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“That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captives to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason,” the chief of the US prosecution team at Nuremberg, Robert H. Jackson, proclaimed in his opening address in November 1945.[1] These were, and remain, soaring and visionary words, words that have inspired creation of instruments and institutions to hold war criminals accountable to law. Jackson’s vision of the most powerful nations in the world meeting to pass reasoned and dispassionate judgment on accused war criminals launched the "Nuremberg myth." It is a myth with remarkable staying power, one that persists until the present day. According to the myth, the USA, USSR, Great Britain, and France, despite their divergent legal traditions and conflicting national interests, subordinated their partial good to a quest for justice for Nazi leader Adolf Hitler’s monstrous crimes, thereby paving a road on which the future defense of human rights might proceed. The myth is in equal parts inspirational, aspirational, and uplifting. It is also, as Francine Hirsch shows in her new book, to a significant degree false and misleading.

In contrast with the history of Nazism and its prolific criminality, which has been written by historians, the first accounts of Nuremberg were written by its participants. In the Anglophone West, this meant that Anglo-American judges and prosecutors shaped public perceptions of the trial. Inevitably, the events and ultimate meaning of Nuremberg were viewed through the perspectives of these individuals. Particularly in the United States, the myth struck root early on of a virtuous America blazing a trail of righteousness for its allies to follow. The British and French played their parts as Dr. Watson to the Yankee Sherlock Holmes, supporting the moral titan in his crusade to punish the Nazi Moriarty. The Soviets were assigned cameos in this melodrama, relegated to the role of a sulking Inspector Lestrade, whose resentment of the boy-genius was surpassed only by his ignoble demand for vengeance. Such was “the myth of the Nuremberg Moment” (p. 7), a morality
play of American heroism, Franco-British helpfulness, German evil, and Soviet gaucherie.

Hirsch's main contention is that the Nuremberg myth is largely, though not wholly, fictitious. To the extent that the myth ignores the Soviet contributions to the Nuremberg war crimes trial, it is a distorted misrepresentation of history. Because the trials were held as the Cold War was reaching liftoff (we might recall that former British prime minister Winston Churchill delivered his "Iron Curtain" speech as the Soviets were presenting their case against the Nazis), Nuremberg quickly became one of many fronts in the East-West confrontation. This fact, when considered in light of the pro-American reportage of the era, itself profoundly shaped by the viewpoints of American trial participants, helps account for the tenacity of the myth in our cultural lives. It has surfaced repeatedly in Hollywood films about Nuremberg: both Judgment at Nuremberg (1961) and the television docudrama Nuremberg (2001) packaged the myth for mass audiences. As Hirsch notes, the latter film was based on a history of Nuremberg that drew on the memoirs of US and British trial participants. Given its source material, it is little wonder that Nuremberg would reflect a pro-Western bias. Not even PBS was immune to the mythologizing. Its 2006 documentary on Nuremberg lionized Robert Jackson as a champion of justice while ignoring Soviet contributions to the trial.

And these contributions, as Hirsch retells the story of the Nuremberg trial, were considerable. At a time when the British were planning to shoot Nazi leaders after the war as bandits, Soviet foreign minister Vyacheslav Molotov had advocated for prosecuting them in an international tribunal. Although the proceeding the Soviets had in mind was a show trial similar to those they had held in the 1930s, they nonetheless were the first to advocate—and staunchly defend—the trial concept for dealing with German leaders. The clear focus of Hirsch's thesis of Soviet influence on Nuremberg, however, is the figure of Aron Trainin, an international legal scholar and the chief of the Soviet Extraordinary State Commission for the Investigation of German War Crimes. Two years before the war he was urging the creation of an international criminal court to prosecute violations of the "law of nations," a body, he said, that would "defend the peace." Trainin's 1944 book arguing that Nazi leaders could be tried for aggressive war, or crimes against peace, would later be cited with approval by the Anglo-American architects of Nuremberg—Murray Bernays (US author of the conspiracy charge), Jackson, and the chief of the British delegation at the London Conference (the meeting that produced the charter for the Nuremberg trial), D. Maxwell Fyfe.

Hirsch mounts a convincing case that, but for the Soviets, Nuremberg may never have occurred and the progress of human rights in the postwar world might have been stymied. None of this is even remotely acknowledged by the Nuremberg myth, a half-baked just-so story that glosses over vital Soviet contributions in its haste to portray Nuremberg as a triumph of Western legal norms. The Western press fell readily into line with this interpretation, stressing, as the Times of London did on the eve of the International Military Tribunal's (IMT) announcement of its verdict, the judges' "outstanding ... international solidarity" (p. 380). In reality, the four nations presiding over the trial were divided by diverse factors. Most prominent among these were the disparate legal traditions of the trial's organizers (Anglo-American vs. Continental European legal systems) and the conflicting national interests of each. Differences in legal culture were more than the ordinary ones yielded in any comparison of adversarial and inquisitorial systems. These were of relatively minor importance when compared with the immense chasm that separated Western law and Soviet law. Hirsch does a splendid job conveying the Soviet expectation of how the Nuremberg trials would unfold. She notes that the foremost influences on the Soviet role at Nuremberg, e.g., Josef Stalin; Roman Rudenko, the Soviet prosecutor; Andrei Vysh-
insky, a Soviet jurist and Stalin's right-hand man; and Iona Nikitchenko, the Soviet judge at Nuremberg, were all involved in prosecuting the notorious "show trials" of the 1930s, in which alleged "enemies of the people" were railroaded into unjust convictions and executed. Trainin himself was a protégé of Vyshinsky, who adapted Trainin's legal theories of complicity in his prosecution of three show trials between 1936 and 1938. The Soviet expectation was that the Nuremberg trial would follow a similar track. For the Soviets, the Allies had already declared the guilt of Nazi leaders at Yalta in February 1945. All that remained was to convene a trial to announce their guilt and determine each defendant's punishment. Jackson marveled at this conception, countering that a political declaration could not produce a criminal conviction. Only a fair legal proceeding could do that.

Presuming Nazi leaders' guilt before their trial was symptomatic of a deeper rift between the Soviets and the Western Allies. As Hirsch sums up the Soviet predicament, "they had no idea what they were getting into at Nuremberg" (p. 8). Accustomed to show trials that flexed the muscles of untrammeled state power, the USSR's team at Nuremberg assumed the defendants would have no opportunity to defend themselves by challenging official documents, calling their own witnesses, or—most gallingly for the Soviets—making counter-accusations against them. Rather, the Soviets anticipated a massive show trial that would quickly convict all of the accused, send them to their punishment (i.e., the gallows), and burnish the status of the USSR as a great world power. From the beginning, the Soviets wanted to use the trial as a means of pursuing their geopolitical aims. Much of Hirsch's book is devoted page by page to showing how each of these expectations was thwarted and the tables turned decisively against the Soviets.

One of these thwarted expectations was the assumption that the Soviets would present the case against the accused for crimes committed on Soviet territory. Instead, Jackson seized control of the entire case at Nuremberg by claiming the conspiracy charge for the Americans and moving it into position as the first of the charges against the Nazis. Because the conspiracy count extended to each of the other charges (crimes against peace, war crimes, and crimes against humanity), this meant the American team would present evidence on each of these charges at the outset, effectively scooping the case presentations of the other Allies. Hirsch is emphatic that Jackson's objective was to use the conspiracy charge as a means of exercising American control over the Nuremberg trial. British prosecutor Maxwell Fyfe, angered over Jackson's subterfuge insofar as it relegated crimes against peace to Count Two, eventually accepted it. Roman Rudenko was not even aware of Jackson's reformulation of the Indictment until late September 1945. For the first few months of the trial, which began in November 1945, the Soviets looked on in dismay as the American team presented evidence of conspiracy to commit crimes against humanity in the USSR as well as in France. Concerned that Soviet (and to a lesser degree, French) participation in the trial would discredit it, the Americans preempted much of the evidence that had been assigned for presentation to the legal teams of the two countries.

By the time the Soviets began their case, as Hirsch tells us, they had made a "course correction" to finesse the Americans' usurpation of their evidence. They decided to include new documents captured from German-Romanian archives. Such proof, offered to show the involvement of the Romanian government in the plan to attack the USSR, not only demonstrated gaps in the American case but also tended to legitimate Stalin's designs on Romania after the war. After being jolted by surprise witnesses called to the stand by the Americans, the Soviets launched their own bombshell, offering Field Marshal Friedrich von Paulus, German commander of the doomed 6th Army at the Battle of Stalingrad, as a witness. After the de-
feat in 1943, the Germans had announced that Paulus had been killed. His supposed casket, interred in a hero's burial, was empty. The appearance of Paulus as a witness for the Soviets electrified the audience, including Jackson. For all their many blunders and pratfalls at Nuremberg, the Soviets pulled off an extraordinary coup-de-main with Paulus. Their other witnesses, while not as sensational as Paulus, were powerful and effective. Contrary to the misconception that the Final Solution was ignored at Nuremberg, the Soviets presented extensive evidence documenting the Holocaust on Soviet territory. Furthermore, they did not avoid identifying anti-Semitism as the motive for Nazi persecution of the Jews. Telford Taylor, an American prosecutor and the eventual successor to Jackson as the head of the US trial program at Nuremberg, commended the Soviets for their vivid portrayal of the Final Solution in the USSR. The Western press's tendency to either ignore or minimize the Soviet case may have reinforced the mistaken belief that the Holocaust was ignored at Nuremberg.

Much of Hirsch's book builds up to a climax—the Soviet presentation of its case against the Nazis for allegedly committing the Katyn forest massacre. In the seventy-five odd years since the trial, no aspect of Nuremberg is more baffling than the dogged insistence of the Soviets that the Germans perpetrated this crime. The evidence in fact points back at the Soviets themselves, who likely carried out the massacre of more than twenty thousand Polish victims (including thousands of Polish army officers) sometime in early 1940. Today, the Russian government concedes that the massacre was spearheaded by the Soviet Politburo and the NKVD (Ministry of Internal Affairs). Yet even before World War II ended, evidence was available that incriminated the Soviets as the perpetrators. This evidence was extant despite Soviet endeavors to whitewash their responsibility for the mass murder. In 1944 they formed a commission headed by an Extraordinary State Commission member, Nikolai Burdenko, to investigate Katyn. Rather than conduct an investigation, the commission planted evidence at the crime scene as part of an effort to frame the Nazis for the atrocity. The commission produced a report of its sham investigation called the "Burdenko Report." At Nuremberg, the Soviets would go on to demand prosecution of the major war criminals for Katyn, spurning the pleas of the Western Allies to drop the matter from the Indictment. The heart of their case was the fraudulent Burdenko Report.

At Stalin's show trials of the 1930s, evidence like the Burdenko Report was used to convict and execute the accused. At Nuremberg, however, the defendants had the right to defend themselves against the charges and dispute the prosecution's evidence. What followed after the four Allies rested their cases was a bravura performance by the German defense counsel. Like a skilled boxer able to strike his opponent from multiple directions, the defense struck blow after blow on the weakest points of the Allies' case. Hirsch's portrayal of the defense case in chief is for this reviewer the best and most enthralling part of her book. Unaccustomed to trials in which the accused is something more than an inert punching bag, the Soviets were shocked and humiliated by the defense's barrage of counter-charges. Going into Nuremberg, the Soviets had assumed that Articles 19 and 21 of the London Charter would prevent tu quoque defenses (claiming that the countries of the prosecutors had committed the same actions as the defendants) and render official documents such as the Burdenko Report unassailable. These presuppositions, much like others the Soviets had entertained before the trial started, proved to be erroneous. Instead, the Soviets watched in horror as the defendants adduced evidence of the Nazi-Soviet Pact, in which Nazi Germany and Stalin's USSR agreed to divide Poland between them and respect one another's spheres of influence in eastern Europe. The defense also called witnesses to undermine the Burdenko Report and demonstrate Soviet responsibility for the Katyn forest massacre. Whatever capital the Soviets had earned in
presenting their case against the Nazis was demolished by the bruising counterpunches of the defense.

According to Hirsch, the Soviets by this point were learning that the language of human rights could be used to pillory the USSR. This realization was important because it occurred at a moment when the USSR was installing pro-Soviet governments in eastern Europe, and at a time when they were becoming locked into a global military standoff with the United States. The bitter lessons absorbed at Nuremberg guided their diplomacy after 1945, especially in the debates over international human rights instruments. In talks about the International Declaration of Human Rights, Soviet representatives insisted that social and economic rights—i.e., rights granted by the state—be emphasized over civil rights like the rights to speech and religion. The Soviets rejected proposals to create an international criminal court, joining the ranks of the US, Great Britain, and other countries who feared such a court would encroach on state sovereignty. Similarly, the USSR looked askance on the Genocide Convention of 1948, and for the same reason: they thought it would infringe on their sovereignty. The striving of Soviet representatives to exclude political groups from the class of protected persons under the Convention was ultimately successful, and until today political groups have remained beyond the Convention's reach. As Hirsch remarks, the Soviets had good reason to be wary of these and other human rights instruments of the postwar period, inasmuch as they were committing international crimes in eastern Europe. This fact did not prevent them from weaponizing human rights language in their denunciations of the US for allegedly supporting the Nazis and committing worldwide acts of genocide, such as in Korea. Soviet deployment of human rights language as a cudgel against the West would continue into the 1960s. (In 1960 Rudenko described U-2 pilot Francis Gary Powers's violation of Soviet airspace as a crime against peace.)

While her focus is on the USSR, Hirsch argues that the Big Four at Nuremberg, as well as the defendants sitting in the dock, pursued their own agendas pace the romantic conceptions of the Nuremberg myth. France and Great Britain advanced narratives that portrayed them as defending small countries and minorities against Nazi terror. The US “was making the claim that it had rescued Europe from itself” (p. 298). The defendants through their bulldog defense counsel promoted their own narratives built on tu quo que and se defendendo (self-defense). On this view, the Nazis were no worse than any of the countries sitting in judgment of them. In each case, the narrative was driven to a great extent by material and geopolitical factors. For the Soviets, the goals were revenge, reparations, and enhancement of the USSR's status as a world power. For the British and the French, their narratives papered over their appeasement of Hitler and their long—and frequently brutal—histories of colonialism. For the Americans, their narrative justified US control of the prosecution and rallied support for US claims to global leadership. For the defendants, their narrative was a fight for their very lives. In Hirsch's eyes, the Nuremberg trial was as much about “the struggle over the narrative of the war” (p. 298) as it was about justice.

In the midst of competing narratives and countervailing interests, was justice done at Nuremberg? The central message of the book affirms that it was. The message is stated clearly in her introduction and her final chapter—namely, that an "illiberal authoritarian" USSR "positively shaped international law" and that "international justice is an inherently political process" (pp. 8, 416). In this sense, therefore, the Nuremberg myth is not completely mistaken. What it got right was the righteous dispensation of justice for terrible crimes ordered at the highest levels of the German government. Where it erred was in its pious fantasies of allied unity divorced from the pursuit of selfish national interests, as well as its refusal to acknowledge real Soviet contributions to the trial.
Hirsch's book tells this "untold story" (the title of her introduction) as a foil to the Nuremberg myth by folding the USSR back into the narrative as something other than a churlish irritant. They were that, of course, but without them the trial might not have happened. At times ridiculous, overbearing, and clueless, the Soviets at Nuremberg were also discerning, eloquent, and humane. Life is complicated, and so was Nuremberg.

Does Hirsch's book tell the "untold story" of Nuremberg? The answer depends on what we mean by "untold story." Hirsch's assertion that Molotov and Trainin made crucial contributions to the IMT is a commonplace in many treatments of Nuremberg; the reader is referred to previous histories by Bradley F. Smith (Reaching Judgment at Nuremberg, 1977, and The American Road to Nuremberg, 1982), Richard Overy (Interrogations: The Nazi Elite in Allied Hands, 1945, 2001), Arieh J. Kochavi (Prelude to Nuremberg, 1998), Michael R. Marrus (The Nuremberg War Crimes Trial, 1945-46, 1997/2018), and David M. Crowe (War Crimes, Genocide, and Justice, 2014). The role of the Soviets at Nuremberg has also been addressed by George Ginsburg's (Moscow's Road to Nuremberg, 1995) and by Hirsch herself in a journal article ("The Soviets at Nuremberg," 2008). What this reviewer found fresh and original in Hirsch's book is her willingness to see the Nuremberg trial and postwar era through the eyes of the Soviets. She was able to accomplish this feat of historical empathy by consulting Soviet archives unavailable to Western scholars during the Cold War. Immersion in the Soviet sources and the author's willingness to view the world from their perspective are much-needed correctives to the biased Nuremberg myth. In this regard, her account is indeed a largely untold story.

Other aspects of the book, however, are on less solid ground. While her claim that Trainin was the source of the conspiracy and crimes against peace charges is persuasive, she does not address the opposing view that Colonel Murray Bernays, chief of the War Department's Special Projects Branch, was its true originator. As a civilian Bernays had worked for the Securities and Exchange Commission (SEC), an organization that before America's entry into the war had used conspiracy to prosecute corporate wrongdoers under theories of collective liability. Moreover, several members of the US prosecution team had experience working for the SEC. According to the mainstream American narrative, Bernays drew on his background with the SEC in suggesting the Nazis might be charged with conspiracy. When he encountered a précis of Trainin's book in 1944, it merely confirmed Bernays' own thinking on the matter. His January 1945 memo on conspiracy, though clearly citing Trainin's book, represented an independent route to the notion that the Allies might charge Nazi war criminals with conspiracy, thereby relieving potentially crushing caseloads and expediting their prosecution.

Similarly, there is no mention in Hirsch's book of William Chanler, a high-level advisor and confidante of Secretary of War Henry Stimson, whom Telford Taylor credited as the author of the aggressive war charge. Taylor affirmed in his memoir (The Anatomy of the Nuremberg War Crimes Trial, 1992) that Chanler carried the idea of prosecuting the Nazis for waging unlawful warfare back to the Pentagon from his assignment as chief legal officer of the Allied Military Government in Italy. If Taylor is correct, then the Americans had arrived at the crimes against peace charge before their encounter with Trainin's book. The point here is not that Hirsch's recognition of Trainin as the author of the conspiracy and aggressive warfare charges is wrong but that her account contradicts a mainstream narrative buoyed by the testimonies of direct participants in the trial. She should confront this narrative head-on and demonstrate more clearly why Trainin and not Bernays or Chanler was the true author of these charges.
In addition, Hirsch might have reorganized her excellent study to devote more time to an exposition of Soviet law. Room for such coverage could have been found by reducing chapters 14 and 15, which for this reviewer languish after her gripping chapters on the defense case in chief and the "Katyn Showdown" specifically. In her defense, Hirsch does talk about differences between the Anglo-American adversarial and the Franco-Soviet inquisitorial systems (pp. 60-61; see also her discussion of the peculiar features of Soviet law on pp. 273, 377, and 399-400), yet Soviet law cannot be so readily classified with French law. The critical difference is not between the British and Americans on the one hand and the French and Soviets on the other. Rather, it is the difference between Western law (of which French law is an integral part) and Soviet/socialist law. In this regard, Hirsch does not provide an adequate context for understanding the extraordinary and shocking behavior of the Soviets at Nuremberg; the top-down control of Soviet prosecutors by Moscow, the intrusive and counterproductive meddling of the Vyshinsky Commission, the clear subservience of the Soviet judge to Stalin, the bizarre demand of that same judge (acting on orders from the Kremlin) that all the defendants be convicted and executed, including the three who were acquitted, or the issuance of a "dissenting opinion" nominally written by Nikitchenko yet authored by members of the Vyshinsky Commission in Moscow. Hirsch's brief references to Soviet law—described as the creature of an "illiberal authoritarian" government—do not shed much light on why the Soviets acted as they did. Her book might have recounted the distinctive features of Soviet law that separated it from the legal systems of the West—not just the American and British but the French and German as well. That system, as Soviet legal expert Harold J. Berman once wrote, was "parental in character" and involved top-down control by the supreme authority in the USSR, the Communist Party.[2] Within the parental legal system of the Soviet state, no separation of powers existed; the Soviet Constitution concentrated all power in the hands of the Supreme Soviet. Thus, the Soviet judiciary was entirely subordinate to the Communist Party, and that subordination was prescribed by the highest law of the land. Furthermore, the judge's role in this system was, to quote two eminent scholars of Soviet law, the "strict interpretation of enacted law rather than the creation of legal rules."[3] The Soviet judge might apply the law but had to do so in accordance with the instructions of the Communist Party. Judges therefore neither created nor developed law; they took their marching orders from the legislature.

These aspects of Soviet law might make the enigmatic behavior of the Soviets at Nuremberg less inscrutable. They might explain why the Soviet prosecutor Rudenko was hobbled so tightly by Stalin and the Vyshinsky Commission and why the Soviet judge jerked and capered at the end of a string held by these same parties. The lack of separation of powers in the USSR and the abject submission of the judiciary to the government go a long way toward clarifying the striking discrepancies between Western and Soviet law. They resided not in the "inquisitorial system" but in a one-party state hostile to an independent judiciary.

More engagement with Soviet law might also have underscored Hirsch's important point that "the real story of Nuremberg is messy" (p. 416). The "real story" is imbedded in a world where contradictory circumstances arise in defiance of our expectations. It is a strange world in which subatomic particles are entangled although separated by light-years, seemingly good-natured sports heroes murder their ex-wives, and illiberal tyrannies promote human rights. It is an odd reality in which a Soviet police state could act, and genuinely see itself, as a parent and teacher to its citizens, a reality in which that very same state, despotic in its power, could nonetheless be responsible for the well-being of its people. A follower of Hegel might see the progress recorded in Hirsch's
fine book as signs of history’s cunning at work, laughing in the face of all our settled wisdom as it pushes things an inch or two farther along the path toward a better world.

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Notes


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