during the war.¹³ The Germans captured Kharkov and the rest of eastern Ukraine in October 1941.¹⁴ In May 1942, the Soviet Red Army led a disastrous counter-attack in an attempt to recapture the city.¹⁵ Hundreds of thousands of Red Army soldiers lost their lives in what military historian David Glantz calls “one of the most catastrophic offensives in Russian military history.”¹⁶ In February 1943, the Red Army launched another offensive, this time successfully liberating the city.¹⁷ Soon thereafter, German forces countered with another attack, recapturing Kharkov in March 1943.¹⁸ This turned out to be the last major German victory on the Eastern Front.¹⁹ On August 23, 1943, the Red Army carried out Operation Rumyantsev and finally liberated Kharkov, once and for all, from German occupation.²⁰

In December 1943, the Soviet Union conducted a trial in Kharkov of three captured Germans and one Russian collaborator, charging them with the murder of Kharkov civilians, almost all Jews.²¹ The highly publicized Kharkov trial was the first trial of Germans held by any of the Allied Powers.²² Earlier in the year, the Soviets held a public trial at Krasnodar, but the defendants were all Soviet citizens tried for treason stemming from their collaboration with the German invaders.²³ The Soviets had also been conducting summary military trials of captured Germans, followed by quick executions.²⁴ These, however, were not public trials and so were virtually unknown to the outside world.²⁵

13. See generally I. C. B. DEAR & M. R. D. FOOT, *THE OXFORD COMPANION TO WORLD WAR II* (1995).

14. *Id.*

15. *Id.*

16. GLANTZ, *supra* note 12, at xi.

17. *Germans Recapture Kharkov*, HISTORY.COM, <http://www.history.com/this-day-in-history/germans-recapture-kharkov> (last visited Oct. 22, 2012).

18. *Id.*

19. GERALD REITLINGER, *THE SS, ALIBI OF A NATION, 1922–1945*, at 77, 194 (1957).

20. CHRIS BELLAMY, *ABSOLUTE WAR: SOVIET RUSSIA IN THE SECOND WORLD WAR* 591–93 (2007).

21. See IGNATIK FEDOROVICH KLADOV ET AL., *THE PEOPLE’S VERDICT: A FULL REPORT OF THE PROCEEDINGS AT THE KRASNODAR AND KHARKOV GERMAN ATROCITY TRIALS* 45–124 (1944).

22. *Nazi Captain at Kharkov Trial Blames Hitler for Murders*, L.A. TIMES, Dec. 18, 1943, at 3 (“The trials, in which a group of Germans and one Russian traitor are defendants, are the first since the Moscow pledge by Russia, Britain and the United States that war criminals would be returned to the scene of their crimes and tried under local law.”).

23. ARIEH J. KOCHAVI, *PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT* 64 (1998).

24. Arieh J. Kochavi, *The Moscow Declaration, the Kharkov Trial, and the Question of a Policy on Major War Criminals in the Second World War*, 76 HIST. 401, 404 (Oct. 1991).

25. *Id.*

By contrast, the Kharkov trial was a highly publicized affair, and an attempt (albeit partly successful—see discussion below) by the Soviets to conduct a Western-style legal proceeding.

It would take another two years, after Germany's unconditional surrender in May 1945, for the Allies to organize and begin the trial of the so-called Major War Criminals at Nuremberg.²⁶ The trial before the International Military Tribunal ("IMT") at Nuremberg, which began in November 1945 and ended in October 1946, was not, in a strict sense, a trial of the Holocaust since the murder of the Jews was not the central focus at Nuremberg.²⁷ As noted in the Judgment of the tribunal, the supreme crime adjudged at Nuremberg was the crime of initiating aggressive war, formally called "crimes against peace."²⁸ In Kharkov, by contrast, much of the focus of the trial was on the murder of the Jewish population of Kharkov, although the Jewish victims were never identified as such.²⁹ Instead, the victims were referred to in the generic as "Soviet citizens"—for reasons discussed below.

This article analyzes the Kharkov trial, the first trial of Nazi war criminals undertaken by any Allied Power, as well as the first trial of the

26. *Id.* at 416.

27. Evidence of the murder of the Jews was not entirely absent at Nuremberg. For example, the 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." Michael R. Marrus, *The Holocaust at Nuremberg*, 26 *YAD VASHEM STUDIES* 3–4 (1998), available at http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%203220.pdf. As Holocaust historian Michael Marrus points out: "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." *Id.* at 31–32. Nevertheless, of the approximately 17,000 transcript pages recording the proceedings of the first Nuremberg trial, only a small portion deal with the murder of the Jews.

28. "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Avalon Project, *Two Hundred and Seventeenth Day*, 22 *NUREMBERG TRIAL PROCEEDINGS* 410, 427, <http://avalon.law.yale.edu/imt/09-30-46.asp> (last visited Oct. 22, 2012). For analysis of the crime of aggression adjudged at Nuremberg as the supreme international crime, see generally Jonathan A. Bush, *The Supreme . . . Crime and Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 *COLUM. L. REV.* 2323 (2002).

29. Alexander Prusin, "Fascist Criminals to the Gallows!": *The Holocaust and War Crimes Trials, December 1945–February 1946*, 17 *HOLOCAUST AND GENOCIDE STUDIES* 1, 9 (2003), available at http://muse.jhu.edu/journals/holocaust_and_genocide_studies/v017/17.1prusin.html.

Holocaust.³⁰ It is written on the occasion of the 70th anniversary of the Kharkov trial. Part II, as background, describes the Holocaust as experienced in Kharkov, Ukraine. Part III discusses the trial that took place in Kharkov: the defendants, the prosecution, the setting, and the testimony. Part IV looks at the Kharkov trial as a typical Stalinist “show trial,” where guilt has been predetermined and a trial is used merely as a show to its audience of the presupposed wrongdoings of the defendants. In this discussion, Part

30. The “first trial of the Holocaust” designation we have chosen for the Kharkov trial in no way implies some taxonomic distinction between Holocaust trials and other trials of Nazi war criminals. No such division exists or, for that matter, can even be made. Jews were not the only victims of the Nazi racial state; as a result, individuals were put on trial after the war not only for the mass murder of Jews but also at the same time for the mass murder of non-Jews, both civilians and military. As the IMT trial at Nuremberg most starkly illustrates, the central focus of many postwar Nazi war crimes trials was on Nazi criminality other than the murder of the Jews; and yet, at the same time, the murder of the Jews often played (for some trials, expressly, and for other trials, *sub rosa*) a critical part of the prosecution’s case. Consequently, debate still rages among scholars about whether the IMT trial, the subsequent Nuremberg trials, and later trials of Nazis and collaborators helped or distorted our understanding of the Holocaust. See, e.g., Marrus, *supra* note 27, at 1; LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 42–43 (2001); Donald Bloxham, *From Streicher to Sawoniuk: The Holocaust in the Courtroom*, in THE HISTORIOGRAPHY OF THE HOLOCAUST 397 (Dan Stone ed., 2004).

Moreover, while some defendants after the war were put on trial for the murder of individuals who were either exclusively or primarily Jews, their victims were not described in the courtroom as Jews, but instead as Soviets, Poles, Hungarians or members of some other nationality. The Kharkov trial is a stark example of this disconnect between how the Jewish victims were seen by their German perpetrators and by those who put the perpetrators on trial.

Last, our use of the term of “trial of the Holocaust” for the trial at Kharkov is part of the formation of memory of the Holocaust in the former Soviet Union that we discuss in Section V, *infra*. It has only been in the last two decades, since the breakup of the Soviet Union in 1991, that the history of the murder of the Jews at the hands of the Nazis and their local collaborators has been openly discussed in that part of the world. Historiography on this subject by local historians is also at its infancy, with most of the studies on the subject appearing only in the West. See generally, e.g., THE UNKNOWN BLACK BOOK: THE HOLOCAUST IN THE GERMAN-OCCUPIED SOVIET TERRITORIES, *supra* note 8; BITTER LEGACY: CONFRONTING THE HOLOCAUST IN THE USSR (Zvi Gitelman ed., 1997); THE HOLOCAUST IN THE SOVIET UNION: STUDIES AND SOURCES ON THE DESTRUCTION OF THE JEWS IN THE NAZI-OCCUPIED TERRITORIES OF THE USSR, 1941–1945 (Lucjan Dobroszycki & Jeffrey S. Gurock eds., 1993).

Our designation of the Kharkov trial as a “Holocaust trial” aims to serve the didactic purpose of finally bringing to the forefront the long-neglected genocide of the Jews in German-occupied territories of the Soviet Union. See generally GREG DAWSON, JUDGMENT BEFORE NUREMBERG: THE HOLOCAUST IN THE UKRAINE AND THE FIRST NAZI WAR CRIMES TRIAL (2012) (written by the American journalist in the same vein as this article). Dawson is a long-time columnist for the *Orlando Sentinel*, and his mother and her younger sister are the only known survivors of the organized massacre of Kharkov Jews that took place shortly after the military capture of the Kharkov region by German troops. *Id.* at 6. “[A] very personal journey through one small corner of history,” *id.* at 3, Dawson’s book likewise seeks to shine a spotlight on the mass murder of the Jews of the Ukraine and this long-forgotten first war crimes trial against the Nazis.

IV will also explore the trial's three audiences, the absence of the term "Jew" to identify the victims, and the lack of subsequent public Soviet trials of war criminals following the Kharkov trial. Part V explores the implications of the Kharkov trial on the subsequent Nuremberg Trials, later postwar Nazi trials in the Soviet Union, and the role of the Kharkov trial in the formation of history and memory of the Holocaust in the former territories of the Soviet Union. Part VI, the Conclusion, ends with a postscript—providing another distressing example, this one surrounding the Holocaust at Kharkov, of how many senior Nazis were never adequately punished for their crimes, with some even remembered fondly today.

II. THE HOLOCAUST IN KHARKOV

The murder of the Jews of Kharkov in Eastern Ukraine was part of the "Holocaust by bullets" conducted by the German forces in the conquered parts of the Soviet Union, later supplemented by the murder of Soviet Jews by mobile gas vans.³¹ Soviet Jewry, therefore, experienced the Holocaust quite differently from their Jewish brethren in the rest of Europe.³²

The Jews of the Soviet Union were the first group to be targeted for mass extermination.³³ Israeli historian Yitzhak Arad explains how Nazi ideology considered the creation of the U.S.S.R. to be the product of Eastern European Jewry, so that the term Bolshevik and Jew became synonymous in German eyes: "Hitler maintained that the Soviet state and its communist ideology were the instruments with which Jews (the rulers of the USSR, according to Hitler) were using to establish dominance of the world. Consequently, the physical destruction of the Soviet Jews, as part of a Final Solution of the Jewish Question, became a means of simultaneously annihilating communism and the Soviet state, and of preparing its East European lands for German colonization."³⁴ A defendant

31. HELMUT LANGERBEIN, *HITLER'S DEATH SQUADS: THE LOGIC OF MASS MURDER* 39 (2004); see also Maria Danilova & Randy Herschaft, *Priest Uncovering the Beginnings of Nazi Final Solution*, THE HUFFINGTON POST, Jan. 31, 2009, http://www.huffingtonpost.com/2009/01/31/priest-uncovering-the-beg_n_162865.html.

32. LANGERBEIN, *supra* note 31, at 16 ("Although the Holocaust is usually associated with factory-style gassing in the extermination camps, the Einsatzgruppen and other mobile execution squads accounted for almost one fourth of all Holocaust victims.").

33. Arad, *supra* note 8, at xii–xiv.

34. *Id.* at xiii.

at the postwar *Einsatzgruppen* trial at Nuremberg explained that for the Nazis, “Eastern Jewry was the reservoir of Bolshevism.”³⁵

Following the invasion of the Soviet Union in June 1941, special action murder squads known as the *Einsatzgruppen* followed the regular German army into newly conquered territory.³⁶ Operating just behind the advancing German troops, these mobile killing squads would round up and murder all the Jews and other “undesirables” such as the Roma and the Sinti (commonly known as Gypsies), perceived communist political leaders, professionals, and “criminals,” often with assistance from the local populace.³⁷ The regular German army, the *Wehrmacht*, also was heavily involved in the killings.³⁸

Later on, police battalions—initially organized to keep order in the occupied territories—joined in the killing process.³⁹ They were supplemented by troops of the *Waffen-SS* (the military wing of the SS), the German Order Police, and non-German staffed auxiliary police units comprised of Ukrainians, Estonians, Latvians, Lithuanians, Crimean Tartars, Belorussians, and Russians—all who participated in mass killings of civilians.⁴⁰ As Arad explains, “A substantial number of people, particularly in the Baltic countries and Ukraine, collaborated with Hitler’s troops, and many participated in the murder of the Jews. Without the active support of the local inhabitants, tens of thousands of whom served in police units, the Germans would not have been able to identify and exterminate as many Jews in the occupied territories of the Soviet Union.”⁴¹ Greg Dawson explains that there were so many local collaborators “that the Germans had a word for those who donned uniforms

35. Walter Blume Aff., *Trial No. 9, in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 530–31 (1949), *quoted in* THE UNKNOWN BLACK BOOK: THE HOLOCAUST IN THE GERMAN-OCCUPIED SOVIET TERRITORIES, *supra* note 30, at 5.

36. Arad, *supra* note 8.

37. LANGERBEIN, *supra* note 31, at 15; *see also* TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN 276 (2010); *Babi Yar*, Jewish Virtual Library (2012), <http://www.jewishvirtuallibrary.org/jsource/Holocaust/babiyar.html>.

38. Arad, *supra* note 8, at xv.

39. *See generally* CHRISTOPHER R. BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND (1992) (the leading study analyzing the involvement of these non-army police battalions in the Holocaust).

40. Arad, *supra* note 8, at xiv–xv.

41. *Id.* at xvi. For further discussion, *see* MARTIN DEAN, COLLABORATION IN THE HOLOCAUST: CRIMES OF THE LOCAL POLICE IN BELORUSSIA AND UKRAINE, 1941–44, at 60–61 (2000). Dean explains that “[o]ccasionally members of these local units participated directly by pulling the trigger at the pits. However, [they] were usually left to finish the job afterwards; they searched diligently over the following days for any Jews who had escaped the roundup, murdering those they found.” *Id.* Additionally, “[l]ocal police collaborators are described by some witnesses as being more cruel than the Germans in their treatment of the Jews.” *Id.* at 161–62.

and took up rifles against their fellow Ukrainians (and other Eastern European nationalities): *Schulzmannschaften*.”⁴²

The murder operations in the Ukraine were conducted by *Einsatzgruppe C*, organized with the other three *Einsatzgruppen* in a police academy in Pretzsch, a town about fifty miles southwest of Berlin.⁴³ *Einsatzgruppe C* troops were transported to the Ukraine, where they joined the Army South, composed of *Wehrmacht* and *Waffen-SS* troops, which spread itself across the western Ukraine, including Kiev and Kharkov.⁴⁴ On September 19, 1941, German forces captured Kiev, the capital of the Ukraine.⁴⁵ Ten days later, detachment 4a of *Einsatzgruppe C*, led by *SS-Standartenführer* (SS-Colonel) Paul Blobel, massacred 33,771 Kiev Jews over a period of two days in the ravine at Babi Yar.⁴⁶

The German forces first entered Kharkov⁴⁷ a month later, on October 23–24, 1941.⁴⁸ In November 1941, they ordered that a census of the city be taken, in order to identify Jews among the population.⁴⁹ In December

42. DAWSON, *supra* note 30, at 70. The *Schutzmannschaften* were created on the personal order of Reich leader Heinrich Himmler, head of the SS, on July 25, 1941, to organize “additional protective units from the ethnic groups suitable to us in the conquered area as soon as possible.” CHRISTOPHER R. BROWNING, *THE ORIGINS OF THE FINAL SOLUTION: THE EVOLUTION OF NAZI JEWISH POLICY, SEPTEMBER 1939–MARCH 1942*, at 274 (2004). Browning explains: “Himmler’s order marked the official creation of the *Schutzmannschaften*, which over time became, in addition to the German security divisions, SS units, and Order Police battalions, a crucial element in the ‘pacification’ of the occupied territory. In late 1941, 26 battalions with local policemen had been created, and 33,000 *Schutzmänner* were serving German interests; within a year this figure had multiplied to about 300,000 local policemen, who were deployed in a variety of functions.” *Id.*

43. Arad, *supra* note 8, at xiv; RICHARD RHODES, *MASTERS OF DEATH: THE SS-EINSAZSGRUPPEN AND THE INVENTION OF THE HOLOCAUST* 3, 12 (2002).

44. RHODES, *supra* note 43, at 3, 12, 15.

45. Joshua Rubenstein, *The War and the Final Solution on the Russian Front, in THE UNKNOWN BLACK BOOK: THE HOLOCAUST IN THE GERMAN-OCCUPIED SOVIET TERRITORIES*, 3, 5–6 (Joshua Rubenstein & Ilya Altman eds., 2008).

46. *Id.* at 6–7, 12.

47. Tetyana Basina describes pre-war Kharkov: “Kharkov was a big industrial city with the population about 930,000 people and around 1200 factories. . . . It was known for the creation of such famous war-planes as MIG-1 and MIG-3 and tanks T-34. [The] Jewish population of Kharkov consisted of almost 150,000 people. The majority of them occupied leading positions at the factories and took active part in the academic life of the city.” *Jewish Collective Memory on Holocaust: The Case of Kharkov*, http://www.nbu.gov.ua/portal/Soc_Gum/Mtpsa/2008/articles/Basina.pdf (last visited Oct. 22, 2012).

48. Chris Webb, *Operation Barbarossa 1941–1943: Timeline of the German Invasion of the Soviet Union*, HOLOCAUST EDUC. & ARCHIVE RESEARCH TEAM (2008), <http://www.holocaustresearchproject.org/nazioccupation/opbarb.html>.

49. RAUL HILBERG, *PERPETRATORS VICTIMS BYSTANDERS THE JEWISH CATASTROPHE 1933–1945*, at 91 (1992).

1941, the Jews of Kharkov were forced into a ghetto and then taken, in a similar fashion to Kiev, to the countryside to be shot.⁵⁰ During this killing operation on December 15, 1941, at a ravine outside Kharkov known as Drobitsky Yar, approximately fifteen thousand Jews were murdered by the same detachment 4a troops and their collaborators.⁵¹ In total, Unit 4a—according to operational field reports sent to Berlin—executed 59,018 Jews in the Ukraine.⁵²

The Drobitsky Yar mass grave is only exceeded numerically by the mass grave at Babi Yar, but remains largely unknown today, even to the local population of Kharkov.⁵³ Babi Yar, on the other hand, has achieved iconic status because of the poem of the same name by the great Russian poet Yevgenii Yevtushenko.⁵⁴

The Unknown Black Book, a compilation of testimonies from Jews who survived open-air massacres and other atrocities carried out by the Germans and their collaborators in Soviet territories, contains the testimony of one survivor of the Drobitsky Yar massacre, engineer S.S. Krivoruchko:

I, a resident of Kharkov, by nationality a Jew, by training an engineer, could not be evacuated from the city in October 1941, due to illness On the morning of December 14, a decree was posted throughout the city from the German commandant of Kharkov ordering all Jews to move to barracks on the grounds of a tractor factory within two days; persons found in the city after December 16 would be shot on the spot.

Starting on the morning of December 15, whole columns of Jews headed out of the city For many of the elderly and the handicapped, the journey from the city to the barracks of the tractor factory was the last of their lives. The corpses of no fewer than thirty old people lay on the ground. The program began at about twelve o'clock, along with the robbing of the Jews who were on the move. As a result, many Jews arrived at the barracks without anything to their name and, more importantly, with barely any food

The barracks . . . were one-story, ramshackle structures, with smashed windows, torn away floors, and holes in the rooftops In the room which I had found myself more than seventy people had arrived by evening, whereas no more than six to eight people would have been able to live in it under normal circumstances. People stood compressed against each other. . . . From the dreadful overcrowding, hunger and lack of water, an epidemic of gastro-intestinal diseases broke out. . . . Robbery and murder were daily occurrences. Usually, the Germans would burst into the room on the pretext of searching for weapons and would steal anything that came to mind. In the event of any resistance, they dragged people out into the yard and shot them

50. TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* 204–05 (2010).

51. YITZHAK ARAD, *THE HOLOCAUST IN THE SOVIET UNION 191–92* (2009).

52. RHODES, *supra* note 43, at 178.

53. *Id.*

54. Yevgeni Yevtushenko, *Babi Yar*, LITERATURNAYA GAZETA, Sept. 19, 1961.

On January 2, 1942, at 7:00 am . . . German sentry shouted out an order for everyone to gather their things and be outside in ten minutes I went outside Then German sentries and policemen formed a tight ring around us and announced that we were being evacuated to Poltava. We marched out onto the Chuguyev-Kharkov highway but then were directed away from the city, although the road to Poltava ran through town. It was obvious that they were not taking us to Poltava. But where exactly we were going, nobody knew Two kilometers past the last houses of the tractor factory workers' quarters, they turned us in the direction of a ravine. The ravine was strewn with bits of rags and the remains of torn clothing. It became clear why they had brought us here. The ravine was sealed off by a double row of sentries. On the edge of the ravine stood a truck with machine guns. Terrible scenes erupted when people understood that they had been brought here to be slaughtered Many said goodbye to each other, embracing, kissing, exchanging the last supplies they had

From the standing column, the Germans began using clubs to drive groups of fifty to seventy people one hundred paces or so forward, then forcing them to strip down to their underwear. It was -20 or -25 degrees C. Those undressed were driven down to the bottom of the ravine, from which were heard occasional shots and the chattering of machine guns.

I was in a daze and did not notice the screaming behind me. The Germans began driving forward the group that I was part of. I moved off, ready to die within a few minutes. Just then, something happened: the Germans brought up the aged and handicapped to be executed. The belongings of those who had been killed had been loaded onto these trucks and brought back to the city. I moved along behind one of these vehicles. Two young Jews were in the truck; the Germans had assigned them to do the loading. In a flash, I jumped into the truck and asked the youngsters to cover me. Then they hid themselves as well. When the truck was full, the German drivers took off with it and in this way took me and the two boys away from the awful ravine

I went to find my wife (she is not a Jew and had stayed behind in the city with our adopted daughter) who hid me with a girlfriend of hers. I stayed with her for six and a half months. For four months later after that I wandered from village to village with a false passport and, in this way, held on until February 16, 1943, when Kharkov was liberated for the first time from the German occupiers.⁵⁵

Operational Situation Report USSR No. 164, transmitted from the field to Berlin and dated February 4, 1942, summarizes the actions taken regarding the Jews of Kharkov:⁵⁶

Einsatzgruppe C—Arrest of the Jews in Kharkov

55. Rubenstein, *supra* note 45, at 99–103.

56. An Operational Situation Report USSR mentioning the execution in Drobitsky Yar has never been located.

The extensive preparations that became necessary in the matter of the arrest of the Kharkov Jews were speeded up within the framework of SK 4a responsibilities. First of all, it was necessary to find a suitable area for the evacuation of the Jews. This was accomplished with the closest understanding of the municipality's housing department. An area was chosen where the Jews could be housed in the barracks of a factory district [in Rogan on the edge of town]. . . .

The evacuation of the Jews went on without a hitch except for some robberies during the march of the Jews in the direction of their new quarters. Almost without exception, only Ukrainians participated in the robberies. So far, no report is available on the number of Jews that were arrested during the evacuation. At the same time, preparation for the shooting of the Jews is underway. 305 Jews who have spread rumors against the German Army were shot immediately.⁵⁷

In his book, *Judgment Before Nuremberg*, Dawson tells the story of his mother, one of the few survivors at Drobitsky Yar, and details the ruthlessness of the Germans: "She [Dawson's mother] recounted the march of 16,000 Jews from Kharkov to a killing field outside the city, and how the Nazis mocked the walking dead and took souvenir photos to send home to Germany."⁵⁸

The Nazis used an alternative method of killing in the Kharkov region: carbon monoxide gas pumped through the exhaust of mobile death vans.⁵⁹ The Nazis first tested carbon monoxide gas on Soviet prisoners of war in September 1941 at the Sachsenhausen concentration camp, located north of Berlin.⁶⁰ By the following year, approximately fifteen gas vans had fanned out throughout German-occupied Soviet territory to exterminate Jews and other "undesirables."⁶¹ The victims were packed into the back of closed vans, specially sealed, while carbon monoxide was piped through a hose attached to the van's tailpipe.⁶² The bodies were then unloaded, and either buried in mass graves or incinerated in open flames.⁶³

When the Red Army liberated Kharkov for the last time in August 1943, almost no Jews remained.⁶⁴ That the Nazis had managed to make the

57. *Operational Situation Report USSR No. 164*, HOLOCAUST EDUC. & ARCHIVE RESEARCH TEAM (2008), <http://www.holocaustresearchproject.org/einsatz/situationreport164.html>.

58. DAWSON, *supra* note 30, at 33.

59. Rubenstein, *supra* note 45, at 10.

60. SAUL FRIEDLÄNDER, *THE YEARS OF EXTERMINATION: NAZI GERMANY AND THE JEWS, 1939–1945*, at 234 (2007).

61. *Id.*; see also Rubenstein, *supra* note 45, at 10; *Einsatzgruppen, AKTION REINHARD CAMPS*, <http://www.deathcamps.org/occupation/einsatzgruppen.html> (last updated Mar. 2, 2006).

62. *Einsatzgruppen*, *supra* note 61; FRIEDLÄNDER, *supra* note 60, at 234.

63. Rubenstein, *supra* note 45, at 12; KLADOV ET AL., *supra* note 21, at 49.

64. Boris Polevoi, a Soviet correspondent during the war, describes Kharkov's streets in August, after the Germans were expelled: "Her finest buildings were destroyed by fire and shell, or disfigured beyond recognition. Whole blocks stared blankly at us

Ukraine (including Kharkov) *Judenrein* is confirmed by the account of great Soviet Jewish writer and journalist Vassily Grossman reporting from the field: “There are no Jews in Ukraine. Nowhere—Poltava, Kharkov, Kremenchug, Borispol, Yagotin. . . . All is silence. Everything is still. A whole people have been brutally murdered.”⁶⁵

Grossman’s description is applicable for the rest of the Soviet territory occupied by the Germans. Of the approximately 2.5 million Jews who were trapped in German-occupied Soviet Union, only 100,000 to 120,000 survived.⁶⁶ Most did so by joining the Jewish partisans or going into hiding.⁶⁷ Arad points out the aftermath: “All told, of the five million Jews who lived in the Soviet Union on the eve of the German attack on June 22, 1941, about half lost their lives as a result.”⁶⁸

III. THE TRIAL

As the Red Army liberated Soviet territory, it repeatedly found mass graves containing remains of Jews who had been systematically slaughtered.⁶⁹ In the Kharkov region, some of these sites were discovered after the first liberation in February 1943, but before the German troops recaptured the region a month later.⁷⁰ Most of the Jews of Kharkov had already been murdered by that time. The Red Army liberated Kharkov

through paneless window-sockets. Dzerzhinsky Square had been the handsomest and most spacious in pre-war Kharkov. Its majestic architectural ensemble was now reduced to a wilderness of rubble and debris. Through the ribs of the smoke-blackened skeletons of the sixteen-story buildings stared the leaden, sultry August sky.” BORIS POLEVOI, FROM BELGOROD TO THE CARPATHIANS: FROM A SOVIET WAR CORRESPONDENT’S NOTEBOOK 23 (1945).

65. The victims included Grossman’s mother, murdered in Grossman’s Ukrainian hometown of Berdichev. Rubenstein, *supra* note 45, at 23.

66. Arad, *supra* note 8, at xiii, xvii.

67. *Id.*

68. *Id.*

69. KLADOV ET AL., *supra* note 21, at 46, 52.

70. Yitzhak Arad, *The Holocaust as Reflected in the Soviet Russian Language Newspapers in the Years 1941–1945*, in WHY DIDN’T THE PRESS SHOUT?: AMERICAN & INTERNATIONAL JOURNALISM DURING THE HOLOCAUST 208 (2003) (“A day after the liberation of Kharkov [in February 1943], *Pravda* wrote in an editorial: ‘Tens of thousands of Soviet people, Ukrainians, Russians, Jews, were shot, hanged, tortured It is hard to count all the bloody brutalities aimed to annihilate the Ukrainian people, to turn the others into slaves’ A *Pravda* correspondent wrote that in Kharkov ‘a concentration camp was discovered on Kholodnaya Gora where the Germans shot and starved 15,000 people. . . . In the area of the Kharkov tractor factory the fascists shot 14,000 Jews’”).

for the second and last time in August 1943.⁷¹ The defendants on trial were part of the German troops captured during this last liberation.⁷²

Earlier in the year, in July 1943, the Soviets put eleven local Soviet citizens who collaborated with the Nazis on trial in the northern Caucasus city of Krasnodar.⁷³ After a three-day trial, the eleven Krasnodar defendants were found guilty of treason.⁷⁴ Eight were executed and three were given sentences of twenty years of hard labor.⁷⁵

On November 1, 1943, the foreign ministers of the United States, the United Kingdom, and the U.S.S.R. issued the so-called Moscow Declaration. In its final part, titled “Statement On Atrocities” and signed by President Roosevelt, Prime Minister Churchill, and Premier Stalin, the Allies put on notice Germans participating in “atrocities, massacres and executions” that they would be tried for their “abominable deeds” in the countries where they committed those deeds.⁷⁶ The Kharkov trial of December 1943, the first public trial of German nationals by any Allied power, was the Soviet signal to the Allies that they were now putting into practice the Moscow Declaration.⁷⁷

Three Germans and one Ukrainian were tried before a military tribunal constituted by the 4th Ukrainian Front of the Red Army.⁷⁸ The four-day

71. BELLAMY, *supra* note 20, at 591–93.

72. CHARLES W. SYDNOR, *SOLDIERS OF DESTRUCTION: THE SS DEATH’S HEAD DIVISION, 1933–1945*, at 295 (1977).

73. KOCHAVI, *supra* note 23, at 64; *see also* George Ginsburgs, *Laws of War and War Crimes on the Russian Front during World War II: The Soviet View*, 11 *SOVIET STUDIES* 253, 263 (1960).

74. KLADOV ET AL., *supra* note 21, at 41.

75. KOCHAVI, *supra* note 23, at 64.

76. *Joint Four Nation Declaration*, <http://avalon.law.yale.edu/wwii/moscow.asp> (“The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled Accordingly, the aforesaid three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows: At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.”). For an analysis of the Moscow Declaration written by a distinguished Harvard law professor at the time, and who later came to assist the American prosecution in Nuremberg, see Sheldon Gluek, *Punishing the War Criminals*, 109 *NEW REPUBLIC* 706–09 (Nov. 22, 1943).

77. KOCHAVI, *supra* note 23, at 64; *see also* Ginsburgs, *supra* note 73, at 267.

78. Ginsburgs, *supra* note 73, at 267; *see also* KLADOV ET AL., *supra* note 21, at 41.

trial began on December 15, 1943, exactly two years—and purely by coincidence—after the German massacre of the Kharkov Jews at Drobitsky Yar.

Presiding over the trial was Major of Justice General A.N. Miasnikov,⁷⁹ who, along with Major of Justice S. Zapolski and Colonel of Justice M. Kharchev, formed the three-judge tribunal.⁸⁰ A young military colonel with a legal background, State Prosecutor of Justice Colonel N.K. Dunayev, led the prosecution of the case.⁸¹ The defendants were appointed three Soviet defense counsel.⁸² Additionally, a six-member forensic team of medico-legal experts served as expert witnesses in the case.⁸³

To accommodate the large attendance, and to provide the necessary gravitas to the proceedings, the trial was held in a theater auditorium, the Kharkov Dramatic Theater.⁸⁴ The theatrical atmosphere was confirmed by

79. *Biography of Major-General of Judiciary Andrei Nikolaevich Miasnikov*, http://generals.dk/general/Miasnikov/Andrei_Nikolaevich/Soviet_Union.html (last visited Oct. 22, 2012). Myasnikov was born in 1897 in the village of Kotel. He graduated from the Military Academy and Military-Political Academy. He served as both a scribe and clerk prior to World War I, when he enlisted as a soldier. He served several roles before becoming the Chairman of the Military Tribunal of the 4th Ukrainian Front. *Andrei Nikolaevich Myasnikov, Major General of Justice*, http://voen-sud.ru/about/struktra/rukovodstvo/predsedatel/istoria_vozdei/miasnikov.php (last visited Oct. 22, 2012).

80. KLADOV ET AL., *supra* note 21, at 120, 124. For an image of the three trial judges, see *Kharkov, Ukraine, A Nazi War Crimes Trial, December 1943*, YAD VASHEM PHOTO ARCHIVE, <http://collections.yadvashem.org/photosarchive/en-us/12699.html> (last visited Oct. 22, 2012).

81. KLADOV ET AL., *supra* note 21, at 45; Richard E. Lauterbach, *How the Russians Try Nazi Criminals*, 190 HARPER'S MAG. 658, 659 (1945). For an image of the lawyers in the trial, see *Kharkov, Ukraine, Lawyers in a Nazi War Crimes Trial, December 1943*, YAD VASHEM PHOTO ARCHIVE, <http://collections.yadvashem.org/photosarchive/en-us/9497.html> (last visited Oct. 22, 2012).

82. KLADOV ET AL., *supra* note 21, at 45; *see also* Bohuslav Etcher, THE LESSONS OF THE KHARKOV TRIAL 4 (1944) (“The counsel were three well-known Soviet barristers.”); *The Nuremberg Trials Were Rehearsing in Kharkov*, CTR. AND FOUND. HOLOCAUST, <http://www.holocf.ru/facts/674> (last visited Oct. 22, 2012) (“Nikolai Belov [one of the defense counsel] said that he learned about the process of preparing [for the Kharkov trial defense] in November, when he, a young specialist, was summoned to the People’s Commissariat. He and his colleagues reported that they would have to speak in defense of the Germans in order to ensure the legitimacy of the court. All three men were indignant and refused to defend the people of conscience of the crimes, but because the process was carried out according to the norms of the Soviet criminal law, they had to agree.”) (translation by authors).

83. KLADOV ET AL., *supra* note 21, at 45, 108–11.

84. EDMUND STEVENS, RUSSIA IS NO RIDDLE 111 (1945). For an image of the courtroom, see *Kharkov, Ukraine, The Courtroom of a Nazi War Crimes Trial, December 1943*, YAD VASHEM PHOTO ARCHIVE, <http://collections.yadvashem.org/photosarchive/en-us/11899.html> (last visited Oct. 22, 2012); Lauterbach, *supra* note 81, at 658.

the illumination of the auditorium with klieg lights, used to film the proceedings by a slew of cameras.⁸⁵ The audience was rotated each day to ensure maximum attendance.⁸⁶ Foreign correspondents were specifically invited to attend but, due to a glitch, only arrived on the last day of the trial.⁸⁷

The most knowledgeable of the foreign observers was American journalist Edmund Stevens. Stevens was a seasoned Soviet “old hand” who first went to the Soviet Union in 1934 to study “the Russian experiment” and married a Russian woman who immigrated with him and their son back to the United States before the war.⁸⁸ In 1945, he published *Russia Is No Riddle*, describing his journeys through the Soviet Union before and during the Second World War.⁸⁹ The book included a chapter about his visit to the Kharkov trial.⁹⁰ Unlike some Westerners who became enamored with the Bolshevik revolution and so viewed all things Soviet in a positive light, Stevens aimed to be objective about what he observed. His descriptions of the court proceedings in the Kharkov Dramatic Theater reflected this critical outlook. As he noted:

The Russians are past masters at mis en scene,⁹¹ and the atmosphere of that Kharkov trial room was distinctly reminiscent of the famous Treason Trials of 1936–38. In fact, two of the defense lawyers, Kommodov and Kaznachejev, had defended some of the figures in the treason trials. Their presence provided an element of direct continuity. This, too, was a military tribunal: judges, prosecutor, and attendants were all in uniform. . . .

The building is also referred to as the “Ukrainian Musical Comedy Theater on Rymarskaya Street,” by an observer, Richard Lauterbach, who attended the trial. *Id.* Lauterbach describes the theater as “old and smelly,” but the design was “baroque, and white sculptured nymphs arched against the upper boxes like so many little daughters of Atlas supporting the world.” *Id.*

85. STEVENS, *supra* note 84, at 111–12. Lauterbach explains that “the setting seemed like a Hollywood premiere. . . .” Lauterbach, *supra* note 81, at 658.

86. Ginsburgs, *supra* note 73, at 269; Lauterbach, *supra* note 81, at 658 (“Tickets to the proceedings went to wounded Red Army men, front-line heroes on leave, outstanding production workers, and families of Kharkov citizens who had been slaughtered by the Germans during the occupation.”).

87. STEVENS, *supra* note 84, at 111–12. (“[A]dmission tickets valid for one session only were distributed to factory workers and office employees through their trade union organizations, so that the audience kept rotating. . . . The best Soviet writing talent was mobilized to cover the trial, and representatives of the Allied press were flown down to attend the last day’s session and witness the executions the following morning.”).

88. *Id.* at ix. For a biography of Stevens, see generally CHERYL HECKLER, AN ACCIDENTAL JOURNALIST: THE ADVENTURES OF EDMUND STEVENS, 1934–1945 (2007).

89. STEVENS, *supra* note 84.

90. *Id.* at 110–29; HECKLER, *supra* note 88, at 246–55.

91. Literally translated from French as “placing on stage.” The expression is used to describe the design aspects of a theatre or film production, which essentially means “telling a story.”

During the recesses, I discovered that many of the people in the audience had personal knowledge or experience of the events and atrocities described, and had seen or known the defendants during the German occupation. Several times during more gruesome bits of evidence there were stifled sobs from some woman—not out of pity for the defendants. For the most part the proceedings took place against a background of concentrated silence.⁹²

The defendants were correctly characterized by Stevens as “small fry” and “non-entities”⁹³—chosen to embody various ranks and generations of the German military command that occupied the Kharkov region.⁹⁴ The three Germans on trial at Kharkov were:

- Wilhelm Langheld,⁹⁵ a fifty-two-year-old captain of the German Military Counter-Espionage Service (*Abwehr*) and a commander of a POW camp for Soviet prisoners.⁹⁶ Stevens described Langheld as “stocky, red-headed [and] beefy-faced . . . whose carriage, heel-clicking, and rows of ribbons proclaimed a German soldier of the old school.”⁹⁷
- Hanz Ritz, an *SS Untersturmführer* [Second Lieutenant] in the *Sicherheits Dienst–SD*, one of the security organizations of the SS, and an assistant SS Company Commander of a *Sonderkommando* unit.⁹⁸ Stevens described Ritz as a “Nazi horse of a different color from the hard-bitten Langheldt[,] . . . a baby-faced youth of twenty-four, with a tender little mustache.”⁹⁹ Ritz, trained in music and law, worked as a lawyer before being drafted into the SS to fight on the Eastern Front.¹⁰⁰

92. STEVENS, *supra* note 84, at 111.

93. *Id.* at 111, 116.

94. Prusin, *supra* note 29, at 6; W.H. Lawrence, *Four Nazis and ‘Traitor’ Confess to Mass Murders of Soviet Citizens*, N.Y. TIMES, Dec. 17, 1943, at 8 (the defendants “represent ‘three different generations of German people equally morally controlled by Hitlerite leaders.’”). For an image of the defendants, see *Kharkov, Ukraine, The Accused in a Nazi War Crimes Trial, December 1943*, YAD VASHEM PHOTO ARCHIVE, <http://collections.yadvashem.org/photosarchive/en-us/8716.html> (last visited Oct. 22, 2012).

95. Lauterbach, *supra* note 81, at 659–60. Langheld was a World War I veteran who “had been a British Prisoner of war in 1917 and ha[d] been allowed to return home to resume his career all over again.” *Id.*

96. KLADOV ET AL., *supra* note 21, at 45, 60; STEVENS, *supra* note 84, at 111.

97. STEVENS, *supra* note 84, at 112.

98. KLADOV ET AL., *supra* note 21, at 45, 60.

99. STEVENS, *supra* note 84, at 112–13.

100. KLADOV ET AL., *supra* note 21, at 73 (testimony of Hans Ritz); *see also* ETCHER, *supra* note 82, at 5 (“From April, 1941, until May, 1943, [he] worked as a lawyer in Poznan . . .”).

- Reinhard Retzlaff, a thirty-six-year-old corporal and member of the 560th Group of German Secret Field Police.¹⁰¹ Unlike the other two German defendants, Retzlaff was not a Nazi Party member.¹⁰² Prior to the war, Retzlaff was the assistant manager of distribution for a newspaper in Frankfurt.¹⁰³

All three Germans were charged with playing a “direct part in [the] mass and brutal extermination of peaceful Soviet people by the use of specially equipped automobiles known as ‘murder vans,’ and also with having taken a personal part in mass shootings, hangings, burning, plunder and outrages on Soviet people.”¹⁰⁴

Along with the three Germans on trial, the Soviets added a Soviet citizen: Mikhail Bulanov, a twenty-six-year-old Ukrainian collaborator who worked with the Germans from October 1941 to February 1943.¹⁰⁵ The indictment characterized Bulanov as a *shafior* (chauffeur) with the Kharkov *Sicherheits Dienst—SD*.¹⁰⁶ Bulanov was charged with “betrayal of the motherland . . . [and] with having taken a direct part in the mass extermination of the Soviet people by means of asphyxiation in ‘murder vans,’ with having personally shot civilian Soviet citizens, among whom were old people, women and children.”¹⁰⁷

The four defendants were charged under both international law and Soviet law. The legal basis under international law was the Moscow Declaration issued by the Allies a month earlier announcing that Germans participating in atrocities would be tried by the countries where the atrocities took place.¹⁰⁸ In the sphere of the Soviet legislation, on April 19, 1943, the Presidium of the Supreme Soviet [Parliament] of the U.S.S.R. issued a decree entitled, *On measures of punishment for German-Fascist villains guilty of killing and torturing the Soviet population and captive Red Army soldiers, for spies and traitors to the Motherland from among Soviet citizens and their accomplices*.¹⁰⁹ The April decree

101. KLADOV ET AL., *supra* note 21, at 45, 60.

102. *Id.* at 60.

103. *Id.* at 75.

104. *Id.* at 60.

105. *Id.* at 60, 83 (testimony of Mikhail Bulanov).

106. *Id.* at 60.

107. *Id.*

108. Moscow Declaration, Oct. 30, 1943, *available at* <http://avalon.law.yale.edu/wwii/moscow.asp>.

109. George Ginsburgs, *Light Shed on the Story of Wehrmacht Generals in Soviet Capacity*, 11 CRIM. L.F. 101, 105–06 (2000). The April 19, 1943 decree reads, in pertinent part:

1. To mandate that German, Italian, Romanian, Hungarian and Finnish fascist villains implicated in the killing and torture of the civilian population and captive Red Army soldiers, as well as spies and traitors to the Motherland from among Soviet citizens, be punished by hanging.

became the prime legal tool for prosecution of German Nazis and their Soviet collaborators.¹¹⁰ Alexander Prusin notes, “[t]he [April] decree became a binding tool with which to handle all accused war criminals, and its very language signifies its designation as an instrument of deterrence against collaboration with the Germans.”¹¹¹ The decree used the terms “atrocities” and “evil deeds” to broadly encompass the war crimes committed by the German (foreign) and Soviet (domestic) war criminals while stipulating punishment by public execution or long prison terms.¹¹²

The German defendants appeared in court dressed in full military attire, which was not common at Soviet trials.¹¹³ After a public reading of the indictment,¹¹⁴ all of the defendants entered guilty pleas.¹¹⁵ However, under continental civil law legal systems, and emulated by Soviet socialist

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2. Accomplices from among the local population, implicated in assisting the villains and engaging in reprisals and violence against the civilian population and captive Red Army soldiers are punished by hanging or by banishment to penal servitude for terms of 15 to 20 years.
 3. The hearing of cases . . . is assigned to field courts-martial attached to divisions of the regular army and consisting of the chairman of the military tribunal of the division (chairman of the court), the chief of the special department of the division and the deputy commander of the division for political affairs (members of the court), with the participation of the procurator of the division.
 4. The sentences pronounced by the field courts-martial attached to divisions are approved by the commander of the division and put into effect immediately.
 5. Execution of the sentences pronounced by the field courts-martial attached to divisions—hanging for those sentenced to death—is carried out publicly, before a popular audience, and the bodies of those hanged are to be left on the scaffold for several days so that everyone will know what punishment and retribution awaits all those who commit violence and reprisals against the civilian population and betray their Motherland.

Id.

110. KLADOV ET AL., *supra* note 21, at 60–61.

111. Prusin, *supra* note 29, at 4.

112. *Id.*; Harold J. Berman, *Principles of Soviet Criminal Law*, 56 YALE L.J. 803, 823 (1947) (explaining that “[d]uring the war, death by hanging was introduced for highly malicious treason.”).

113. Prusin, *supra* note 29, at 6 (“[T]he prosecution pointed out that the decorations were rewards received for the atrocities committed against the Soviet people.”).

114. The indictment included a description of the atrocities that had been committed, summaries of testimony from the pre-trial interrogations of the defendants, statements of witnesses, and findings of the medico-legal experts. The subsequent trial testimony, for the most part, was based on the text of the indictment.

115. KLADOV ET AL., *supra* note 21, at 61.

law, a plea of guilty is not automatically accepted by the court.¹¹⁶ The court must still be satisfied that the evidence proves the guilt.¹¹⁷ Additionally, evidence is presented to help determine what sentence should be rendered.¹¹⁸ The trial, therefore, continued despite guilty pleas.

Undoubtedly, the Soviets did not constitute this public trial for the defendants merely to plead guilty and subsequently sentence them without giving specifics of the atrocities committed. Almost all public trials held of Nazi war criminals and collaborators over the last half-century have had a didactic component, and this first trial of the Nazis was no exception. Detailed evidence of the brutal atrocities committed by the “Fascist-Hitlerite” invaders in the Kharkov region was going to be introduced during the trial, and subsequently disseminated to the outside world. As confirmation of this intent, the Soviets translated excerpts of the proceedings into English shortly after the trial’s conclusion and published them in a book, *The People’s Verdict*.¹¹⁹ The book included commentary and also excerpts from the Krasnodar trial.¹²⁰ The Soviets also produced a documentary, which was widely shown in Soviet theaters, though it only had limited screenings in the West.¹²¹

Stevens, the American correspondent, noted that, “all legal niceties were observed to a fault. The defendants and their counsel had full latitude to speak or interpolate, and every comma of what was said was translated into German for their benefit.”¹²² Each defendant took the stand and was questioned by the prosecutor, members of the tribunal, and defense counsel.¹²³ George Ginsburgs commented that “[t]here [was] no indication . . . that the German defendants had either been rehearsed or coerced.”¹²⁴

The trial began with the most senior of the three German defendants taking the stand: Captain Wilhelm Langheld.¹²⁵ He explained that the German High Command encouraged atrocities against civilians and decorated soldiers for fulfilling orders to exterminate Soviet citizens.¹²⁶

116. Steven C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN J. INT’L L. 61, 103 (1995).

117. *Id.*

118. Berman, *supra* note 112, at 822.

119. See KLADOV ET AL., *supra* note 21, at 45–124.

120. *Id.* at 7–44.

121. JANINA STRUK, PHOTOGRAPHING THE HOLOCAUST: INTERPRETATIONS OF THE EVIDENCE 138–39 (2004) (“In May 1945 the film of the Kharkov trials, called *Atrocities* (and also *We Accuse*), was screened at the Little Carnegie Hall in New York but was then withheld from general release.”); see also KOCHAVI, *supra* note 23, at 67.

122. STEVENS, *supra* note 84, at 112.

123. KLADOV ET AL., *supra* note 21, at 61–87.

124. Ginsburgs, *supra* note 73, at 269.

125. KLADOV ET AL., *supra* note 21, at 61.

126. *Id.* at 64 (testimony of Wilhelm Langheld).

Langheld described the use of gas vans by the German military for mass slaughter:

Langheld: I saw the “gas van” in Kharkov . . . [s]ometime in May, 1942, when I was on a service visit to Kharkov. . . . As far as I remember the “gas van” is a vehicle dark grey in colour, completely covered in, having hermetically sealed doors at the back. . . . [It holds] [a]pproximately 60 to 70 persons. . . . I was at 76, Chernishevsky Street at the H.Q. of the S.D. and heard a terrific noise and screaming outside A gas van at that moment had driven up to the main entrance of the building, and one could see how many people were being forcibly driven into it, while German soldiers were standing at the doors of the van I was a few paces away from the gas van and saw it being done Among the people being loaded into the gas van were old men, children, old and young women. These people would not go into the machine of their own accord and had therefore to be driven into the gas van by S.S. men with kicks and blows of the butt ends of automatic rifles. . . . I presume that these people guessed the sort of fate that awaited them.¹²⁷

When describing the child of a woman who was killed, Langheld explained: “He clung to his dead mother, crying aloud. The lance-corporal who came to take away the woman’s body got tired of this so he shot the child. . . . Such things happened everywhere. It was a system.”¹²⁸ Stevens described his observation of Langheld’s testimony:

When the prosecutor asked Langheld whether the German High Command ever punished its soldiers or officers for ill treatment of civilians, he pondered a moment, rocking slightly back and forth on his toes and heels, and then answered, in the same quiet, measured voice in which his entire testimony had been delivered, that on the contrary such treatment was deliberately encouraged and rewarded. At each conclusion of his testimony, Langheldt saluted smartly, turned on his heels, and strode back to his seat in the prisoners’ box.¹²⁹

The next defendant to take the stand was Second-Lieutenant Hans Ritz, who testified that the functions fulfilled by SS troops included “shooting, forcible evacuations of villages, [as well as] the transportation and guarding of arrested persons.”¹³⁰ Like Langheld, Ritz also indicated his awareness of “the extermination of civilian citizens in Kharkov” and admitted his involvement in the killings.¹³¹ Prosecutor Dunayev sought out Ritz’s mindset for his murderous acts:

Prosecutor: You, Ritz, are a person of higher legal education and apparently consider yourself a man of culture. How could you not only watch people being

127. *Id.* at 65–66.

128. *Id.* at 62–63.

129. STEVENS, *supra* note 84, at 113.

130. KLADOV ET AL., *supra* note 21, at 68 (testimony of Hans Ritz).

131. *Id.* at 71–72.

beaten, but even take an active part in it, and shoot perfectly innocent people, not only under compulsion but of your own free will?

Ritz: I had to obey orders, otherwise I would have been court-martialed and certainly sentenced to death.

Prosecutor: This is not quite so, because you yourself expressed a desire to be present when people were loaded on to the gas vans and nobody specially invited you to be there.

Ritz: Yes, that is true. I myself expressed a desire to be present, but I beg you to take into consideration that I was then still a newcomer on the Eastern Front and wanted to convince myself as to whether it was true that these lorries of which I had heard were used on the Eastern Front. Therefore, I expressed my desire to be present when people were loaded on them.

Prosecutor: But you took a direct part in the shooting of innocent Soviet citizens?

Ritz: As I have testified earlier, during the shooting at Podvorki, Major Hanebitter said to me: "Show us what you are made of," and, not wanting to get into trouble, I took an automatic rifle from one of the S.S. men and started firing.

Prosecutor: Consequently, of your own free will you entered upon this vile course of shooting completely innocent people, as nobody had forced you to do it.

Ritz: Yes, I must admit that.¹³²

Ritz also acknowledged that German policy was to ignore the laws of warfare on the Eastern Front:

Prosecutor: Now, Ritz, you are a man with some knowledge of law. Tell us, were the standards of international law observed to any extent by the German Army on the Eastern Front?

Ritz: I must say that on the Eastern Front there was no question of international or any other law.

Prosecutor: Tell us, Ritz, on whose orders did all this take place? Why was this system of complete lawlessness and monstrous slaughter of perfectly innocent people instituted?

Ritz: This lawlessness had its deep seated reasons. It was instituted on the instructions of Hitler and his collaborators, instructions which are capable of detailed analysis.¹³³

The third defendant to take the stand was Corporal Reinhard Retzlaff. Retzlaff's testimony included a description of how he participated in the murder of Soviet civilians:¹³⁴

Prosecutor: Tell the Court how you exterminated Soviet citizens.

...

132. *Id.* at 72.

133. *Id.* at 71–72 (testimony of Hans Ritz).

134. *Id.* at 77.

Retzlaff: Every person detained by the military authorities and sent to the Secret Field Police for examination, was first of all beaten up. If a prisoner gave the evidence we needed, the beatings were discontinued, while those who refused to give evidence were further beaten, and this frequently resulted in their death.

Prosecutor: This means that if a person did not confess, he was murdered. And if he did—he was shot. Is that correct?

Retzlaff: Yes, that was so on most occasions.

Prosecutor: Was there any occasion when cases were trumped up and evidence was faked?

Retzlaff: Yes, all this happened and rather frequently. One may say that this was quite normal procedure.¹³⁵

The final defendant to take the stand was Bulanov, who described the transport of medical patients from a hospital to shooting sites. He acknowledged that on four occasions he drove a three-ton truck with a total of about 150 patients from the Kharkov Hospital to a shooting site:

Bulanov: When I arrived at the hospital I was told to drive up to one of the hospital blocks. At this moment Gestapo men began to lead out patients dressed only in their underwear, and load them into the trucks. After loading, I drove the truck to the shooting site under German escort. This place was approximately four kilometers from the city. When we arrived at the shooting site, screams and sobs of patients who were already being shot filled the air. The Germans shot them in front of the other patients. Some begged for mercy and fell down naked in the cold mud, but the Germans pushed them into the pits and then shot them.¹³⁶

Bulanov also discussed a similar trip from a Children's Hospital to transport children aged six through twelve for extermination.¹³⁷

Once examination of the defendants concluded, the court and counsel proceeded to interrogate percipient witnesses. These included both Kharkov residents (including hospital personnel) who witnessed the atrocities as well as captured German soldiers. None testified directly about the defendants on the dock. Rather, their testimony served as background, adding to the overall picture of the horror that had taken place in the Kharkov region: mass shootings, gas van descriptions, discussions of the plunder of agricultural products, instructions from superiors in command

135. *Id.*

136. *Id.* at 84–85 (testimony of Mikhail Bulanov).

137. *Id.*

(to implicate those higher ranked officials), the disgraceful prison camp conditions, and murder of hospital patients.¹³⁸

As part of the prosecution's case, forensic experts from the Commission of Medico-Legal Experts also testified and presented a report based upon their examination of the various mass graves found at the Drobitsky Yar gully and other places in the Kharkov region.¹³⁹ The expert report confirmed by forensic evidence that the methods of murder by the German forces of local civilians and POWs consisted of shooting the victims and gassing them through the use of carbon monoxide:

The Medico-legal experts examined in Kharkov and neighbouring localities the scenes of the crimes of the German fascist invaders—the places where they carried out the extermination of the Soviet citizens. These included the burned-out block of the army hospital, where they shot and burned war prisoners—severely wounded personnel of the Red Army; the place of the mass shooting of the healthy and sick, of small children, juveniles, young people, old men and women in the forest park of Sokolniki, near the village of Podvorki, in the Drobitsky gully, and in the therapeutic colony of Strelechye. At these sites the medico-legal experts examined the grave-pits and exhumed bodies of Soviet citizens shot, poisoned, burned or otherwise brutally exterminated.

The medico-legal experts examined the places where the German fascist invaders burnt bodies to destroy evidence of their crimes—the poisoning with carbon monoxide. This is the site of the conflagration on the territory of the barracks of the Kharkov tractor plant. Examination of territories on which bodies were burnt or buried, examination of the grave-pits and positions of bodies in them and comparison of material thus obtained with data of the Court proceedings, provide grounds for considering that the number of bodies of murdered Soviet citizens in Kharkov and its environs reaches several tens of thousands, whereas the figure of 33,000 exterminated Soviet citizens given by accused and some witnesses is only approximate and undoubtedly too low.

In the 13 grave-pits opened in Kharkov and its immediate vicinity were found a huge number of corpses. In most graves they lay in extreme disorder, fantastically intertwined, forming tangles of human bodies defying description. The corpses lay in such a manner that they can be said to have been dumped or heaped but not buried in common graves. In two pits in the Sokolniki forest park bodies were found lying in straight rows, face downward, arms bent at the elbow and hands pressed to faces or necks. All the bodies had bullet wounds through the heads. Such a position of the bodies was not accidental. It proves that the victims were forced to lie down face downward and were shot in that position. In the grave pits where the bodies lay and in places where the bodies had been burnt the medico-legal experts found articles of everyday use and personal effects, such as bags, sacks, knives, pots, mugs, spectacles, fasteners of women's handbags, etc. The fact revealed by the investigation—namely, that before being murdered Soviet citizens were stripped of their footwear—is fully confirmed by the medico-legal examinations: during exhumation the experts in most cases discovered naked or half-naked bodies.

138. *Id.* at 88–106.

139. *Id.* at 108–11 (findings of the Commission of Medico-Legal Experts).

In order to ascertain which Soviet citizens were exterminated and in what manner, the experts exhumed and examined 1,047 bodies in Kharkov and its environs. These included the bodies of 19 children and adolescents, 429 women and 599 men. The dead ranged in age from two to 70 years. The fact that the bodies of children, adolescents, women and old men as well as invalids were discovered in grave-pits with civilian clothes and articles of domestic use and personal effects on the bodies or near them proves that the German fascist authorities exterminated Soviet citizens regardless of sex or age. On the other hand, the fact that on bodies of young and middle-age men were found clothes of military cut worn in the Red Army, also articles of military equipment (pots, mugs, belts, etc.) is evidence of Soviet war prisoners.

On the basis of all the combined data of their proceedings—the medico-legal experts have established the presence of:

- (a) A vast number of burial sites in the city of Kharkov and its immediate environs.
- (b) A huge number of bodies in the grave-pits.
- (c) Varying times of burial in various graves.
- (d) Varying degrees of preservation of the bodies in the same graves.
- (e) Distinction of bodies in regard to sex and age.
- (f) Uniformity of methods of extermination of human beings.

We regard the above as proofs of systematic, methodically organized, mass extermination of Soviet civilians and war prisoners.¹⁴⁰

The defense strategy was to argue that ultimate guilt for their crimes lay with the Nazi regime and immediate higher-ups.¹⁴¹ Langheld explained: “I fulfilled the orders of my superiors. Had I not done so I would have been court-martialed.”¹⁴² Retzlaff stated: “I plead guilty to all the crimes I have committed upon the orders of my immediate command.”¹⁴³ The reliance on superior orders and the defense of duress were, of course, the most-repeated defenses in subsequent trials of Germans and local accomplices by the Allies, both at Nuremberg and thereafter.¹⁴⁴

On the morning of December 18, 1943, after three days of testimony, prosecutor Dunayev gave his closing argument.¹⁴⁵ While seeking to confirm that the defendants all acted on the superior orders of others, he argued that this should not exculpate defendants from their personal guilt.¹⁴⁶

140. *Id.*

141. *See id.* at 117–20.

142. *Id.* at 65 (testimony of Wilhelm Langheld).

143. *Id.* at 82 (testimony of Reinhard Retzlaff).

144. KEVIN MAHONEY, IN PURSUIT OF JUSTICE: EXAMINING THE EVIDENCE OF THE HOLOCAUST 19 (1996).

145. KLADOV ET AL., *supra* note 21, at 111–17.

146. *See id.* at 114–15.

In so doing, Dunayev utilized an argument that was later to be used in the Nuremberg trials: German law itself rejected the defense of superior orders.¹⁴⁷ The precedent specifically relied on by Dunayev was a result of the trials held in Weimar Germany after the First World War before the German Supreme National Tribunal at Leipzig, where German judges found German military defendants guilty of war crimes.¹⁴⁸

One of the classic decisions from the Leipzig tribunal is the *Llandovery Castle* case, where in 1921 two German naval submarine officers were convicted of war crimes for shooting survivors in lifeboats after torpedoing the British hospital ship *Llandovery Castle*, despite the fact that their acts of shooting upon the lifeboats were carried out on orders of their submarine captain.¹⁴⁹ Dunayev specifically referred to this case in his closing argument.¹⁵⁰

Dunayev concluded on an emotional note. After an obligatory nod to “[t]he heroic Red Army, led by the great Stalin,” he ended:

Concluding my speech for the prosecution, I appeal to you, citizen judges, to inflict severe punishment on the three base representatives of fascist Berlin, and on their abominable accomplice, who are sitting in the dock, to punish them for their bloody crimes, for the sufferings and the blood, for the tears, for the lives of our children, of our wives and mothers, of our sisters and brothers!

Today they are answering to the Soviet Court, to our people, to the whole world, for the felonies they committed on a scale and of a baseness far surpassing.

The blackest pages of human history, the horrors of the Middle Ages and of barbarism! Tomorrow their superiors will have to answer—the chieftains of these bandits who invaded our peaceful, happy land on which our people toiled, reared their children, and built our free State. I accuse Reitzlaff, Ritz, Langheld and Bulanov of the crimes specified in Part I of the Decree of the Presidium of the Supreme Soviet of the U.S.S.R., dated 19th April 1943.

In the name of the law and of justice, in the name of tens of thousands of peoples maimed and tortured to death, in the name of the entire people—I, as State Prosecutor, beg you, citizen judges, to sentence all four base criminals to death by hanging.¹⁵¹

Defense counsel did not argue with the prosecution’s request for a guilty verdict; only that extenuating circumstances called for the defendants’ lives to be spared. Defense counsel Kommodov explained: “[T]hese

147. *See id.* at 114.

148. *See id.* For a discussion of Leipzig after World War I, see, for example, GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 59–105 (2000); PATRICIA HEBERER AND JÜRGEN MATTHÄUS, *Lessons of the Leipzig, in ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES* 3–20 (2008).

149. KLADOV ET AL., *supra* note 21, at 11–13.

150. *See id.* at 114.

151. *Id.* at 116–17.

men were made into assassins by, first of all, killing their souls, and it is this doubt which gives me, comrades judges, the moral right to pose the question of the possibility of a lesser penalty than that demanded by the Prosecutor.”¹⁵² His colleague, defense counsel Kaznacheyev, described the crimes as being committed by an army where “human feelings were considered a weakness, and ruthlessness and fanaticism a virtue.”¹⁵³ Focusing on defendant Retzlaff, Kaznacheyev argued that because “Retzlaff . . . is now conscious of what he has done and has undergone a psychological transformation, I consider it possible to ask that his life be spared.”¹⁵⁴ With regard to Bulanov, the defense argued that he also had repented, and this should be taken into account in the determination of a final sentence.¹⁵⁵

The four defendants were allowed to make final statements. Langheld stated: “I do not want to minimize my guilt in any way, but I should like to point out that the underlying reasons for all the atrocities and crimes of the Germans in Russia are to be sought in the German Government The Hitlerite regime has succeeded in stifling the finest feelings of the German people, by implanting base instincts in them.”¹⁵⁶ According to Langheld, who argued that he had to follow the evil “orders or directives” of his superiors, that like the deceased, “I was also a victim of these orders and directives.”¹⁵⁷ Retzlaff repeated the defense of compulsion: “If I had not obeyed these orders, I should have been put in the same position as my victims.”¹⁵⁸ Bulanov begged: “I ask one thing of you, citizen judges, that in passing sentence you spare my life so that I may in the future atone for my guilt before the country.”¹⁵⁹

Ritz, the young lawyer, gave the most eloquent speech. Like Langheld, he argued the defense of duress: “I would like to ask the Court to take into consideration an old principle of Roman Law: Crime under duress. You must believe me that if I had not obeyed orders I should have been arraigned before a German military tribunal and sentenced to death.”¹⁶⁰

152. *Id.* at 117 (closing statement of N.V. Kommodov).

153. *Id.* at 116.

154. *Id.* at 117.

155. *Id.*

156. *Id.* at 117–18.

157. *Id.* at 118.

158. *Id.* at 120.

159. *Id.*

160. *Id.* at 118–19.

But he then detailed particular circumstances that led him to commit his crimes:

I beg you, gentlemen of the Court, also to take into consideration the facts of my life. When the Hitlerite system came to power I was a child of only thirteen. From that time on I was subjected to the systematic and methodical influence of the Hitlerite system and education in the spirit of the legend of the superiority of the German race; an education which taught me that only the German people were destined to rule, and that other nations and races were inferior and should be exterminated. I was subjected to systematic training by such teachers as Hitler, Rosenberg and Himmler, who educated the whole German people in the same spirit.

At the beginning of the war new propaganda came from these same sources, although these were encountered before the war. I have in mind the idea that the Russian people were uncultured and inferior. That is what they taught us. Then, with total mobilization I was sent to the front. When I reached the Eastern Front I was convinced that there was not a word of truth in these fables of Hitler, Rosenberg and others; that on the Eastern Front the Germans did not have the slightest understanding of any tenets of international law; that there was no justice here in all the actions of the German authorities. But nothing remained to me but to continue along the same path. On the Eastern Front, I was also convinced of another thing, namely that a system on the banner which is inscribed the words “murder and atrocities” cannot be a right system.

I realize that the destruction of this system would be an act of justice. I am young. Life is still only beginning with me. I request you to spare my life so that I may devote myself to the struggle against that system.¹⁶¹

The tribunal judges returned with a verdict later that evening, with Miasnikov announcing it five minutes before midnight.¹⁶² All four defendants were found guilty.¹⁶³ The tribunal described the individual guilt of each defendant as follows:

- Wilhem Langheld . . . personally fabricated a number of cases in which about 100 perfectly innocent Soviet war prisoners and civilians were shot
- Hans Ritz . . . directed the shootings carried out by the *S.D. Sonderkommando* in Taganrog, and during the examination of prisoners beat them up with ramrods and rubber truncheons, thus trying to extort from them false statements
- Reinhard Retzlaff . . . tried to extort from them [Soviet civilians] false statements by means of torture—plucking out their hair and torturing them with needles, drew up fictitious reports in the case of 28 arrested Soviet citizens He personally drove into the “murder van” Soviet citizens doomed to death,

161. *Id.*

162. *See id.* at 120; Lauterbach, *supra* note 81, at 661.

163. KLADOV ET AL., *supra* note 21, at 123.

accompanied the “murder van” to the place of unloading and took part in the burning of bodies of asphyxiated people

- Mikhail Petrovich Bulanov, having betrayed the Socialist motherland, voluntarily sided with the enemy, joined the German service as a chauffeur with the Kharkov Gestapo branch, personally took part in the extermination of Soviet citizens by means of the “murder van,” drove peaceful Soviet citizens to the place of shooting and took part in the shooting of sixty children.¹⁶⁴

All four defendants were sentenced to death by hanging, with no right to appeal.¹⁶⁵ As Stevens observes: “The sentence of hanging was read by the chief judge around midnight, in a final blaze of klieg projectors.”¹⁶⁶

The next morning, on December 19, 1943 at 11 a.m., the defendants were publicly hanged in Kharkov City Square.¹⁶⁷ Stevens describes the hanging:

It was all over in a few moments. The defendants were hoisted into the back of four open trucks and stood on stools. Then the nooses were looped around their necks. There was no blindfolding. During the preliminaries three of the four prisoners had to be propped up. Bulanov had fainted; Ritz and Retsalu [Retzlaff] had turned pasty white; they drooled at the mouths and their knees gave way. Only Langheld . . . , the old soldier, remained stiff as a ramrod throughout, never once flinching. Once the nooses had been adjusted, at a signal the trucks pulled away and the four were left dangling and kicking in mid air.¹⁶⁸

In 1944, the Soviet Union released a full-length documentary of the trial, which has been titled *We Accuse*, as well as *Atrocities and Justice*

164. *Id.* at 120, 123–24.

165. *Id.* at 124.

166. STEVENS, *supra* note 84, at 115.

167. *The New York Times* describes the setting: “A crowd of about 50,000 men, women and children had gathered by 11 A.M. Red army men, fur capped and with tommy guns slung over their shoulders, made chains around the small square inside which stood members of the tribunal, members of the Atrocities Commission, city authorities and Russian, British and American correspondents The sky was cold gray and the roofs of the buildings were black with people. Many persons stood on trucks to get a better view. . . . Soviet fighter planes were flying over the square. Newsreel photographers were filming the scene. One camera was placed on a platform twenty feet high opposite the gallows The Germans were in full uniform with epaulettes and ribbons and they wore forage caps [After the hanging,] [l]oud cheers broke from the crowd.” *Atrocity Killers Hanged in Kharkov*, N.Y. TIMES, Dec. 20, 1943, at 12.

168. STEVENS, *supra* note 84, at 115–16.

is Coming.¹⁶⁹ Seven months after the trial, *Life Magazine* published a full two-page spread with photos (taken from the documentary film stills) and brief descriptions of the trial and its participants.¹⁷⁰

IV. THE “SHOW” TRIAL

A. *The Kharkov Trial as a Typical Stalinist Show Trial*

The show trial is one of the special hallmarks of the Stalin era and of Stalinism. The first Stalinist purge trial of fellow Communist Party members in August 1936 typifies the process by which Soviet courts became instruments of political repression.¹⁷¹ Sixteen party leaders were charged in organizing a “terrorist” center on behalf of the exiled Leon Trotsky.¹⁷² After their arrest and interrogation, most confessed to the false charges, a common occurrence in such trials.¹⁷³ Stalin’s instructions to the secret police, the NKVD, for interrogation were as follows: “Mount your prisoner and do not dismount until they have confessed.”¹⁷⁴ Defendants

169. To view footage of the trial, see *Utro nemetskoj kazni ili Niuremberg v Kharkove, Vtoraiia Mirovaiia Voiina, Kroniki* [“The Morning of the German Penalty or Nuremberg in Kharkov, World War II Chronicles”] (translation by authors), <http://war2.name/utro-nemeckoj-kazni> (last visited Feb. 2, 2012). “A documentary film story of the Kharkov war criminal trials, ‘We Accuse,’ is a sober exposition of the German plot to enslave the world.” *We Accuse*, CHRISTIAN SCI. MONITOR, Mar. 16, 1944, at 9.

[The film] begins with a quotation from Stalin: “We shall bring the German criminals to book.” It continues with shots of burning Russian villages and devastated cities and of the charred bodies of dead children. “Be ye accursed, ye murderers,” the sound track shrills.

It then presents scenes at the “trial.” All the prisoners confess. They tell of gas-filled murder vans into which victims are pushed by the score; of truckloads of children shot, then kicked into mass burial pits.

When the prosecutor asked death by hanging, the audience—and the best shots in the film, cinematically, are audience shots—claps and roars its approval. It cheers again when the verdict is pronounced. Red army men have difficulty in holding back the exuberant, cheering mob when the nooses are sprung.” It is “entirely sickening,” said James Agate, reviewing the film in “The Tatler,” adding, “and should be exhibited all over the country.”

Robombs Change British View on Movie of Kharkov Trials, WASH. POST, Aug. 13, 1944, at B3.

170. *Kharkov Trial: First Pictures from Russian Movie Show Legal Trial and Death of Nazi War Criminals*, LIFE MAG., July 10, 1944, at 94, 97, available at <http://books.google.com/books?id=RE8EAAAAMBAJ&pg=PA94&dq=kharkov+trial+life&hl=en&sa=X&ei=5VQnT968L4qdiALXgpGTAQ&ved=0CDgQ6AEwAA#v=onepage&q=kharkov%20trial%20life&f=false>.

171. William Chase, *Stalin as Producer: the Moscow Show Trials and the Construction of Mortal Threats*, in STALIN: A NEW HISTORY 229 (Sarah R. Davies & James R. Harris eds., 2005).

172. SIMON SEBAG MONTEFIORE, STALIN: THE COURT OF THE RED TSAR 188–89 (2003).

173. *Id.* at 184–88.

174. *Id.* at 185.

were told (falsely) that if they signed a confession, their lives would be spared.¹⁷⁵ Prosecution witnesses were forced to provide false evidence by the same method.¹⁷⁶

For these trials, as William Chase notes, Stalin was the producer, controlling the show in the courtroom.¹⁷⁷ For the August 1936 trial, Stalin “helped phrase the charges, decided on the slate of defendants, crafted the [false] evidence, and prescribed the sentences. He even dictated [prosecutor Andrei] Vishinsky’s emotional speech as the grand finale of the trial and polished its style.”¹⁷⁸

Of course, “Stalin appreciated that staging a successful show trial is a risky affair. A show trial requires the participation, or at least the compliance, of many people (investigators, prosecutors, defence attorneys, judges, witnesses, the press corps, and the defendants) who act out of shared beliefs or under duress, although the latter motive can be most unpredictable. Orchestrating such a complex undertaking is daunting.”¹⁷⁹

Show trials were a feature of the Soviet system even prior to Stalin.¹⁸⁰ Chase quotes a letter by Lenin in 1922 to the People’s Commissar of Justice Kursky recommending the “staging [of] a series of model trials” to administer “quick and forceful repression” in Moscow, Piter [Petrograd], Kharkov and several other important centres.”¹⁸¹ In his correspondence, Lenin stressed the importance of an “explanation of their significance to the popular masses through the courts and the press” and noted that “the educational significance of the courts is tremendous.”¹⁸² The educational feature of a Soviet show trial included the filming of the proceedings, with the wide-scale distribution of such newsreels to Soviet movie audiences.¹⁸³

Considering the pedigree of the trial process in Stalin’s Soviet Union and when it took place, it is difficult to see the Kharkov trial as anything other than another Stalinist show trial.¹⁸⁴ The making of a full-length

175. *Id.* at 187.

176. J. Arch Getty, *The Politics of Repression Revisited*, in *STALINIST TERROR: NEW PERSPECTIVES* 54 (J. Arch Getty & Roberta T. Manning eds., 1993).

177. *See* Chase, *supra* note 171, at 226.

178. ROBERT GELLATELY, *LENIN, STALIN AND HITLER: THE AGE OF SOCIAL CATASTROPHE* 270 (2009).

179. Chase, *supra* note 171, at 228.

180. *Id.* at 226.

181. *Id.* at 227.

182. *Id.*

183. KOCHAVI, *supra* note 23, at 67.

184. GEORGE GINSBURGS, *MOSCOW’S ROAD TO NUREMBERG* 54 (1996).

documentary film on the trial and its screenings in Soviet movie theaters adds to this notion.¹⁸⁵ Even the publication in English in 1944 of the proceedings of the Kharkov trial, to be sold in the United States and the United Kingdom, is further proof that the Kharkov trial followed in the tradition of a typical Stalinist show trial.¹⁸⁶

What are the characteristics of a show trial? Jeremy Peterson provides a good summary:

[A] show trial can be defined by the presence of two elements. The first element is increased probability of the defendant's conviction resulting from the planning and control of the trial. The second element is a focus on the audience outside of the courtroom rather than on the accused—the extent to which the trial is designed or managed for the benefit of external observers rather than for securing justice for the defendant. The first element could be termed the reduction of the “element of risk to the authorities” that the defendant will be acquitted. When there is no risk to the authorities, the content of the trial is predetermined, and the verdict is a foregone conclusion. The second element could be termed the “show.”¹⁸⁷

It is the first element that makes the trial unfair. Peterson quotes Elise Groulx Diggs, in her explanation that “all trials must contain an element of risk—namely the risk that the accused may be freed. If this aspect is missing, what we have is a show trial, a clear lack of legitimacy, and no desirable legacy for the future of international criminal justice.”¹⁸⁸

With regard to Soviet show trials, Susan Arnold notes that there is a gulf difference between Soviet-style show trials and a true war crimes trial: “A real trial involves risk and assuming that risk is a political decision.”¹⁸⁹ Why were the Nuremberg trials not show trials? The consensus is because not all of the defendants were convicted.¹⁹⁰ As noted by David Luban: “The best proof of the fairness of the Nuremberg Tribunal lies in its acquittal of such major figures of the Third Reich as Fritzsche, Papen, and Schacht.”¹⁹¹

The second element—the show—does not necessarily make the trial unfair. Rather, in addition to providing procedural due process, the trial can be used for a didactic purpose. The Eichmann trial was a show trial in that sense as Israeli Prime Minister David Ben-Gurion and prosecutor

185. KOCHAVI, *supra* note 23, at 67.

186. See KLADOV ET AL., *supra* note 21, at 45–124.

187. Jeremy Peterson, *Unpacking Show Trials: Situating the Trial of Saddam Hussein*, 48 HARV. INT'L L.J. 257, 260 (2007).

188. Elise Groulx Diggs, *Verbatim*, CHAMPION, Nov. 2004, at 46.

189. Susan K. Arnold, Book Note, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, 172 MIL. L. REV. 195, 196 n.5 (2002) (reviewing BASS, *supra* note 148).

190. Francine Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order*, 113 AM. HIST. REV. 701, 726 (2008).

191. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 144 n.203 (2004).

Gideon Hausner aimed to use the trial of Eichmann to teach both young Israelis and the outside world about the Holocaust. As Lawrence Douglas observes in his excellent *The Memory of Judgment*: “The Eichmann trial, even more explicitly than Nuremberg, was staged to teach history and shape collective memory.”¹⁹² For this reason, Douglas labels the Eichmann proceedings as “The Great Holocaust Trial.” In Douglas’s view:

[T]he tasks of doing justice to unprecedented crimes, clarifying a tortured history, and defining the terms of collective memory conjoined and collided in the most provocative fashion. Indeed the Eichmann trial served to create the Holocaust: it helped remove an episode of unprecedented atrocity from the silences of shame, unexamined horror, and purposeful avoidance and transform it into an episode of world historical significance and collective meaning.¹⁹³

As Asli Bâli has noted: “Trials that exemplify international standards of accountability for atrocities are for show in the best possible sense: they provide a public forum for local and international audiences that demonstrates that justice is being served and leaders are being held accountable for their crimes.”¹⁹⁴ For this reason, as Jeremy Peterson observes: “[T]his does not mean that all show trials are damnable. It also may be true that some show trials are defensible.”¹⁹⁵

The Kharkov trial can be characterized as such a defensible show trial. While the defendants were all convicted and put to death, later postwar trials conducted by the Soviets of captured Germans led to acquittals and varying degrees of sentences, depending on the evidence produced during the proceedings.¹⁹⁶ Using Luban’s fairness standard for Nuremberg noted above, the best proof of fairness in the Soviet postwar trials of Nazis *in toto* was the acquittal of some defendants. In the earlier Krasnodar trial, not all of the collaborators were given death sentences.¹⁹⁷ Rather, guilt and measures of guilt were adjudged by each defendant’s degree of culpability.¹⁹⁸ The same took place in the Kharkov courtroom.

As Kochavi observes:

192. DOUGLAS, *supra* note 30, at 3.
 193. *Id.* at 6.
 194. Asli Ü. Bâli, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 459 (2005).
 195. Peterson, *supra* note 187, at 268.
 196. Ginsburgs, *supra* note 73, at 270 n.63.
 197. KOCHAVI, *supra* note 23, at 64.
 198. The differentiation in the defendants’ sentencing may be attributed to the defendants’ determined degree of culpability.

American correspondents who followed the trial [in Kharkov] and attended the hanging of the convicted men were generally convinced of the guilt of the accused and of the genuineness of the Soviets' charges of organized atrocities. They thought that the Russians had been punctilious in their observance of the legal proprieties of the trial and found no evidence of duress. The self-abasing testimony of the accused, the journalists observed, was reminiscent of the purge trials of the mid-1930's. Still, this was largely attributed to the care that had been exercised in selecting those who were placed on trial.¹⁹⁹

Unlike a paradigmatic “show trial,” whose purpose is to stage-manage falsehoods, the defendants on the dock in Kharkov were indeed guilty of the crimes accused. From Dawson's perspective, the Kharkov trial, “[s]ymbolically at least, . . . was the trial of the men who murdered my grandparents and great-grandparents at Drobitsky Yar. Yes, it could have been worse. They [the defendants] could have been torn to pieces by dogs. If this was a ‘show trial,’ it was because the victims were showing the perpetrators far more justice than they deserved.”²⁰⁰ Soviet Jewish lawyer Aaron N. Trainin, in the aftermath of the trial, correctly observed that in the Kharkov trial, defendants “were tried for the misdeeds which they themselves committed, with their own hands, for the crimes committed by them personally.”²⁰¹ Justice, therefore, was meted out in Kharkov by the Soviet judges, although it was delivered through the vehicle most familiar to Soviet jurists at the time: the Stalinist show trial.

B. The Kharkov Trial's Three Audiences and the Absence of Jews as Victims

The Soviets organized the Kharkov trial for three audiences: (1) their domestic audience, the Soviet populace fighting for liberation from Germany; (2) their international audience, the U.S.S.R.'s British and American allies with whom they were in a common cause to defeat Nazi Germany; and (3) their enemy, the German military and German political leaders. In this additional sense, the Kharkov trial was a “show trial,” where political considerations led to the creation of the judicial proceedings. Stalin's strategy towards these three audiences each featured different considerations, and the trial was aimed to satisfy each audience.

On the home front, Stalin used the media to publicize the trial and link the victories to the Red Army.²⁰² Not only did the publicity aim to promote a positive image of the Soviet Union, but also a negative image

199. KOCHAVI, *supra* note 23, at 68.

200. DAWSON, *supra* note 30, at 289.

201. KOCHAVI, *supra* note 23, at 69 (quoting A.N. Trainin); *see also* Lukasz Hirszowicz, *The Holocaust in the Soviet Mirror*, in *THE HOLOCAUST IN THE SOVIET UNION* 29 (Lucjan Dobroszycki & Jeffrey S. Gurock eds., 1993).

202. KOCHAVI, *supra* note 23, at 67.

of the enemy to “satisfy popular demand for revenge and to stimulate further hatred of the enemy.”²⁰³ In the view of American Ambassador Averell W. Harriman, the Kharkov trial was “meant to show Soviet citizens that the government was sincere in its promise to punish the Germans and to lose no time in doing so.”²⁰⁴ According to news reports at the time, in “[d]evoting more than two pages of their four-page editions, Russian papers declare the Kharkov trials are of great international significance, heralding the triumph of justice and bearing witness to the fact that criminal violations of international laws and principles will not remain unpunished.”²⁰⁵ The Soviet official daily *Pravda* stated that “[t]he sword of the Red Army and the armies of our Allies are victoriously preceding the sword of justice. . . . The sword will not be sheathed until the leaders of the cursed Fascist band shall answer with their heads for their crimes against humanity.”²⁰⁶ In effect, Stalin wanted to keep the Soviet spirits high in order to ensure success in the war effort.

On the international front, Stalin attempted to impress upon the British and the Americans that victory could be achieved through a legal process. As the *Christian Science Monitor* observed at the time: “The Kharkov executions thus seem intended to set precedents for dealing with war criminals: their trials need not await the end of the war, and the execution of those directly involved will not absolve others whose responsibility may seem less direct but whose policies dictated brutal methods of warfare against innocent populations.”²⁰⁷ In fact, John Balfour, the British Minister in Moscow, furthered this idea by stating his view that the Kharkov trial had been staged in order to “throw . . . a cloak of legality over past, present, and future hangings.”²⁰⁸ Harriman suggested that Stalin wanted to exhibit the Soviets’ determination to track down and hold responsible war criminals.²⁰⁹ Additionally, Stalin may have wanted to ensure that his allies, the British and Americans, would “keep their pledge about bringing

203. *Id.* at 67–68.

204. Kochavi, *supra* note 24, at 404–05 (citing 3 FOREIGN RELATIONS OF THE UNITED STATES 850–51 (1943)).

205. Lawrence, *supra* note 94, at 1.

206. *Id.* (quoting *Pravda*).

207. *Retribution at Kharkov*, CHRISTIAN SCI. MONITOR, Dec. 20, 1943, at 18.

208. Kochavi, *supra* note 24, at 404 (citing Public Record Office, Kew, FO371/34380, C14890, Balfour to the FO, no. 1568, Dec. 19, 1943).

209. *Id.* at 404–05.

‘war criminals’ to trial”²¹⁰ Finally, Stalin sought to deter Germans from creating further harm while they were in retreat from Soviet territory and consequently to break the German morale.²¹¹ Harriman stated that the Soviets sought to create a fear of retribution among the German army ranks and the SS, as well as encourage the Soviet resolve “to hold individual Germans responsible for crimes committed by them even though they were acting on direct orders from their superiors.”²¹² An article in the *Washington Post* posits: “The Kharkov trial is a warning to th[e German nation], a warning not merely to Hitler and his hierarchy, not merely to Himmler and his menagerie of trained brutes, but also to the rank and file in the German army, to the German officer class, to Germans generally that as far as the Allies are concerned guilt will be personal as well as collective.”²¹³

In reviewing the Kharkov trial proceedings, we observe one glaring omission: the word *evrei* [Jew] is never uttered during the trial nor does it appear in any court document.²¹⁴ Rather, the primary murder victims of the German invaders are described in generic terms as “civilian Soviet people,” “Soviet citizens,” or “peaceful civilians.”²¹⁵ The initial indictment termed the herding of the Jews of Kharkov into a ghetto as the “forceful resettlement of Soviet citizens”—it hid the fact that only Jews were forced to ghettoize while the rest of the local population were free, for the most part, to go about their daily lives, albeit under German occupation. The absence of the term “Jew” to describe the victims in the trial at

210. *Kharkov Trials*, WASH. POST, Dec. 20, 1943, at 5. An editorial in the U.S.-based Catholic weekly *Commonweal* published shortly after the conclusion of the Kharkov proceeding, took a critical view of the trial: “The avowed purpose of all this is to strike terror into the hearts of guilty nazis [sic] and the German people generally, which, with the cry of ‘unconditional surrender,’ would seem to spur them all on to fight to the last ditch. But whether or not the practice of public executions is alien to us, we may well question the psychological value of such evidences of popular fury and vindictiveness as propaganda film material to induce surrender.” *Retribution in Kharkov*, COMMONWEAL, Dec. 31, 1943, at 267.

The editorial concludes: “What can be said in defense of such procedure . . . ? At most a grievously wronged people’s rude sense of justice, their demand for retribution, etc.; that otherwise the enraged victors would throw themselves upon every available living German and mass slaughter would ensue.” *Id.*

211. *Atrocity Killers Hanged in Kharkov*, N.Y. TIMES, Dec. 20, 1943, at 12. (“Trial also was filmed for use in breaking German morale—Hitler’s guilt stressed.”).

212. Kochavi, *supra* note 24, at 404–05 (quoting correspondence from Averell W. Harriman, the American Ambassador to the Soviet Union, to Cordell Hull, the American Secretary of State (Dec. 23, 1943), reprinted in United States Department of State, *Foreign Relations of the United States, 1943*, iii (1963), at 850–51).

213. Barnet Nover, *The Guilty Must Die: Meaning of the Kharkov Trial*, WASH. POST, Dec. 22, 1943, at 13.

214. See KLADOV ET AL., *supra* note 21, at 45–124.

215. *Id.*

Kharkov and its subsequent publicity is yet another element of the “show trial” mechanism.

Even when different groups are mentioned, the Jews are specifically omitted. In his closing address, Prosecutor Dunayev refers to the extermination campaign fashioned by the Nazi leaders: “It is a matter of common knowledge that these [atrocities at Kharkov] are no accidental crimes of individual Germans, but a thoroughly considered, well-worked-out programme for the extermination of the Russian, Ukrainian, Byelorussian and other peoples, . . . a system of annihilation of the population in the temporary occupied districts of the Soviet Union.”²¹⁶ In their verdict, the judges find Langheld guilty of “shooting . . . and atrocities against . . . the civilian population.”²¹⁷ Ritz is also found guilty of “shooting of Soviet civilians.”²¹⁸ Retzlaff and Bulanov “personally drove into the ‘murder van’ Soviet citizens doomed to death” and “personally took part in the extermination of Soviet citizens by means of the ‘murder van,’” respectively, without mentioning that it was Jews who were in those vans.²¹⁹ The verdict also completely de-Judaizes the ghettoization of the Jews of Kharkov and the Drobitsky Yar massacre, referring to “Soviet civilians . . . [being] turned out of their houses in the town into barracks in the area of the Kharkov Tractor Factory. Later they were taken away in groups of two to three hundred to a gully in the vicinity and were shot.”²²⁰

Even the German defendants do not utter the word *Jude* [Jew] during the trial, at least in the proceedings that the Soviets published of the trial. A German witness, Georg Heinisch, provided a fairly accurate description of the mass extermination process, when information about it was still largely unknown, but also without mentioning the Jews:

[Chief of Security Service in Breslau] Somann told me about the camp in Auschwitz in Germany where the gassing of prisoners was also carried out . . .

Those who were to be executed first entered a place with a signboard with “Disinfection” on it and there they were undressed—the men separately from the women and children. Then they were ordered to proceed to another place with a signboard “Bath.” While the people were washing themselves special valves were opened to let the gas which caused their death. Then the dead people

216. *Id.* at 112.

217. *Id.* at 123.

218. *Id.*

219. *Id.*

220. *Id.*

were burned in special furnaces in which about 200 bodies could be burned simultaneously

Somann told me that in the autumn of 1942 a conference took place between Hitler, Himmler, and S.D. Chief Kaltenbrunner, at which it was decided to perform executions by means of gas poisoning.²²¹

By that time, approximately sixty percent of the prison population of Auschwitz consisted of Jewish prisoners.²²² Individuals selected for gassing upon arrival at Auschwitz were almost exclusively Jews.²²³

In publicizing the Kharkov trial, noted Soviet Jewish war correspondent Ilya Ehrenburg tried to correct this glaring omission against his Jewish brethren by writing in his dispatches “explicitly about the Jewish victims and descri[bing] with contempt how German officers spoke without emotion about helpless [Jewish] women and children, as if hoping they could ‘emerge dry from the water.’”²²⁴ Robert Chandler explains the Soviet policy of avoiding the mentioning of Jews as specific targets of the Nazi murder process:

The official Soviet line . . . was that all nationalities had suffered equally under Hitler; the standard retort to those who emphasized the suffering of the Jews as “Do not divide the dead!” Admitting that Jews constituted the overwhelming majority of the dead would have [also] entailed that other Soviet nationalities—and especially Ukrainians—had been accomplices in the genocide; in any case, Stalin was anti-Semitic.²²⁵

The omission of Jews from the historiography of the Great Patriotic War continues, unfortunately, to the present day. In 2000, more than a half-century after the trial, the Drobitsky Yar Memorial Committee in Kharkov installed a plaque at the entrance of the Kharkov Theater to commemorate the trial.²²⁶ It reads, in Ukrainian: “In this building, on 15–18 December, 1943 there took place the first trial in history of war

221. *Id.* at 89 (testimony of witness *Obersturmbannführer* Georg Heinisch).

222. *Auschwitz-Birkenau—The Death Factory*, JEWISHGEN, <http://www.jewishgen.org/ForgottenCamps/Camps/AuschwitzEng.html> (last visited Oct. 22, 2012).

223. *Killing Centers: An Overview*, in *Holocaust Encyclopedia*, U.S. HOLOCAUST MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005145> (last visited Jan. 30, 2012).

224. THE UNKNOWN BLACK BOOK: THE HOLOCAUST IN THE GERMAN-OCCUPIED SOVIET TERRITORIES, *supra* note 30, at 29–30.

225. Robert Chandler, *Translator’s Introduction to Vasily Grossman*, LIFE & FATE, xiii–xiv (1985). Chandler’s reference to “[a]dmitting that Jews constituted the overwhelming majority of the dead” must refer to the fact that of all of the different groups that were murdered, the Jews constituted the largest group. *Id.*

226. Larisa Volovik, *Progovor okochiatelnyii I obdzolovanii nie podliedszhid: pervii v istorii protsess nad natziskim prestupnikami. Kharkov, dekabr 1943 goda, Zametki po evreiskoi istorii [The Sentence Is Final and Not Appealable: The First Court Proceedings in History against Nazi Criminals. Kharkov, December 1943, Notes on Jewish History]*, <http://berkovich-zametki.com/2007/Zametki/Nomer19/Volovik1.htm> (last visited Mar. 1, 2012) (translation by authors).

criminals for atrocities they committed against the civilian population of Kharkov and Kharkov region, who, according to verdict of the Military Tribunal of the 4th Ukrainian Front, were sentenced to death by hanging.²²⁷

C. *The Immediate Aftermath*

At the outset of the Kharkov trial, Ehrenburg wrote the following while sitting in the press box:

I waited a long time for this hour. I waited for it on the roads to France I waited for it in the villages of Belarussia, and in the cities of . . . [the] Ukraine. I waited for the hour when these words would be heard: “The trial begins.” Today I heard them. The trial commences. On the dock, besides a traitor, three Germans. These are the first. But these are not the last. We will remember the 15th of December. On this day we stopped speaking about a future trial for the criminals. We began to judge them.²²⁸

Ehrenburg’s words did not come to pass. The Kharkov trial was not succeeded by other Soviet public trials of captured Nazis.²²⁹ After Kharkov, Stalin acceded to Churchill’s and Roosevelt’s request not to conduct any more high-profile prosecutions of captured Germans for fear that the Nazis would put on trial captured Western POWs.²³⁰ The documentary film of the trial was soon taken off Soviet screens.

227. *Id.*

228. Volovik, *supra* note 226 (quoting I.G. Ehrenburg, *War April 1943–March 1944*, MEMOIRS (1944)). Soviet newspapers at the time (December 1943–January 1944), indicated the belief that more trials were to come: “The newspaper *War and the Working Class* today replied to foreign criticism of the Kharkov war criminal trials and asserted this was ‘only one of the first blows inflicted upon the hideous fascist beast.’” *More Trials of Nazis Likely Soon in Russia: Newspaper Says Kharkov Hangings Were Only ‘First Blows’*, N.Y. TIMES, Jan. 3, 1944, at 3.

229. GINSBURGS, *supra* note 184, at 55–56.

230. After Kharkov, Germany threatened to retaliate against British and American prisoners of war. *Nazis Hint Death for Yank Flyers*, L.A. TIMES, Dec. 23, 1943, at 3. Although the United States held more Germans than the Germans held American soldiers, “policy requires the American and British governments to present a common front in a life and death issue of this kind and regard for their soldiers in German hands as a unit. On that basis, the Nazis still h[e]ld the numerical advantage.” Ernest Lindley, *Kharkov Trials*, WASH. POST, Dec. 31, 1943, at 9. It was far more important to protect the lives of the soldiers than to allow the Soviet Union to conduct more public trials of war criminals while the war was still going on. Based on the foregoing, and the lack of public Soviet trials of Nazis after Kharkov until the war had ended, it appears as though Soviets acceded to the Allies request.

For the rest of the war, the Soviets returned to their pre-Kharkov trial behavior of trying captured Nazis in secret.²³¹ The only evidence of such trials was their aftermath: the sudden appearance of gallows with dead men hanging from them.²³² Most of these, however, were of local collaborators and used to send a stern message to those who would collude with the German occupiers.²³³

V. IMPLICATIONS OF THE KHARKOV TRIAL ON SUBSEQUENT ALLIED TRIALS OF “WAR CRIMINALS”

A. *Implications on the Nuremberg Tribunal*

A Czech jurist, Bohuslav Etcher, sitting on the British-created United Nations Commission for the Investigation of War Crimes, wrote in a January 1944 analysis of the Kharkov trial: “The Kharkov trial was a beginning, a very necessary beginning. . . . We talk constantly of reconstruction. We can reconstruct devastated factories. We can build up bombed houses But in our task of reconstruction we must give some sort of priority to the reconstruction—on new foundations—of the law.”²³⁴ A British colleague, writing in the same pamphlet, explained:

231. GINSBURGS, *supra* note 184, at 55–56.

232. *Id.*

233. Tanja Penter, *Collaboration on Trial: New Source Material on Soviet Postwar Trials against Collaborators*, 46 SLAVIC REV. 782, 783, 788 (2005); DEAN, *supra* note 41, at 148 (“For local policemen the fear of Soviet retribution was sufficient to persuade most to leave with the Germans Those who remained behind or returned after the war, by contrast, generally encountered the full rigour of the Soviet penal system.”).

234. ETCHER, *supra* note 82, at 3, 16. Etcher, in his January 1944 article, was also prescient in calling for the establishment of a “United Nations Criminal Court” to try the top Nazi leaders, and what would later become the International Military Tribunal at Nuremberg:

We must decide to establish an United Nations Criminal Court for all cases which for territorial or moral reasons have acquired international importance. All the arch-criminals who have committed crimes in various countries or against humanity as a whole should be tried and punished by this court. The legal basis for the jurisdiction of this court could be clearly established if the United Nations were to delegate jurisdiction to the court for those cases which had been enumerated in the convention establishing the court.

Id. at 15. In effect, in writing about the Kharkov trial, Etcher was sketching a blue-print for the IMT. Etcher’s prescience also extended to calling for prosecution of the Nazi leaders for the crime of waging a war of aggression. Echoing Justice Jackson’s later statements and the Judgment of the IMT, Etcher explained that jurisdiction of the United Nations Criminal Court should include foremost “the preparation of, and the launching of, this Second World War This aggression was the fundamental crime. Without war, there would be no ‘war crimes.’” *Id.*; compare Robert H. Jackson, Report to the President by Mr. Justice Jackson, June 6, 1945, Int’l Conference on Military Trials (1949) (“It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal”), with Judgment of the Int’l Military Tribunal, Nov. 20, 1945, The Trial of German Major War Criminals by the Int’l Military Tribunal Sitting at Nuremberg

“[T]he real value of the Kharkov trial . . . lies in the early and convincing reassurance not merely that such cases will be prosecuted . . . but also that their trial in due form of law, with all the safeguards of the law’s regular machinery, is practicable and even simple.”²³⁵

Legal scholars hail the Nuremberg proceedings as the beginning of the “judicialization of World War II atrocities in Europe”²³⁶ and “legalism’s greatest moment of glory.”²³⁷ In fact, the judicialization began with the Kharkov Trial, putting into practice the political decision made by Roosevelt, Churchill and Stalin two months earlier to use the public courtroom as the setting where the deeds of both Nazi leaders and ordinary German foot soldiers would be examined. Since the Nuremberg trials mark the birth of modern international criminal law, the Kharkov trial is the seed from which this policy arose, and exists today in the work of the International Criminal Court and the various *ad hoc* international criminal tribunals such as the Yugoslav and Rwandan war crimes tribunals.

While the Kharkov trial was only briefly mentioned during the Nuremberg proceedings,²³⁸ a direct link between the two proceedings nevertheless exists. Kharkov served to make the Germans, the Soviets, the British, the Americans, and the rest of the world aware that “war criminals” would not escape punishment for their criminal acts as many had done at the end of World War I,²³⁹ or that if punishment was meted

Germany (1946) (“To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”).

However, Etcher’s desire to establish this Court “now . . . [as] the only fitting inter-Allied sequel . . . to the Kharkov tribunal,” ETCHER, *supra* note 82, at 15–16, did not come to pass. Eighteen months later his proposal did become reality when the Allies in London created the IMT.

235. D.N. Pritt, *Foreword to ETCHER, supra* note 82, at 2.

236. MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 48 (2007).

237. BASS, *supra* note 148, at 203.

238. *Sixty-Fourth Day: Thursday, 21st February, 1946 (Part 6 of 8)*, in *The Trial of German Major War Criminals: Volume 7: Sitting at Nuremberg, Germany 14th February to 26th February, 1946*, THE NIZKOR PROJECT, <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-07/tgmwc-07-64-06.shtml> (last visited Jan. 28, 2012) (Lieutenant-General Raginsky states, “From the document presented by the Soviet Prosecution as Exhibit USSR 32, containing the sentence pronounced by the Military Tribunal of the 4th Ukrainian Front on 15-18 December, 1943, it is evident that the German fascist armies in Kharkov, in the Province of Kharkov, acting on the direct instructions of Hitler’s Government, burnt, plundered and destroyed the material and cultural treasures of the Soviet people. These excerpts, your Honours, you will find on Page 359 in your document book.”).

239. After World War I, the Germans did not take action to prosecute war criminals for two and a half years, which led the Allies to step in and agree to “permit the trial of

out, it would be inside the courtroom. Rather than adopting the option of merely summarily executing war criminals,²⁴⁰ the Kharkov trial set a precedent for the use of a trial proceeding to justly determine the guilt of the individuals to be charged.²⁴¹

some 900 of the most serious violators of the laws and customs of war by the German Supreme Court in Leipzig, under German law and German conceptions of justice. Only 12 offenders were actually tried. Of these, but 6 minor officers were convicted” with minimal sentences of at most four years of imprisonment. Gluck, *supra* note 76, at 706. American commentators recognized at the time (during World War II) that the Soviets aimed to demonstrate to their Western Allies that after the war ended trials of Nazis would indeed take place. See, e.g., *Kharkov Trials*, WASH. POST, Dec. 20, 1943, at 5 (“[I]t may be Stalin’s way of notifying his allies they must keep their pledge about bringing ‘war criminals’ to trial and make certain that none of them is permitted to save himself by surrender.”); *Retribution at Kharkov*, CHRISTIAN SCI. MONITOR, Dec. 20, 1943, at 18 (“For war criminals who had counted on a repetition of history to save them from justice, Kharkov is a grim spectacle indeed. It alters the usual concept of war-guilt trials which envisaged these as an exclusively postwar function. . . . The Russians can remember as well as anyone the Allied promises to punish the criminals of World War One, the strange aftermath in which the German authorities and peoples joined in declaring that program of punishment to be merely a frenzy of hatred against Germany, and the sequel in which only the merest handful were convicted.”); Edwin L. James, *Red Propaganda Coup Seen in Atrocity Trial: Kharkov Tribunal, Now Acting Under Moscow Decisions, Traces Cruelty Orders to Higher Nazis*, N.Y. TIMES, Dec. 19, 1943, at E3 (“Whether or not Secretary Hull and Foreign Secretary Eden expected the Russians to start trials right away is not on the record, but it is quite plain that the Russian leader interpreted the Moscow decision quite literally and has seized the earliest opportunity to carry it out.”).

240. At the Tehran Conference, November 28 to December 1, 1943, Stalin expressed his preference to take the top 50,000 Nazi officials and shoot them, a statement that so offended Churchill that he exclaimed that “Parliament and the British public would never countenance mass killings like that,” and then stormed out of the conference room in a fury. KOCHAVI, *supra* note 23, at 402–03. The Soviets later would support the view championed by American Secretary of War Henry Stimson to hold trials. BASS, *supra* note 148, at 148. Churchill, however, was not opposed to summary executions, but only to the high number proposed by Stalin. *Id.* at 189–90. As late as April 12, 1945, the British War Cabinet, in support of Prime Minister Winston Churchill’s longtime view, continued to argue “that it would be preferable that the Nazi leaders should be declared world outlaws and summarily put to death as soon as they fell into Allied hands.” *Id.* at 190.

It would be an overstatement, therefore, to say that the Kharkov trial firmly set the policy of the Allies to criminally prosecute Nazis through the use of international law and domestic legislation rather than to summarily execute them. The final decision was always in flux, and it was not until the Allied legal representatives met in London in the summer of 1945 and promulgated the IMT Charter that one could be assured that the judicialization of Nazi atrocities would take place.

241. Michael J. Bazylar, *The Role of the Soviet Union in the International Military Tribunal at Nuremberg and Impact on Its Legacy*, in *DIE NÜRNBERGER PROZESSE: VÖLKERSTRAFRECHT SEIT 1945* [THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945], at 45 (Herbert R. Reginbogin, Christoph J. Safferling & Walter R. Hippel eds., 2006) (“The nation first to announce their preference for a judicial process for the crimes of the Nazis was the Soviet Union. . . . The British . . . were not keen on setting up a court to judge the Nazis . . . favor[ing] execution by firing squad of the major Nazi war criminals” like U.S. Treasury Secretary Henry Morgenthau Jr.’s “Morgenthau-Plan.”).

Kharkov also expanded the definition of “war criminals” to include not only those individuals who gave orders, but also those individuals who carried out orders, and confirmed that the defense of “following orders”—raised by the three German defendants regarding Nazi crimes—would not succeed. Etcher, writing in 1944 before the Nuremberg trials were contemplated, explains:

Here is the fifth lesson of the Kharkov trial. In this first trial of German war criminals the Kharkov tribunal sentenced the accused in spite of their plea of superior orders and in accordance with Soviet penal law, with the criminal codes of almost all the United Nations, with the German military Code of October 10, 1940 (Article 47), with the opinion of nearly all experts in International Law and in accordance with the standpoint which the London International Assembly adopted on May 4th, 1943.²⁴²

Additionally, Hirsch notes that “[t]he Soviets pushed for and agreed to participate in an international tribunal of major Nazi leaders (this time present and accounted for) for the sake of catharsis, and with the faith that a public trial and conviction of ‘the Hitlerites’ would serve positive political goals—demonstrating the evils of fascism and the valor of the people-loving Soviet people.” Hirsch, *supra* note 190, at 714.

An editorial in the *New York Times* written in the immediate aftermath of the Kharkov trial argued for the importance of holding war crimes trials:

The execution of any man whose guilt is not clearly established would make that man a martyr. It may be difficult now to imagine any large section of the German people as possessing a sense of justice. Yet in the end they, too, must come to see that the killing of hostages, the murders, slow or swift, committed in the internment camps, the horrors of the lethal chamber, the almost inconceivable savagery which not only wiped out the innocent people of Lidice but boasted it, were not merely crimes against those who died but crimes against all humanity—even German humanity. They will see this sooner and with better effect on the peace of the world if every offender, from private to general, from slinking spy to arrogant Gestapo official, has his day in court.

Shadows in a Market Place, N.Y. TIMES, Dec. 21, 1943, at 26.

242. ETCHER, *supra* note 82, at 11. The London International Assembly was an unofficial body created in 1941 to deal with issues of international criminal law, with Allied governments appointing representatives. It was one of the first bodies calling for the establishment of a permanent International Criminal Court, to be created after the end of the war. On May 4, 1943, it agreed to the following:

An order given by a superior to an inferior to commit a crime is not itself a defence. The court may consider in individual cases whether the accused was placed in a state of irresistible compulsion and acquit him or mitigate the punishment accordingly. The defence that the accused was placed in a state of compulsion is excluded: (a) if the crime was of a revolting nature[;] (b) if the accused at the time when the alleged crime was committed was a member of an organisation the membership of which implied the duty to execute criminal orders.

Id. at 10–11.

The drafters of the Nuremberg Charter specifically legislated in June 1945 what had already been announced as judicial precedent at Kharkov in December 1943. Article 8 of the Nuremberg Charter set out the following principle with regard to the prosecution of the German Major War Criminals: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”²⁴³ At the same time, the Kharkov trial “chase[d] the guilt as high up as [it] could,” in order to establish the guilt of major war criminals who would later be charged under a “criminal organization” theory at the Nuremberg Tribunal.²⁴⁴

There is one major difference, however, between Kharkov and Nuremberg. Much to the Soviets’ dismay, the Nuremberg tribunal did not proceed as a “show trial” quite to the same extent that the Kharkov trial had.²⁴⁵ As Francine Hirsch describes, the Soviets were unable to control “‘the script’—the course of the trials or the narrative that the trials told—despite their best efforts to do so.”²⁴⁶ However, she adds that

243. Nuremberg Charter art. 8 (1945).

244. James, *supra* note 239, at E3. James explained that “[t]he excuses of the Germans on trial there run along the line that they were military men carrying out orders. There is no evidence that the court discourages this line; indeed, there is an apparent design to put on the record in full this plea of the accused Germans. In other words, the Russians intend to chase the guilt as high up as they can. . . . What the Russians intend to do, in all probability, is to try to chase blame officially right on up to Himmler and then to Hitler. They haven’t got their hands on the arch-culprits, but perhaps they may some day.” *Id.*; see also Bazylar, *supra* note 241, at 46 (“The Soviets maintained that the IMT should focus on the leaders and members of the Nazi organizations, with the authority to rule after each case whether the entire organization—for example, the Gestapo—constituted a criminal enterprise. This procedural move would thereby ‘eliminat[e] the need to prove the criminality of the organization in each subsequent case of prosecution of a member of the organization.’ In the end, the Soviet position prevailed, and became an important prosecutorial tool during the [Nuremberg] trial.” (quoting GINSBURGS, *supra* note 184, at 98)); Hirsch, *supra* note 190, at 709–10 (“At the London Conference [in 1945], the Four Powers also decided to integrate the complicity charge into the Nuremberg Charter, agreeing that ‘leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit’ specified crimes ‘are responsible for all acts performed by any persons in execution of such plan.’ . . . The exact degree to which the Soviets, versus the other members of the Four Powers, were responsible for the formulation of the charges in the Nuremberg Charter remains unknown. What is clear is that historians who credit the United States with coming up with the major legal innovations of the Nuremberg Trials far overstate their case.”).

245. Hirsch, *supra* note 190, at 703 (“The Russian archival record leaves no question that the Soviet regime and its secret Commission for Directing the Nuremberg Trials envisioned Nuremberg as a ‘show trial’—that is, as an exercise in didactic legalism—and made a significant effort to control the Soviet legal team and the course of the trials.”).

246. *Id.* at 715 (“The Vyshinskii Commission, operating from Moscow before and during the ten months of the trials (and unable to establish a private Moscow-Nuremberg phone line), experienced great difficulties in its efforts to ‘direct’ the trials and to manage Soviet personnel on the ground.”). “The final reminder to the Soviets that they

“Soviet leaders were willing to compromise on procedural issues as long as Nuremberg told a straightforward tale of good versus evil—as long as the Allies agreed from the start that the ‘Hitlerites alone’ (the Germans and the other Axis powers) would be treated as villains.”²⁴⁷ For the aforementioned reasons, the Kharkov trial, as stated by George Ginsburgs, “point[ed] the way toward the grand finale at Nuremberg.”²⁴⁸

B. Implications on Post-World War II Trials in the Soviet Union

After the Kharkov trial and concurrently with the Nuremberg trials, between December 1945 and February 1946, the Soviet Union once again began publicly trying war criminals. Alexander Prusin explains:

In December 1945, two years after the Khar'kov trial, public trial began in Smolensk, where ten low-ranking members of the German army faced war crimes charges. The trial was followed by a series of similar proceedings in the cities of Briansk, Leningrad, Velikie Luki, Riga, Minsk, Kiev, and Nikoloyav. As in the Krasnodar and Khar'kov cases, the trials were held to pursue political and

could not control the storyline of Nuremberg—and the biggest affront to their vision of what Nuremberg should be—came in October 1946 with the verdict. Much to the Soviets' dismay, three of the twenty-two major German war criminals standing trial . . . were found ‘not guilty’ on the grounds of ‘reasonable doubt.’” *Id.* at 726.

247. *Id.* at 717; Unfortunately for the Soviets, this wish was never granted. As explained by Francine Hirsch, “the Soviets were failing to take advantage of this unique international setting to present the Soviet Union to the world in the best possible light.” *Id.* at 723.

The Soviet correspondents did not have adequate knowledge of what concurrently took place in the Soviet Union while they were in Nuremberg. Additionally, unlike the Americans, the Soviets did not take advantage of the ability to screen films of their representatives to the international press and also battled the spread of negative rumors by the United States about the Soviet Union in both Nuremberg and other American zones. *Id.* While the Soviets attempted to remedy this problem, the Soviet Union was still never able to put itself in a better light before the international audience. *Id.* at 724.

The Germans were also allowed to present defenses that accused the Soviet Union of having been prepared to fight alongside the Germans in 1939. Although these accusations were true, “the British and the Americans had gone back on their word and had helped the German defense to turn Nuremberg into a forum for attacking the USSR Unprepared for the defense’s attack, and expecting their wartime allies to prevent items on the list of hot-button issues from being discussed in open court, [the Soviet] team had let their guard down, allowing the defense to denigrate the USSR before the whole world.” *Id.* at 724–25. The Soviet response was to send more advisors to Nuremberg. “But the damage could not be undone: the Western powers, in allowing the German defense to present evidence that incriminated the Soviets in crimes against peace, had distanced themselves from the USSR and undermined Soviet efforts to use the trials to present an unambiguous narrative of good versus evil.” *Id.* at 725–26.

248. Bazyler, *supra* note 241, at 48 (quoting GINSBURGS, *supra* note 184, at 56).

ideological objectives. The timing of the trials was chosen carefully to correspond with the Nuremberg Military Tribunal.²⁴⁹

These trials featured similar war crimes and crimes against humanity charges as well as “crimes against civilians and POWs, and the destruction of property” charges, to those found at Nuremberg.²⁵⁰ The dockets would contain more than eighty defendants of different German military rank and used the idea of collective responsibility—akin to the conspiracy charge at Nuremberg—to infer guilt.²⁵¹ In total, the Soviets convicted at least 25,921 German and Austrian Nazis after the war in the Soviet Union.²⁵² Additionally, over one million German POWs in the Soviet

249. Prusin, *supra* note 29, at 7; GINSBURGS, *supra* note 184, at 56 n.33 (“Immediately after the close of World War II, the policy and techniques first tested at Kharkov were resumed on a large scale by the Soviet government. A series of public trials was conducted at various locations. Death sentences were liberally meted out. Ten Germans were tried in Smolensk for wholesale atrocities against Soviet civilians and war prisoners; seven were hanged, one sentenced to 20 years at hard labor, one to 15 years and one to 12 Eleven Germans, including a Major-General, were tried at Leningrad with a defence counsel of German lawyers: the General and seven others were sentenced to hang, two received twenty years at hard labor, one 15 years At Briansk, three, including a Lieutenant-General, were sentenced to hang, one received twenty years of imprisonment. . . . Seven Germans were convicted of war crimes and executed at Riga”).

250. Prusin, *supra* note 29, at 8.

251. *Id.*

252. See Andreas Hilger, *Die Gerechtigkeit nehme ihren Lauf!: die Reden des sowjetischen Hauptanklägers im Nürnberger Prozess der deutschen Hauptkriegsverbrecher [The Justice Takes Its Course: the Speeches of the Soviet Chief Prosecutor at the Nuremberg Trials of German Major War Criminals]*, in TRANSNATIONALE VERGANGENHEITSPOLITIK [TRANSNATIONAL POLITICS OF THE PAST] 193 tbl.1 (2006) (translation by authors). Additionally, there were twenty-one major trials of war criminals in the Soviet Union between 1961 and 1965, as indicated in “Post War Adjudication of War Crimes Fact Sheet,” compiled by the United States Holocaust Memorial Museum (unpublished, and on file with authors). Lukasz Hirszowicz explains the trials in the USSR after the 1940s:

The media also paid attention to war crimes trials held in the USSR Before 1960, with the notable exception of trials of well-known collaborators with the enemy in the immediate postwar years, there was little if any reporting in the accessible media of such trials held in the USSR. But there is every reason to believe that under Stalin many people who had had any contacts with the occupiers, including war criminals and participants in the Holocaust, were prosecuted and sentenced, and that there were such trials after 1953 as well. I came across reports of depositions by people accused of war crimes in 1949 and 1959 . . . and a report of a war crimes trial in 1957, the latter without any Jewish connotations The amnesty decree of the USSR Supreme Soviet of 17 September 1955 “for Soviet citizens who collaborated with occupiers during the Great Patriotic War, 1941–45” should be mentioned in this context. The amnesty applied to a very wide group of offenders, with the explicit exception of individuals guilty of murder and torture of Soviet citizens The amnesty must have signified a certain relaxation with regard to people under the cloud of accusations of collaborating and sympathizing with the enemy. Hence, the reasons for the lack, or the extreme paucity, of reports about war crime trials must have been complex, and the unwillingness to bring the fate of the Jewish population to general attention could have been only one of them.

Union and other parts of Eastern Europe were used as laborers to rebuild the destruction that resulted from the war.²⁵³ Many of these men were not returned to Germany until many years after the war ended.²⁵⁴

After 1960 we find in the media a considerable number of reports of war crimes trials in the USSR, in the Baltic republics, in Ukraine, and Belorussia, as well as in the RSFSR. In the course of the trials the Nazi crimes against the Jewish population were discussed, in most cases in the same way as described above with regard to trials held abroad. Naturally, there are no attacks on the leniency of the courts or on the way the trial is conducted.

The more important trials were reported at greater length in the press of the republic where the trial was held, and there was also reporting in the central press, though less frequent and shorter. We know very little about the way of reporting trials in the local press.

Hirszowicz, *supra* note 201, at 39–40. Additionally, the Soviets accused the German courts of not being aggressive enough in pursuing big-time Nazis. At the same time, they complained that the German courts had missed the point of Order No. 201 on denazification, which drew a clear distinction between nominal Nazis, who were needed for the democratic construction of the country and therefore should quickly be given back their political and civil rights, and former active Nazis, militarists and war criminals, who should immediately be brought to justice. When the German system dallied, the Soviets sometimes simply lost patience, took over the trials, and punished the alleged offenders.

NAIMARK, *supra* note 5, at 66. This last point is interesting because it shows that German courts in the Soviet zone exercised some independence from their Soviet masters. This independence was soon lost in 1949 with the creation of the German Democratic Republic, which became a puppet state of the Soviet Union. Trials by Germans in the occupied zone of Germany are outside of the scope of this article.

253. RICHARD BESSEL, *GERMANY 1945: FROM WAR TO PEACE* 202–03, 251 (2009). “The destruction left in the wake of German occupation led the victorious Allies to put German POWs to work rebuilding cities and towns across Europe, both east and west. In particular, the USSR looked upon the enemy troops they had taken prisoner as a source of labour, and between December 1944 and August 1945 the number of ‘western’ prisoners of war (the majority of whom were Germans) registered as working for the Russians grew from 418,979 to 1,623,137. Many would spend years in captivity, in camps in the USSR or rebuilding destroyed cities and towns in the Soviet Union. Altogether, the German soldiers of the Second World War would spend more man-years in captivity than they had in active service.” *Id.* at 251. “Although the British and French also used German POW labour for reconstruction work back home, it was in the USSR that POW labour was used most extensively and for the longest time. Whereas all the Germans taken prisoner in the west had been released by the end of 1948, it would not be until 1955 that the last surviving German POWs returned from the USSR.” *Id.* at 203. Hundreds of thousands of these German POWs died while in captivity.

254. *Id.*

*C. The Formation of Holocaust Memory in the Soviet Union and
Contribution of Nazi Trials in the U.S.S.R. to
Holocaust Memory*

During the war, there was no specific term used to describe the mass murders and other atrocities committed against the Jews of Europe.²⁵⁵ This was true in the United States and Western and Central Europe, as well as in the Soviet Union and Eastern Europe. For the first twenty years after the defeat of Nazi Germany, little attention was paid to murder of the Jews, and the term “Holocaust” as representative of the destruction of the Jews in Europe was unknown.²⁵⁶ In 1948, with the creation of Israel, the Israeli Declaration of Independence referred to the period as “the Nazi *shoa*,”²⁵⁷ which was translated officially into English as “the Nazi holocaust” at the end of the 1950s.²⁵⁸ In the West, the word “holocaust”—used in various contexts prior to the war to describe some kind of tragedy, natural or man-made—began to be used in the American public discourse in the 1960s to refer to the special tragedy of the Jews at the hands of the Nazis and their collaborators.²⁵⁹ However, it was only after the Eichmann trial in 1961–62 that references to the period during World War II as “the Holocaust”²⁶⁰ (capitalized “H”) became more common.²⁶¹

255. PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* 20 (1999) (“[D]uring the war, and for some time thereafter, there was no agreed-upon word for the murder of Europe’s Jews . . .”).

256. *Id.* at 1–2. It would be an overstatement to say that the murder of the six million Jews was quickly forgotten after the war. For a recent volume challenging this “myth of silence” that supposedly took place until the 1960s, see *AFTER THE HOLOCAUST: CHALLENGING THE MYTH OF SILENCE* (Eric J. Sundquist & David Cesarani eds., 2011).

257. NOVICK, *supra* note 255, at 133 (“‘[S]hoah,’ in the Hebrew Bible, was repeatedly used to describe punishments visited by God on the Jews.”).

258. *Id.*

259. *Id.* (“‘Holocaust’ began to be widely used in connection with the Nazi murder program in the 1960s.”). For an excellent discussion of the etymology of the term and its various meanings, see John Petrie, *The Secular Word HOLOCAUST: Scholarly Myths, History, and 20th Century Meanings*, 2 J. GENOCIDE RES. 31, 31–63 (2000), available at http://www.armenews.com/IMG/pdf/petrie_the_secular_word_holocaust.pdf.

260. The United States Holocaust Museum explains that “[t]he word holocaust comes from the ancient Greek, *olos* meaning ‘whole’ and *kaustos* or *kautos* meaning ‘burnt.’ *Frequently Asked Questions . . . About the Holocaust*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/research/library/faq/details.php?topic=01#02> (last visited on Oct. 25, 2012). Initially, the term was not used to exclusively refer to the murder of Jews, but instead to the Nazi crimes generally.

261. NOVICK, *supra* note 255, at 133 (“‘Holocaust’ began to be widely used . . . not as the result of a gentile plot, but as an import from Israel.”). American journalists at the Eichmann trial used the term “Holocaust” as a translation for “*shoah*,” as Israelis had done for many years. The first time the translation appears is in the 1948 Israeli Declaration of Independence official Israeli English translation of “the Nazi *shoa*” as

In the late 1970s, the topic of “the Holocaust” became “ever more central in American public discourse—particularly among Jews, but also in the culture at large.”²⁶² A greater recognition of the Jewish tragedy also began to take place in Western Europe. Popular media helped the formation of Holocaust memory in the West. In April 1978, NBC presented *Holocaust*,²⁶³ a miniseries, that had over 100 million American viewers and conveyed more information to the American public over the course of its four-night showing than had been imparted during the prior thirty years.²⁶⁴ *Holocaust* was also shown in Germany in January 1979.²⁶⁵ As Peter Novick points out, “[t]he airing of the series . . . became a turning point in Germany’s long-delayed confrontation with the Holocaust, which, albeit not without bumps in the road, has continued ever since. It enabled Germans to connect with Jewish victims, and with the crime, as never before.”²⁶⁶ Other Holocaust-themed television shows were released around the same time, including *Playing for Time*, *Escape from Sobibor*, *Triumph of the Spirit*, and *War and Remembrance*.²⁶⁷

At the same time, Jewish organizations were working to educate both Jewish and non-Jewish Americans about the Holocaust.²⁶⁸ Then, in 1979, President Carter, in an Executive Order, created the United States Holocaust Memorial Council. The Council “defined ‘the Holocaust’ as

“the Nazi holocaust.” *Id.* “In the United States, the word ‘Holocaust’ first became firmly attached to the murder of European Jewry as a result of the trial [of Eichmann].” *Id.*

During the war, in the United States, most people did not know about the atrocities taking place in Europe and the Soviet Union against the Jewish population. News correspondents were afraid that their accounts would be viewed as exaggerations and not credible. *Id.* at 22–23. For example, a *New York Times* correspondent who traveled with the Red Army, while explaining that the “Soviet officials claimed that tens of thousands of Jews had been killed at Babi Yar, ‘no witnesses to the shooting . . . talked with the correspondents’; ‘it is impossible for this correspondent to judge the truth or falsity of the story told to us’; ‘there is little evidence in the ravine to prove or disprove the story.’” *Id.* at 22.

262. *Id.* at 1–2.

263. *Id.* at 209 (“The drama followed ten years in the lives of two fictional families—one of assimilated German Jews, the other of a highly placed official of the SS [T]he series was able to cover all of the principal landmarks: the Nuremberg Laws, Kristallnacht, the Wannsee Conference, Babi Yar, the Warsaw Ghetto Uprising; Buchewald, Theresienstadt, and Aushwitz.”).

264. *Id.*

265. *Id.* at 213.

266. *Id.*

267. *Id.*

268. *Id.* at 210 (“Jewish organizations successfully lobbied major newspapers to . . . publish special inserts on the Holocaust.”).

the ‘ . . . extermination of six million Jews and some five million other peoples ’”²⁶⁹

In the Soviet Union, immediately after the war, discussion of the mass murder of Soviet Jews during Nazi occupation was repressed, as it had been during the war.²⁷⁰ According to Zvi Gitelman, as of 1997, “the term ‘Holocaust’ [was] completely unknown in the Soviet literature. In discussions of the destruction of the Jews, the terms ‘annihilation’ (*unichtozhenie*) or ‘catastrophe’ (*katastrofa*) [had] been used.”²⁷¹

Gitelman provides a leading rationale behind the official Soviet policy of treating the suffering of all nationalities and ethnic groups in the Soviet Union under Nazi occupation equally, encapsulated in the above-noted Soviet slogan “Do Not Divide the Dead”:

[N]o country in the West lost as many of its non-Jewish citizens in the war against Nazism as did the USSR, so that the fate of the Jews in France, Holland, Germany, or Belgium stands in sharper contrast to that of their co-nationals or co-religionist than it does in the East Thus the Soviet Union did treat the issue differently from the way it was treated in most other countries, whether socialist or not, though the Soviet treatment was not uniform [T]he Holocaust was seen as an integral part of a larger phenomenon—the murder of civilians—whether Russians, Ukrainians, Belorussians, Gypsies, or other nationalities. It was said to be a natural consequence of racist fascism If the Nazis gave the Jews “special treatment,” the Soviets would not.²⁷²

With respect to discussion of the Holocaust of Ukrainian Jews, Dawson explains: “It’s been said that history is written by the winners, but in the history of the Holocaust it’s as though the chapter on Ukraine had been written by Himmler himself. For all practical purposes, the pages are blank.”²⁷³ Dawson reflects:

The slaughter by gunfire in Ukraine should have become Hitler’s original sin and Babi Yar—where 34,000 Jews were murdered in two days—the darkest icon of the Shoah. But when the war ended, Stalin abetted Himmler’s cover-up by

269. Petrie, *supra* note 259, at 49.

270. Paul A. Shapiro, *Foreword* to PATRICK DESBOIS, *THE HOLOCAUST BY BULLETS: A PRIEST’S JOURNEY TO UNCOVER THE TRUTH BEHIND THE MURDER OF 1.5 MILLION JEWS* viii (2008) (“These first mass victims of the Holocaust went largely forgotten through most of the post-World War II era. Their stories and the fates of their communities were obscured by clouds of Soviet secrecy and anti-Semitism. While we [the West] slowly but surely came to understand the detailed operation of the Nazi concentration camp system in the west, Soviet totalitarianism restricted our knowledge about the east.”); Zvi Gitelman, *Politics and the Historiography of the Holocaust in the Soviet Union*, in *BITTER LEGACY: CONFRONTING THE HOLOCAUST IN THE USSR* 21 (Zvi Gitelman ed., 1997) (“Even during the war (1944), the Soviet Extraordinary State Commission to Examine and Investigate German-Fascist Crimes was ‘instructed to avoid stating that the victims of the massacres had been Jews’ and ‘to suppress the extent of Ukrainian collaboration with the Germans and particularly with the SS in the mass shootings of Jews.’”).

271. Gitelman, *supra* note 270, at 18–19.

272. *Id.* at 18, 20.

273. DAWSON, *supra* note 30, at 7.

throwing an Iron Curtain around his crime scene, off limits to writers, journalists, and historians. The only deaths in the great war to defend the Motherland would be “Russian” deaths. And so, by default, the liberation of Auschwitz and other camps became the defining images of the Holocaust. Hitler’s crime in Ukraine began to fade slowly from public view and consciousness till it became what it is today—barely a footnote in popular understanding of the Holocaust.²⁷⁴

Anti-Semitism also played a role in the suppression of the special tragedy of the Jews during the Nazi occupation. From 1948 until Stalin’s death in 1953, anti-Semitic policies escalated in the Soviet Union under the rubric of eradicating so-called “rootless cosmopolitanism.”²⁷⁵ As one commentator explains: “Suddenly, all Jews were potential traitors, enemies of the Soviet state, spies in the service of American and British Intelligence . . . [and] by August 12, 1952 virtually all of the members of [wartime Stalin-created] JAC [Jewish Anti-Fascist Committee] had been arrested or shot.”²⁷⁶

Just before his death in January 1953, Stalin ordered the trial of nine doctors (at least six of whom were Jewish) charged with seeking to poison

274. *Id.* at 8.

275. Mordechai Altshuler, *Jewish Holocaust Commemoration Activity in the USSR Under Stalin*, *Shoah Resource Center*, 30 YAD VASHEM STUD. 271, 285 (Naftali Greenwood trans., 2002), available at http://www1.yadvashem.org/untoldstories/documents/studies/Mordechai_Altshuler.pdf; Konstantin Azadovskii & Boris Egorov, *From Anti-Westernism to Anti-Semitism*, 4 J. COLD WAR STUD. 66, 66–80 (Winter 2002), available at <http://www.fas.harvard.edu/~hpcws/egorov.htm> (last visited Oct. 25, 2012) (“In private conversations he [Stalin] openly expressed his desire to eliminate ‘Jewish influence’ and to help a ‘native’ (i.e. non-Jewish) intelligentsia gain sway in the Soviet Union. . . . Terms such as *rootless cosmopolitans*, *bourgeois cosmopolitans*, and *individuals devoid of nation or tribe* continually appeared in newspaper articles. All of these were code words for Jews and were understood as such by people at the time.”). Anti-Semitism had been suppressed in the early after war years of 1945–1948, so that Joseph Stalin could be viewed as the Jewish savior. Miguel A. Faria, Jr., *The Jewish Doctors’ Plot—The Aborted Holocaust in Stalin’s Russia!*, HACIENDAPUBLISHING.COM (Aug. 3, 2011), <http://haciendapublishing.com/articles/jewish-doctors'-plot—aborted-holocaust-stalin's-russia> (last visited Oct. 25, 2012). In 1948, Russian Jews appeared “too festive, too enthusiastic,” at the visit of the Soviet Union by Golda Meir (the Israeli Prime Minister), that the Jewish people were viewed as a threat to the Soviet state, by Stalin. *Id.* For more information on postwar anti-Semitism in the Soviet Union, see Antonella Salmoni, *State-Sponsored Anti-Semitism in Postwar USSR: Studies and Research Perspectives*, J. FONDAZIONE CDEC (Apr. 2010), http://www.quest-cdecjournal.it/files/5_Salomoni.pdf.

276. Faria, *supra* note 275. Additionally, Antonella Salmoni describes “this time embedded in a specific anti-Jewish campaign and the repressions set out by the Stalinist regime; this period of violence allowed the return of abuses and the revitalisation of stereotypes of anti-Jewish flavor.” Salmoni, *supra* note 275, at 79.

Soviet leaders, to “resolve the Soviet Union’s Jewish problem.”²⁷⁷ Shortly after Stalin’s death in March 1953, it was discovered that the confessions had been coerced and thus fabricated.²⁷⁸ It began to appear as though the complete annihilation of the Jewish people that the Nazis sought was actually occurring, both in actuality and in lack of discussion.²⁷⁹

Albeit seemingly small, some effort was made after the war by Soviet Jews themselves to bring to light the suffering of the Jewish people at the hands of the Germans and local collaborators. In 1946, Soviet Jewish writers Ilya Ehrenberg and Vassily Grossman²⁸⁰ published the *Black Book*²⁸¹ in the United States and other foreign countries.²⁸² The book became the “best source of primary material on the Holocaust in the Soviet Union,” but was banned from publication.²⁸³ The *Black Book* was rejected for publication because, in the eyes of Soviet officials, it emphasized, “the Germans murdered and plundered Jews only. The reader unwittingly gets the impression that the Germans fought against the USSR for the sole purpose of destroying Jews.”²⁸⁴ The volume only appeared in Russia and the other former Soviet states in 1993, after the breakup of the Soviet Union.²⁸⁵

Despite attempts by Soviet officials to restrict the memory of the atrocities committed against the Jews during the war, Soviet Jews did attempt to commemorate their special suffering.²⁸⁶ Mordechai Altshuler explains:

277. A. Mark Clarfield, *The Soviet ‘Doctor’s Plot’—50 Years On*, 325 BRIT. MED. J. 1487, 1487–88 (2002); HELEN RAPPAPORT, JOSEPH STALIN: A BIOGRAPHICAL COMPANION 261 (1999).

278. Clarfield, *supra* note 277, at 1487.

279. Shapiro, *supra* note 270, at ix.

280. Zvi Gitelman explains that Grossman objected to the repeated use of the term “Jew” because it was simply too frequent, but Ehrenburg insisted that it was unavoidable to use the word. Gitelman, *supra* note 270, at 14, 19.

281. Salmoni, *supra* note 275, at 75–76 (“The only great work of documentation in the Soviet era occurred during the war, when a Black Book was compiled in real time in order to record a sizeable selection of witnesses to the genocide. It is known that the volume was stopped by censorship in 1947, at the time of the disestablishment of the Jewish Antifascist Committee (EAK), which had promoted the work, and the beginning of the most acute stage of the campaign against the so-called ‘nationalism’, ‘cosmopolitanism’ and ‘Zionism’ of the Soviet Jewry. That is the reason why the integral publication of this collection in 1993 was perceived as a turning point in research.”).

282. David M. Crowe, *The Holocaust, Historiography, and History*, in TEACHING AND STUDYING THE HOLOCAUST 24, 47 (Samuel Totten & Stephen Feinberg eds., 2001).

283. *Id.*

284. Gitelman, *supra* note 270, at 14, 19 (quoting G. Alexandrov, the head of the Party Secretariat’s Agitprop department in the USSR, in 1947).

285. *Id.*

286. Altshuler, *supra* note 275, at 4. Communities in the Soviet Union wanted to commemorate the Jews who had been murdered, but it was forbidden. *See id.* In July 1944, the town of Cherven was liberated by the Red Army and the Jewish families who

Soviet Jewry, like Jewish communities in most East European countries, fervently wished to memorialize the victims of the Holocaust. Soviet Jews acted intensively for years, even during Stalin's last days, to make this possible. Although the commemorative effort was conducted by the religious community administration or by people associated with it, it embraced very broad strata in Jewish society.²⁸⁷

One of the first gatherings to commemorate Holocaust victims took place in Kharkov in January 1945 to mark the anniversary of the Drobitsky Yar massacre.²⁸⁸ The Drobitsky Yar commemoration was an exception. Public commemorative gatherings and burials were forbidden, though "appropriate institutions" such as synagogues were able to hold memorial services.²⁸⁹ According to Altshuler: "[There is] evidence of extensive Jewish activity in the commemoration of Holocaust victims. Jews from various towns participated in these efforts, and religious circles and prominent figures in the Soviet establishment maintained cooperative relations in their joint endeavors."²⁹⁰ This commemoration continued even after it was forbidden.²⁹¹ Unlike in other European nations, where commemoration was allowed, Soviet Jews had to make "strenuous efforts" and "maneuver among various Soviet authorities in order to implement, albeit partly and often unsuccessfully, even a few of their plans in this respect."²⁹² Altshuler points out that "[t]his alone illustrates the vast importance that these Jews attributed to Holocaust commemoration."²⁹³

Finally, in 1991, with the fall of the Soviet Union, discussion of "the Holocaust" and access to the massive Soviet archives were finally allowed.²⁹⁴ Ukraine gained with its independence the ability to discuss

returned wanted to create a monument for the Jews who had been murdered there. *See id.* at 9–10. They began to collect donations and information, but soon ran out of funding and were never able to complete the memorial. *See id.* at 10–11.

287. *Id.* at 21.

288. *See id.* at 4. The gathering raised approximately 15,000 rubles. *Id.*

289. *See id.* at 5–6. In 1946, "many synagogues across the Soviet Union, including the Great Synagogue in Moscow, held memorial services for Holocaust victims." *Id.* at 7.

290. *Id.* at 11.

291. *See id.* at 13–14.

292. *Id.* at 21.

293. *Id.*

294. Shapiro, *supra* note 270, at ix–x ("After the disintegration of the U.S.S.R., the United States Holocaust Memorial Museum undertook an intensive effort to microfilm Holocaust-related documents in archival repositories of the newly independent former Soviet republics. The collections were much more voluminous [over five million pages and counting] than anticipated, including, for example, the records of the 'Extraordinary State Commission to Investigate German-Fascist Crimes Committed on Soviet Territory' . . . and massive collections of war crimes trials relating to the Holocaust from former KGB archives."); Crowe, *supra* note 282, at 47 ("With the collapse of the Soviet Union

the Holocaust and to refer to the victims of the Holocaust as “Jews” in the monument for Babi Yar.²⁹⁵ The monument had not even been constructed until 1976, well after Yevtushenko’s “Babi Yar” poem brought the world’s attention to the massacre, which contained the opening words “No monument stands over Babi Yar.”²⁹⁶ In 1996, the Kharkov Holocaust Museum, the first Holocaust museum in the Ukraine, opened.²⁹⁷ Gitelman adds: “It is only recently [as of 1997] that ‘Holocaust,’ transliterated from English [as ‘Golocaust’]” appears in the public vocabulary.²⁹⁸

We noted above how the plaque installed in 2000 at the Kharkov Theater referencing the trial makes no mention of Jews as victims. However, in 2002, a memorial was dedicated in the presence of Ukraine’s president, Leonid Kuchma, at Drobitsky Yar. A nine-foot-tall menorah stands beside the highway at Drobitsky Yar:

To one side, a tree-lined road winds to a massive white arch with the years “1941–1942” framed in a circle on the outside and bright blue Stars of David within. Below the arch is a sculpture depicting the tablets of the Ten Commandments. “Thou Shall Not Kill” engraved in several languages, including Yiddish and Ukrainian.²⁹⁹

In 2005, the United Nations passed a resolution designating January 27 as International Holocaust Remembrance Day (*Yom Hashoa*), devoted

in 1991, a new body of historical writing on the Holocaust by former Soviet historians began to appear. Two important historiographical studies on Soviet perspectives on the Holocaust that surfaced during this period were Zvi Gitelman’s ‘Soviet Reaction to the Holocaust, 1945-1991’ (1993), and his ‘Politics and the Historiography of the Holocaust in the Soviet Union’ (1997). These pioneering works opened the door for future study of the historiography of the Holocaust during the Soviet era. Gitelman (1997) argues that the uneven application of the policy of Holocaust suppression left a distorted view of this tragedy that has proven very difficult to overcome in the post-Soviet era. . . .’); Gitelman, *supra* note 270, at 14, 15 (“In 1991 and 1992 . . . in Ukraine and Russia, articles began to appear in non-Jewish journals that described the Holocaust and raised some of the sensitive issues of complicity by local populations, Soviet suppression of discussion of the Holocaust, and the impact of the Holocaust on Jewish perceptions.”).

295. Gitelman, *supra* note 270, at 14, 20; Olena Ivanova, Constructing a Collective Memory of the Holocaust and National Identity of the Student Youth in Ukraine, Address at the Third Annual Danyliw Research Seminar on Contemporary Ukraine (Oct. 13, 2007) (“The first President of Ukraine Leonid Kravchuk’s acknowledgment of a partial guilt of Ukrainians in the destruction of Jews during World War II became a turning point in constructing a new official memory about the Holocaust.”).

296. Avi Hoffman, *A Museum for Babi Yar*, JERUSALEM POST (Oct. 23, 2011), <http://www.jpost.com/JerusalemReport/JewishWorld/Article.aspx?id=242635>; Gitelman, *supra* note 270, at 14, 20 (“The poem was a sensation because it condemned anti-Semitism and made it clear that Soviet society was not free of that problem.”).

297. Gitelman, *supra* note 270, at 14, 18–19.

298. *Id.*

299. Vladimir Matveyev, *Gas, Bathroom, and Shoah Memorial: Proposed Construction Causes Uproar*, UJC FEDWEB: WORLD JEWRY, <http://central.ujcfedweb.org/page.aspx?id=54766> (last visited Oct. 25, 2012).

for annual commemoration of the victims of the Nazis and coinciding with the day that Auschwitz was liberated by Soviet troops.³⁰⁰ As of this writing, International Holocaust Remembrance Day is recognized in Russia, Ukraine, Belarus, Estonia, Latvia, and Lithuania.³⁰¹

In light of the suppression of Holocaust history and memory in the Soviet Union, the postwar trials of Germans in the Soviet Union played only a small, though not insignificant, role in the development of such history and memory. As noted above, after the war, the Soviets held a number of trials of captured Germans in various Soviet cities. As in the Kharkov trial, a large proportion of the unnamed victims were Jews.³⁰²

However, at these trials and in the account of them by the Soviet press, the murdered Jews were again most often referred to as “Soviet citizens,” as they had been in the Kharkov trial.³⁰³ Nevertheless, as Prusin observes, “the trials became the first instances that revealed to the Soviet

300. AVNER FALK, *ANTI-SEMITISM: A HISTORY AND PSYCHOANALYSIS OF CONTEMPORARY HATRED* 151 (2008).

301. See *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited Oct. 25, 2012); *V Rosssii otmehaiut Mezhdunarodnii den' pamiati dzertv Golokosta [In Russia Mark the International Holocaust Remembrance Day]*, NOVOSTIMIRA.COM (Jan. 27, 2012), http://rss.novostimira.com/n_2099400.html (translation by authors); *Mishnarodnii den' pamiatii dzertv Golokostu v Ukraini vidznachaiiut vpiershe [Міжнародний день пам'яті жертв Голокосту в Україні відзначають вперше]*, NOVOSTIMIRA.COM (Jan. 27, 2012), http://rss.novostimira.com/n_2099655.html; *International Holocaust Remembrance Day is Commemorated in Belarus*, UNITED NATIONS IN BELARUS (Jan. 28, 2011), <http://unic.un.org/imu/recent-Activities/post/2011/01/28/International-Holocaust-Remembrance-Day-is-Commemorated-in-Belarus.aspx>; Adina Dymczyk, *Holocaust-Gedenktage In Den Mitgliedsstaaten Der Osze [Holocaust Memorial Days in the Member States of the OSCE]*, GEDENKSTAETTEN FORUM [MEMORIALS FORUM], http://www.gedenkstaettenforum.de/nc/gedenkstaetten-rundbrief/rundbrief/news/holocaust_gedenktage_in_den_mitgliedsstaaten_der_osze (last visited Oct. 25, 2012) (translation by authors); Maris Riekstins, *Pieminot Holokausta Upurus [To Commemorate the Victims of the Holocaust]*, DIENA (Jan. 27, 2010), <http://www.diena.lv/sodien-laikraksta/pieminot-holokausta-upurus-715507> (last visited Oct. 25, 2012) (translation by authors); *International Holocaust Remembrance Day 2012*, TASK FORCE FOR INTERNATIONAL COOPERATION ON HOLOCAUST EDUCATION, REMEMBRANCE, AND RESEARCH (Jan. 27, 2012), <http://www.holocausttaskforce.org/news/400-international-holocaust-remembrance-day-2012.html>.

302. Prusin, *supra* note 29, at 8–9.

303. See DONALD M. MCKALE, *NAZIS AFTER HITLER: HOW PERPETRATORS OF THE HOLOCAUST CHEATED JUSTICE AND TRUTH* 85 (2012) (“The Soviet Union refused both during and after the war to acknowledge the suffering of its own Jewish citizens (. . . it promoted a kind of state-supported Holocaust denial) and recognized only that of its ‘Soviet’ or ‘anti-Fascist’ peoples The government-controlled Soviet press covered the trials extensively but downplayed the Holocaust, camouflaging it as the ‘sufferings of the Soviet people.’ Newspapers referred ambiguously to the murdered Jews as ‘Soviet citizens’ or ‘civilians.’ The word Jew rarely, if ever, appeared in print.”).

public the scope of the Jews' tragedy and made it an inseparable part of the history of the Great Patriotic War."³⁰⁴ At times, the early news reports on these trials, as well as press reports during the 1950s and 1960s, did specifically identify the victims as Jews.³⁰⁵

As a result, as at Nuremberg for Western readers, "these war crimes trial reports were the first glimpse into the Holocaust for many Soviet readers."³⁰⁶ As Prusin explains:

The courtroom treatment of the Holocaust reflected the ambivalence of Soviet officials' attitudes towards the murder of the Jews. While the press referred to Jewish victims interchangeably as "Soviet citizens of Jewish nationality" or "Soviet civilians," the testimonies of the defendants, survivors and eyewitnesses brought to light a horrifying image of the Nazi killing campaign [against the Jews].³⁰⁷

In his recent study, McKale observes:

In contrast to similar Soviet trials during the war[,] . . . the postwar trials introduced crimes related to the Holocaust as one of the principal charges against the defendants. While the indictments included a wide range of war crimes perpetrated in the former German-occupied Soviet territories, the courts paid particular attention to the Holocaust, especially in areas with large prewar Jewish populations.³⁰⁸

In effect, the mass murder of the Jews was too large a phenomenon to ignore during the trials and by the media. During the trials and in press reports, it often became "the elephant in the room" that everyone knew about but dare not express openly. Despite official policy, the genocide of the Jews at the hands of the Germans and local collaborators simply could not be hidden.

No other trials in Kharkov of Germans or collaborators following the 1943 Kharkov trial ever took place. Nevertheless, the memory of December 15th—both 1941 (mass murder at Drobitsky Yar) and 1943 (start of the Kharkov trial)—remain. In 1986, "705 Days Prior to Nuremberg," by playwright Zinovy Sagalova, was performed in Kharkov Theater about

304. Prusin, *supra* note 29, at 9.

305. Crowe, *supra* note 282.

306. Lukasz Hirsowicz, *The Holocaust in the Soviet Mirror*, 22 E. EUR. JEWISH AFF. 39, 39–50 (1992); Prusin, *supra* note 29, at 10. While not made public until after the fall of the Soviet Union, it is noteworthy that the pre-trial interrogation records of captured Germans reveal that the alleged perpetrators were asked specifically about actions taken against Jews: "Inform the investigation what you know about the destruction of Soviet citizens of Jewish nationality [within a given area]" and "[i]nform the investigation about your participation in the destruction of the Soviet citizens of Jewish nationality." Prusin, *supra* note 29, at 10.

307. Prusin, *supra* note 29, at 18.

308. MCKALE, *supra* note 303. Yet in the next paragraph, McKale observes that "[t]he government-controlled Soviet press covered the trials extensively but downplayed the Holocaust." *Id.*

the 1943 Kharkov trial events.³⁰⁹ In 1996, the Kharkov Holocaust Museum opened in Kharkov, Ukraine “without government support by a band of Jewish activists led by Larisa Volovik.”³¹⁰ It is “housed in three-high ceiled rooms on the second story of a pre-war building on Petrovskogo Street in downtown Kharkov” and contains an exhibit devoted to the murder campaign against the Jews and the trial at Kharkov in 1943, including photos, a documentary of the trials, and other archival materials.³¹¹ The museum remains the only public Holocaust museum in Ukraine.³¹²

VI. CONCLUSION

The first step on the legalist journey for dealing with war criminals in a court of law began in Kharkov in 1943 and only later was solidified at Nuremberg in 1945 through the “judicialization of World War II atrocities in Europe.”³¹³ The trials of Nazis and the national prosecution of other perpetrators mark the first time in human history that legalism triumphed over vengeance in the aftermath of a war. Nazi war crimes trials created a new paradigm of how those who are responsible for, or directly commit, massive state-sponsored atrocities should be treated. The process of putting Nazis and their collaborators on trial continues to this very day, as now-aging perpetrators are discovered around the world and then usually tried for acts committed over a half-century ago. Since 2000, over seventy Nazis or collaborators have been convicted worldwide for crimes during the war, with the “last great Nazi war-crimes trial” taking place in 2011 in Munich.³¹⁴ Like Mikhail Bulanov, the collaborator on trial at Kharkov, the defendant in Munich, Ivan Demjanjuk, was also a collaborator from the Ukraine.³¹⁵

309. See generally Нюрнбергский процесс репетировали в Харькове, СЕГОДНЯ, 22 Декабря 2008, <http://www.segodnya.ua/life/stories/njurnberhckij-protsecc-repetirovali-v-kharkove.html> (memories of WWII atrocities and the proceedings of the Nuremberg trial are retold) (last visited Oct. 25, 2012).

310. DAWSON, *supra* note 30, at 45–46.

311. *Id.* at 45, 47.

312. See DAWSON, *supra* note 30. Kiev, the capital of Ukraine and a much larger city than Kharkov, has yet to have a museum dedicated to the history of the mass murder of Jews in the Ukraine during the Nazi occupation.

313. DRUMBL, *supra* note 236, at 48.

314. Lawrence Douglas, *Ivan the Recumbent, or Demjanjuk in Munich: Enduring the “Last Great Nazi War-Crimes Trial,”* HARPER’S MAG., Mar. 2012, at 45–46.

315. *Id.*; Robert McFadden, *John Demjanjuk, 91, Dogged by Charges of Atrocities as Nazi Camp Guard, Dies*, N.Y. TIMES (Mar. 17, 2012), http://www.nytimes.com/2012/03/18/world/europe/john-demjanjuk-nazi-guard-dies-at-91.html?_r=1&pagewanted=all.

The courtroom in Kharkov is a predecessor to the courtroom at Nuremberg, and the courtrooms today in The Hague of the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. As a consequence, the legalist option is also recognized today as the dominant mode for dealing with international outlaws, whether they be tyrants or terrorists. Western liberal democracies do not merely summarily execute suspected terrorists or their leaders, such as Osama Bin-Laden or Khalid Sheikh Mohammed. This option is not seen as viable, in no small part because of the legalist road first taken at Kharkov.

We conclude in the form of a postscript, focusing on the distressing phenomenon—likewise illustrated from the Holocaust at Kharkov—that the prosecution of most Nazi war criminals either did not take place or, if it did, was quickly reversed.³¹⁶ While the four “small fry” defendants on the dock at the Kharkov trial were punished, many of the “large fish” and a multitude of other culprits who committed crimes in Kharkov were never punished. In 1968, in the German city of Darmstadt, ten former Germans who were part of the 4a detachment were brought to trial for the killings of Jews in Eastern Ukraine, including Kharkov.³¹⁷ Three of the ten received no punishment. Others received sentences, ranging from four-to-fifteen years.³¹⁸

One notable figure in the Kharkov tragedy, however, was never punished for his deeds there. In December 1945, the Canadians put captured SS Brigadier General (*Brigadeführer*) Kurt Meyer³¹⁹ on trial before a military commission.³²⁰ Meyer, at age thirty-three, became in 1944 the Führer’s

316. Dawson explains the phenomenon: “Hardball geopolitics clearly was at play. The U.S. government was anxious about offending West Germany, its new ally against the evil empire in Moscow. Intense lobbying by West German government and church officials led to reduced sentences and early freedom for many officers of the Einsatzgruppen, the mobile killing squads responsible for murdering over a million Ukrainian Jews.” DAWSON, *supra* note 30, at 20.

317. *Nazi Crimes on Trial*, JUSTIZ UND NS-VERBRECHEN, <http://www1.jur.uva.nl/junsv/brd/brdengfiles/brdeng694.htm> (last visited Oct. 25, 2012).

318. *Id.*

319. From all indications, Meyer was a life-long and ardent Nazi, fully believing the racist ideology of the NSDAP. During the invasion of Poland, as a young SS officer, he ordered the shooting of fifty Polish Jews as a reprisal in the aftermath of the German capture of the Polish city of Modlin. Meyer earned honors from his Nazi superiors for his lightning quick capture of Soviet territory during Germany’s June 1941 Operation Barbarossa invasion of the Soviet Union. He was given the moniker “Der schnelle Meyer” (“Speedy Meyer”) for the speed by which he captured Soviet territory. GORDON WILLIAMSON, *GERMAN COMMANDERS OF WORLD WAR II* (2): WAFFEN-SS, LUFTWAFFE & NAVY 17–18 (2006); REITLINGER, *supra* note 19, at 196.

320. CRAIG W.H. LUTHER, *BLOOD AND HONOR: THE HISTORY OF THE 12TH SS PANZER DIVISION “HITLER YOUTH,” 1943–1945*, at 190 (1987).

youngest general.³²¹ Meyer also happened to be one of the *Waffen-SS* generals who led the military campaign for the German forces' retaking of Kharkov in March 1943.³²² In fact, he earned his nickname Panzermeyer ("Tank Meyer") during this battle.³²³

As noted earlier, this turned out to be the last major German military victory against the Red Army. A direct order from Hitler on February 13, 1943, delivered to Meyer personally, commanded Meyer's troops to hold Kharkov at all costs.³²⁴ After the bloody recapture of Kharkov by the German forces, Hitler awarded Meyer the *Knight's Cross of the Iron Cross with Oak Leaves and Swords*, the third-highest military decoration of the Third Reich.³²⁵

During this military operation, Meyer apparently ordered the destruction of a village named Jefremovka, located near Kharkov, and the murder of all its inhabitants.³²⁶ He also apparently either directly ordered or had a hand in the shooting of Soviet POWs: "Thousands of Soviet soldiers fell into the hands of [Meyer's] . . . Leibstandarte SS Adolf Hitler division. When the Soviets later liberated Kharkov, their bodies were discovered, revealing that they had been shot out of hand or after capture. Meyer observed, failed to stop, or instigated the killing of defenseless prisoners of war."³²⁷

Yet, no mention of these atrocities is made in his postwar memoirs, published in 1956, where he describes in a gung-ho manner the capture of Kharkov.³²⁸ He ends the chapter as follows: "The battle of Kharkov

321. WILLIAMSON, *supra* note 319, at 18.

322. *Id.*

323. REITLINGER, *supra* note 19.

324. See KURT MEYER, *GRENADIERS: THE STORY OF WAFFEN SS GENERAL KURT "PANZER" MEYER* 173 (2005).

325. WILLIAMSON, *supra* note 319, at 18.

326. "We have evidence, moreover, from two of Meyer's own officers, that in one case . . . he is said to have destroyed a village called Jefremorka and have put to death all its inhabitants, and from the other officer that Meyer himself admitted that on occasion in Russia where his forces were cut off it had been necessary to kill prisoners. He, of course, denies this but stresses the fact that fighting in Russia soon became so hard that neither side gave quarter and in reprisal for the acts of the other frequently killed prisoners. He admits this much but denies having had anything himself to do with the killing of prisoners, or . . . to have any opportunity to do so." Report of Lieutenant Colonel B.J.S. Macdonald, Commanding Officer of Canadian War Crimes Investigation Unit, to R.J. Orde, Brigadier Judge Advocate General (Oct. 21, 1945), in KURT MEYER ON TRIAL: A DOCUMENTARY RECORD 84 (P. Whitney Lackenbauer & Chris M.V. Madsen eds., 2007).

327. *Id.* at 6.

328. See MEYER, *supra* note 324, at 173–96.

had been conducted victoriously despite considerable losses. In the great battle between the Donez [River] and the Dnjepr [River] the German grenadier had emerged victorious over the eastern hordes.”³²⁹

Moved to the Western Front, Meyer participated in battles against American, British, and British Commonwealth forces, where he commanded the 25th SS Panzer Grenadier Regiment of the 12th *SS-Waffen* Hitler Youth Panzer Division, composed primarily of sixteen-to-eighteen-year-old soldiers drawn from the Nazi cadet wing, the “Hitler Youth.”³³⁰

Captured in 1944 by Belgian partisans and turned over to the Americans, Meyer was put on trial in occupied Germany by the Canadians for ordering the shooting of forty-one captured Canadian POWs during the Normandy campaign from June 7, 1944 through June 8, 1944.³³¹ Taking care of their own, the Canadians did not bring charges for any of Meyer’s activities in Poland or in the Soviet Union, including Kharkov, or seek assistance from the Russians or the Poles.³³² He was tried in December 1945 before a military court consisting of five Canadian generals solely for ordering his soldiers at Normandy to execute captured enemy soldiers, thereby violating laws of warfare.³³³

After a trial lasting over two weeks, the Canadian generals found the Nazi general guilty of most of the charges on the basis of the command responsibility principle and sentenced him to death.³³⁴ However, the Convening Authority superior officer reviewing the sentence commuted it to life imprisonment on the grounds that Meyer’s degree of responsibility did not warrant the extreme penalty.³³⁵

During the trial, Bruce Macdonald, the Canadian chief military prosecutor, tried to delve into Meyer’s experience with prisoners on the Eastern Front against the Soviets, but he was cut short by the military court president.³³⁶ In his account of the trial, Macdonald refers to the allegations he would have pursued if allowed to question Meyer about his activities on the Eastern Front:

Anecdotes about [Meyer’s] methods of fighting in Russia were common. It was said that with his Reconnaissance Unit he had several times penetrated the Russian lines and permitted himself to be encircled, but preserving, if he could,

329. *Id.* at 196.

330. WILLIAMSON, *supra* note 319, at 18.

331. LUTHER, *supra* note 320, at 188, 191.

332. *See id.* at 191.

333. *See generally* Canada v. Meyer, 4 L.R.T.W.C. 97 (1948); *see also* PATRICK BRODE, CASUAL SLAUGHTER AND JUDGMENT: CANADIAN WAR CRIMES PROSECUTION 1944–1948, at 20 (1997).

334. LUTHER, *supra* note 320, at 192.

335. *Id.*

336. KURT MEYER ON TRIAL: A DOCUMENTARY RECORD 393, 397 (P. Whitney Lackenbauer & Chris M.V. Madsen eds., 2007).

a way out. He would then destroy an entire village with all its inhabitants, men, women, and even small children. When questioned about this, he said that the shooting of prisoners in such a situation was necessary because they could not be brought back to the German positions.

Another story, told by an S.S. sergeant, was that at another place in Russia he did the same thing in retaliation for the unintentional killing of one of his two German shepherd dogs which were said to have been given to him by Hitler.³³⁷

After his conviction by the Canadian military court in occupied Germany, Meyer was taken by ship to Canada to serve his life sentence.³³⁸ He became the only Nazi war criminal convicted by the Western Allies to be imprisoned outside of Germany.³³⁹

In 1951, as a result of a campaign waged by his supporters back home, Meyer was transferred to a British military prison in Germany.³⁴⁰ He was released in 1954, ten years to the day after being captured by the partisans.³⁴¹ Meyer spent the remainder of his life in West Germany, working as a beer salesman selling beer to bases where Canadian troops, oddly enough, were stationed in Germany.³⁴² Treated with respect by his fellow Germans, Meyer became actively involved in an organization of *Waffen-SS* veterans, HIAG (Hilfsorganisation aug Gegenseitigkeit der *Waffen-SS* or “Mutual Aid Society of the *Waffen-SS*”).³⁴³ He became a spokesperson for HIAG and unsuccessfully campaigned for West Germany to grant pensions to former members of the *Waffen-SS*, which was branded a “criminal organization” by the IMT at Nuremberg.³⁴⁴ In 1961, Meyer, on his fifty-first birthday, suddenly died of a heart attack.³⁴⁵

Meyer remained unapologetic until the end. His 1957 memoir *Grenadiers*—a bestseller in Germany that went through multiple editions, and was translated into French and English—describes the surprise invasion of the Soviet Union in June 1941 as a campaign “to do away with the worldwide threat of Bolshevism forever.”³⁴⁶ The memoir is surreal, devoid of even one mention of Jews (including the gas vans used in Kharkov to murder them), the massive killing operations of civilians

337. B.J.S. MACDONALD, *THE TRIAL OF KURT MEYER* 75–76 (1954).

338. LUTHER, *supra* note 320, at 193.

339. BRODE, *supra* note 333, at 208.

340. LUTHER, *supra* note 320, at 193.

341. *Id.* at 194 n.36.

342. *Id.*

343. *Id.*

344. *Id.*

345. WILLIAMSON, *supra* note 319, at 18.

346. MEYER, *supra* note 328, at 71.

conducted by the Germans, or the *Einsatzgruppen* killing squads working alongside Meyer's troops. The memoirs contain vivid descriptions of atrocities witnessed by Meyer—all committed by Red Army or other Allied troops.³⁴⁷ His trial by Canadians took place only because “[a] new international law came into effect [after defeat of Nazi Germany]—the victors’ justice.”³⁴⁸

Meyer denied until the end having any knowledge of concentration or extermination centers. In a 1957 interview with a Canadian reporter, he stated: “I never saw a concentration camp.”³⁴⁹ As to persecution of Jews, he replied evasively, “I have only seen soldiers and not politicians.”³⁵⁰ Meyer's ordering and participation of atrocities in Kharkov, as well as those which occurred earlier in Poland, were forgotten and he was never brought to justice by the Germans for these acts. Sadly, Meyer is remembered today only as a brilliant military commander, achieving cult status among military historians and military buffs. The Internet today contains numerous sites selling miniatures of SS-General Meyer, and specifically portraying his supposed heroic March 1943 recapture of Kharkov.³⁵¹

347. *See generally id.*

348. *Id.* at 328.

349. Omar Anderson, *Kurt Meyer: Germany's New Beer Hall Hero*, OTTAWA CITIZEN MAG. (Feb. 2, 1957), *reprinted in* KURT MEYER ON TRIAL: A DOCUMENTARY RECORD 654 (P. Whitney Lackenbauer & Chris M.V. Madsen eds., 2007).

350. *Id.*

351. *See* Search Results for “Kurt ‘Panzer’ Meyer Miniature,” GOOGLE, <http://www.google.com> (search “Kurt ‘Panzer’ Meyer Miniature”).