
Judgment at Nuremberg

Fifty years ago the trial of Nazi war criminals ended: the world had witnessed the rule of law invoked to punish unspeakable atrocities

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In the war-shattered city of Nuremberg, 51 years ago, an eloquent American prosecutor named Robert H. Jackson opened what he called “the first trial in history for crimes against the peace of the world.” The setting was the once lovely Bavarian city’s hastily refurbished Palace of Justice, an SS prison only eight months before. In the dock were 21 captured Nazi leaders, notably the fat, cunning drug addict Hermann Göring.

Their alleged crimes, the ultimate in 20th-century depravity, included the mass murders of some six million Jews and millions of other human beings deemed “undesirable” by Adolf Hitler. “The wrongs which we seek to condemn and punish,” said Robert Jackson, “have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated.”

Here were satanic men like Ernst Kaltenbrunner, the scar-faced functionary second only to Heinrich Himmler in overseeing the death camps and the Nazi police apparatus; Alfred Rosenberg, co-founder of the Nazi Party and chief theorist of anti-Semitism; and Hans Frank, the vicious and venal Nazi proconsul in Poland. At the time, many asked why such messengers of evil were to be allowed even one day in court, much less the 403 sessions they were about to undergo. It was a question that Jackson, on leave from his job as a Justice of the U.S.

Supreme Court to prosecute this case, quickly addressed in his opening statement.

With the kind of moral clarity that marked American idealism at the time, Jackson declared, “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.... The real complaining party at your bar is Civilization.... [It] asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude.”

So began, in November 1945, the century’s most heroic attempt to achieve justice without vengeance—heroic because the victors of World War II had every reason to destroy the vanquished without pity. Heroic because they ultimately resisted the temptation to impose on the Germans what the Nazis had imposed on their victims—collective guilt. Instead, they granted their captives a presumption of innocence and conducted a ten-month trial to determine their personal responsibility.

Locked up in solitary cells each night, constantly guarded by American M.P.’s mindful of recent suicides among high-ranking Nazis, the defendants spent their days in a giant courtroom built for 400 spectators, listening to evidence drawn from 300,000 affidavits and meticulous German documents so voluminous they

filled six freight cars. Nearly all were ready to acknowledge the horrific facts while cravenly assigning blame to others. (Göring, who died unrepentant, was the exception.) When it was all over in October 1946, and ten defendants had been hanged messily in the Palace of Justice’s gymnasium, this first Nuremberg trial stood as the judicial Everest of those who hoped, as Jackson did, that the rule of law could punish, if not prevent, the atrocities of war.

The exercise of justice at Nuremberg reverberates across this century. And next month, on November 13 and 14, scholars will ponder the lessons of history at an international conference on the trials, sponsored by the Library of Congress and the U.S. Holocaust Memorial Museum.

How this trial, and the 12 that followed, came to be held is a story in itself. In April 1944, two Jews who escaped the Auschwitz death camp described its horrors to the world. They detailed Germany’s technology of genocide, such as the camp’s four new gas-and-burn machines, each designed to kill 2,000 prisoners at a time. They pinpointed a huge slave-labor operation at nearby Birkenau, run by Germany’s fine old industrial names (I. G. Farben and Siemens among others), where Allied prisoners and kidnapped foreign laborers were fed so little and worked so hard that as many as one-third died every week. Their testimony paved the way to Nuremberg.



UPI/Bettmann Archives

Death camp images, such as this one from Buchenwald, helped convict Ernst Kaltenbrunner, Himmler's deputy. Elie Wiesel, future chronicler of the Holocaust, is indicated by the arrow.

The Allied leaders had little trouble agreeing that German war crimes must be punished. But punished how? Treasury Secretary Henry Morgenthau Jr. urged that all captured Nazi leaders be shot immediately, without trial, and that Germany be reduced to the status of an agricultural backwater. Secretary of War Henry Stimson thought dooming all Germans to a kind of national execution would not do. It violated the Allied (if not Soviet) belief in the rule of law. It would deny postwar Germany a working economy and perhaps, ultimately, breed another war.

Roosevelt, who wanted to bring G.I.'s (and their votes) home promptly, sought a compromise between Morgenthau and Stimson. The man asked to

find it was Murray Bernays, a 51-year-old lawyer turned wartime Army colonel in the Pentagon.

Immediately, a basic but legally complex question rose to the fore—what is a war crime, anyway? At the end of the 19th century, the increased killing power of modern weapons led to the various Hague and Geneva conventions, binding most great powers to treat civilians humanely, shun the killing of unarmed prisoners and avoid ultimate weapons, such as germ warfare, “calculated to cause unnecessary suffering.” Such “laws of war” are quite frequently applied. They have saved thousands of lives. In combat the basic distinction between legitimate warfare and atrocities occurs when acts of violence exceed “military necessity.”

Before Nuremberg, jurisdiction over war crimes was limited to each country's military courts. After World War I, when the victors accused 896 Germans of serious war crimes, demanding their surrender to Allied military courts, the Germans insisted on trying them and accepted a mere 12 cases. Three defendants never showed up; charges against three others were dropped; the remaining six got trivial sentences.

Bernays envisioned a different scenario: an international court that held individuals liable for crimes the world deemed crimes, even if their nation had approved or required those actions. The accused could not plead obedience to superiors. They would be held personally responsible.

Other big questions remained. One was how an international court trying war crimes could legally deal with crimes committed by the Nazis before the war. Another involved the sheer volume of guilt. The dreaded Schutzstaffel, or SS (in charge of intelligence, security and the extermination of undesirables), and other large Nazi organizations included hundreds of thousands of alleged war criminals. How could they possibly be tried individually? Bernays suggested putting Nazism and the entire Hitler era on trial as a giant criminal conspiracy. In a single stroke, this would create a kind of unified field theory of Nazi depravity, eliminating time constraints, allowing prosecution of war crimes and prewar crimes as well. He also suggested picking a handful of top Nazi defendants as representatives of key Nazi organizations like the SS. If the leaders were convicted, members of their organizations would automatically be deemed guilty. Result: few trials, many convictions and a devastating exposé of Nazi crimes.

Roosevelt promptly endorsed the plan, with one addition. The Nazis would be charged with the crime of waging “aggressive” war, or what the eventual indictments called “crimes against peace”—the first such charge in legal history.

Nobody was more enthusiastic about the strategy than Robert Jackson. Then 53, Jackson was a small-town lawyer from western New York with a gift for language. He had served in various posts in New Deal Washington before Roosevelt elevated him to the Supreme Court in 1941. By July 21, 1945, barely two months after Germany surrendered, Jackson had won President Truman’s approval for a four-power International Military Tribunal and had persuaded the Allies to conduct it in Nuremberg.

A master list of 122 war criminals was put together, headed by Hermann Göring, the ranking Nazi survivor. (Hitler, Himmler and Goebbels were dead by their own hand. Martin Bormann, Hitler’s secretary, had vanished, never to be found.) Reichsmarschall Göring, a darling World War I ace, had not allowed defeat to tarnish his reputation for candor, cunning and gluttony. He had turned himself in at a weight of 264 pounds (he

was 5 feet 6 inches tall). His entourage included a nurse, four aides, two chauffeurs and five cooks. His fingernails and toenails were painted bright red. His 16 monogrammed suitcases contained rare jewels, a red hatbox, frilly nightclothes and 20,000 paracodeine pills, a painkiller he had taken at the rate of about 40 pills a day. He managed to charm some of his captors to the point of almost forgetting his diabolism.

On August 8, 1945, the Charter of the International Military Tribunal (IMT, unveiled by the victorious Allies in London, declared aggressive war and international crime. The IMT charter was grounded in the idea that Nazism was a 26-year-long criminal conspiracy. Its aim: to build a war machine, satisfy Hitler’s psychopathic hatred of Jews and turn Europe into a German empire. Judges representing the four powers (the United States, Great Britain, France and the Soviet Union), plus four alternates, were named. They were to take jurisdiction over high-ranking Nazis deemed personally guilty of war crimes, conspiracy to commit war crimes, crimes against peace and crimes against humanity.

The 24 men named in the original indictment represented a wide spectrum of Germany’s political-military-industrial complex. With Martin Bormann (tried in absentia), the list of those actually presented for trial was further reduced by two surprise events. Robert Ley, the alcoholic, Jew-baiting boss of the German Labor Front, which had governed the lives of 30 million German workers, hanged himself in his cell on the night of October 25. And, at the last moment, the prosecutors realized their key industrial defendant, the weapons maker Alfred Krupp, had not personally run his family’s slave-labor factories until after the war began, giving him an easy defense against the prewar conspiracy charge. (Krupp was later sentenced to 12 years for war crimes, but he was released from prison in 1951.)

The trial of the remaining defendants began on the morning of November 20, 1945. In the refurbished courtroom, floodlights warmed the new green curtains and crimson chairs, illuminating the two rows of once fearsome Nazis sit-

ting in the dock guarded by young American soldiers. Göring had shed 60 pounds during his six months of confinement, acquiring what novelist John Dos Passos, reporting for *Life*, called “that wizened look of a leaky balloon of a fat man who has lost a great deal of weight.” Next to him in the front row were the ghostly Rudolf Hess, feigning amnesia; Joachim von Ribbentrop, Hitler’s foreign minister; and Field Marshal Wilhelm Keitel, the Führer’s Wehrmacht chief. Next in order of indictment came Ernst Kaltenbrunner (ill and absent for the first three weeks), Alfred Rosenberg and Hans Frank, who somehow thought his captors would spare his life when he handed over one of the trial’s most damning documents—his 38-volume journal. (He would be sentenced to hang.)

Throughout that first day, as black-robed American, British and French judges and their two uniformed Soviet colleagues peered somberly from the bench, listening via earphones to translations in four languages, the prosecutors droned an almost boring litany of sickening crimes—shooting, torture, starvation, hanging—to which, in descending tones of indignation, from Göring downward, the accused each pleaded not guilty.

The next morning, Robert Jackson opened the prosecution case on Count One, conspiracy to commit war crimes. “This war did not just happen,” Jackson told the judges. The defendants’ seizure of the German state, he continued, “their subjugation of the German people, their terrorism and extermination of dissident elements, their planning and waging of war..., their deliberate and planned criminality toward conquered peoples—all these are ends for which they acted in concert.”

“We will not ask you to convict these men on the testimony of their foes,” Jackson told the court. There was no need. Allied agents had found 47 crates of Alfred Rosenberg’s files hidden in a 16th-century castle, 485 tons of diplomatic papers secreted in the Harz Mountains, and Göring’s art loot and Luftwaffe records stashed in a salt mine in Obersalzberg.

One especially incriminating find—indispensable to the conspiracy theory—was the notes of Hitler aide Col. Friedrich Hossbach from a meeting between Hitler, Göring and other Nazis in Berlin on November 5, 1937. Hossbach quoted Hitler insisting that, as Europe’s racially “purest” stock, the Germans were entitled to “more living space” in neighboring countries, which he planned to seize, he said, “no later than 1943–45.”

During the opening weeks, the pace of the trial was slow. Most of the American prosecution team neither read nor understood German. What with translation gaffes, repetitions and monotone readings, the documentary evidence—reams of it—at times had judges yawning and the defendants themselves dozing off.

Of course, the banality of overdocumented evil did not soften the prosecution’s gruesome narrative. And a month into the recitation of Hitler’s prewar aggressions from the Rhineland to Austria to Czechoslovakia, the Americans suddenly animated the documents by showing films of Nazi horrors. One German soldier’s home movie depicted his comrades in Warsaw, clubbing and kicking naked Jews. In one scene, an officer helped a battered young woman to her feet so that she could be knocked down again.

An American movie documented the liberation of concentration camps at Bergen-Belson, Dachau and Buchenwald, filling the darkened courtroom with ghastly images of skeletal survivors, stacked cadavers and bulldozers shoveling victims into mass graves. In his cell that night, Hans Frank burst out: “To think we lived like kings and believed in that beast!” Göring was merely rueful. “It was such a good afternoon, too—” he said, “and then they showed that awful film, and it just spoiled everything.”

Even when badly translated, Jackson’s documents made a mesmerizing record of Hitler’s appalling acts on the road to Armageddon. They revisited his rise to power as the people’s choice in the depression year 1932. Billing himself as Germany’s economic savior, the Führer immediately began spending so much on weapons that in six years, the

treasury was almost empty. A diversion was called for.

Thrilling his admirers—millions of still worshipful Germans—Hitler bullied British and French leaders into selling out Czechoslovakia at the pusillanimous Munich conference in 1938 (SMITHSONIAN, October 1988). Next, Nazi thugs were unleashed on *Kristallnacht*, the “Night of Broken Glass” (November 9)—a nationwide campaign of anti-Semitic violence. Huge chunks of Jewish wealth wound up in Nazi pockets. Göring, the biggest thief, further demeaned his victims by ordering German Jews to pay the regime a “fine” of one billion marks (\$400 million). As he explained it, “The Jew being ejected from the economy transfers his property to the state.”

Hjalmar Schacht, then head of the Reichsbank, warned Hitler in January 1939 that his arms race was fueling runaway inflation. Hitler immediately fired Schacht and ordered new currency, largely backed by stolen Jewish property. Schacht, long a Hitler apologist, then began working secretly for U.S. intelligence and wound up at Dachau. Now, to his disgust, he sat in the Nuremberg dock.

According to trial documents, Hitler’s profligacy helped propel his aggressions. By 1941, Hitler had made his suicidal decision to renege on the nonaggression pact signed with Stalin in 1939 and invade the Soviet Union. “What one does not have, but needs,” he said, “one must conquer.”

It began well, on June 22, 1941, and ended badly. By late 1942, with German casualties soaring at Stalingrad, Hitler had lost so many soldiers in Russia that he had to keep drafting German workers into the army, replacing them with foreign laborers, mainly French and Russian prisoners. In early 1943, with more than five million industrial slaves already toiling in Germany, the surrender at Stalingrad forced Hitler’s manpower boss, Nuremberg defendant Fritz Sauckel, to kidnap 10,000 Russian civilians per day for work in Germany. Few survived longer than 18 months—a powerful incentive for Russians still at home to flee the kidnapers and join Soviet guerrillas in killing German troops.

Hitler’s campaign to “Aryanize” Germany began before the war with the deliberate poisoning of incurably sick people and retarded children—labeled “garbage children.” The regime’s contempt for non-Aryan life conditioned millions of Germans to turn a blind eye to more and more epidemic evils—the death camps, the ghastly medical experiments, the relentless massacres of those Hitler called “Jews, Poles, and similar trash.”

Listening to the facts, the almost incomprehensible facts, even the defendants longed for some answer to the overpowering question—why? Why did one of the world’s most advanced nations descend to such acts so easily? So swiftly? The trial provided few answers. Hitler’s truly diabolic achievement, French prosecutor François de Menthon observed, was to revive “all the instincts of barbarism, repressed by centuries of civilization, but always present in men’s innermost nature.”

For weeks, the prosecution cited such acts as the use of Jewish prisoners as guinea pigs in military medical experiments to determine the limits of high-altitude flying by locking them in pressure chambers, slowly rupturing their lungs and skulls. How long downed German pilots could last in the ocean was determined by submerging prisoners in icy water until they died. To develop a blood-clotting chemical, the doctors shot and dismembered live prisoners to simulate battlefield injuries. Death did not end this abuse. A Czech doctor who spent four years imprisoned at Dachau, where he performed some 12,000 autopsies, told investigators that he was ordered to strip the skin off bodies. “It was cut into various sizes for use as saddles, riding breeches, gloves, house slippers, and ladies handbags. Tattooed skin was especially valued by SS men.”

The scale of Hitler’s madness was almost beyond imagination. The documents showed that after conquering Poland in 1939, he ordered the expulsion of nearly nine million Poles and Jews from Polish areas he annexed for his promised Nordic empire. The incoming colonists were “racially pure” ethnic Germans imported from places like the Italian Tirol. The SS duly began herding

the exiles from their homes toward ethnic quarantine in a 39,000-square-mile cul-de-sac near Warsaw. Opposition grew; progress slowed. In righteous rage, the SS unleashed hundreds of *Einsatzgruppen*—killer packs assigned to spread terror by looting, shooting and slaughtering without restraint. Thereafter, the SS action groups murdered and plundered behind the German Army as it advanced eastward.

By January 1946, prosecutor Jackson was at last animating his documents with live witnesses. The first was a stunner. Otto Ohlendorf, blond and short, looked like the choirboy next door. In fact he was 38, a fanatic anti-Semite and the former commander of *Einsatzgruppe D*, the scourge of southern Russia. He testified with icy candor and not an iota of remorse.

How many persons were killed under your direction? asked Jackson. From June 1941 to June 1942, Ohlendorf flatly replied, “90,000 people.”

Q. “Did that include men, women, and children?” A. “Yes.”

Rather proudly, Ohlendorf asserted that his 500-man unit killed civilians “in a military manner by firing squads under command.” Asked if he had “scruples” about these murders, he said, “Yes, of course.”

Q. “And how is it they were carried out regardless of these scruples?”

A. “Because to me it is inconceivable that a subordinate leader should not carry out orders given by the leaders of the state.”

The prosecution rested after three months, capped off by another movie distilling still more Nazi horror, and displays of macabre human-skin lampshades and shrunken Jewish heads submitted as evidence.

German defense lawyers then spent five months trying to cope with major handicaps. Most had grown to abhor their clients. All were unfamiliar with adversarial cross-examinations used in the United States and Britain, to say nothing of key documents that the Americans tended to withhold before springing them in court.

They managed to outflank the court’s ban on tu quoque evidence (meaning, “If I am guilty, you are, too”)—a stricture aimed at keeping Allied excesses, notably the mass bombing of German cities, out of the trial. In the dock was Adm. Karl Dönitz, accused of ordering U-boats to sink merchantmen without warning and let the crews drown whenever a rescue attempt might jeopardize the Germans. Dönitz never denied the charge. Instead, his lawyer produced an affidavit from Adm. Chester Nimitz, commander of the wartime U.S. Pacific fleet, stating that American submariners had followed the same policy against Japanese ships. (In the end, he was sentenced to ten years; upon release in 1956, he lived 24 more years, to age 88.)

The prosecution had depicted a vast conspiracy to wage war and commit atrocities. But in choosing representative Nazis as defendants, it wound up with 21 men who, though all pleaded ignorance or powerlessness, were otherwise so different that many hated one another. Each tried to save himself by accusing others. As a result, the defense naturally failed to muster a united front, and the prosecution’s conspiracy theory steadily unraveled.

The trial’s highlight was the star turn of its one wholly unabashed defendant, Hermann Göring. In three days of direct examination, Göring sailed through an insider’s history of Nazism, defending Germany’s right to rearm and reoccupy territory lost by the Versailles treaty. He laughed off the notion that his fellow defendants were ever close enough to Hitler to be called conspirators. “At best,” he said, “only the Führer and I could have conspired.”

Jackson’s cross-examination was a disaster. Göring understood English well; while questions were translated into German, he had time to improvise his answers. At one point, Jackson prodded Göring to admit that the Nazis’ plan to occupy the Rhineland, enacted without warning in 1936, was a Nazi secret, hidden from other countries. Göring smoothly answered, “I do not believe I can recall reading beforehand the publication of the mobilization preparations of the United States.”

Jackson conducted a bizarre cross-examination of Albert Speer, Hitler’s personal architect of gigantic edifices and stage manager of the Nuremberg rallies. Smart, suave, handsome, not yet 40, the wellborn Speer ranked high among Hitler’s few confidants and was chief of all Nazi war production for the regime’s last three years. He oversaw 14 million workers; he could hardly claim ignorance of their condition or how they were recruited. In the spring of 1944, for example, he ordered 100,000 Jewish slave workers from Hungary as casually as if they were bags of cement.

On the witness stand, Speer said he had become totally disillusioned with Hitler when the Führer responded to Germany’s inevitable defeat by ordering a nationwide scorched-earth policy: the total destruction of everything in the path of the Allied armies. Rejecting Hitler’s monomania, which he called a betrayal of ordinary Germans, Speer told the court, “It is my unquestionable duty to assume my share of responsibility for the disaster of the German people.” And he revealed—offering no proof—that in February 1945 he had set out to assassinate Hitler by dropping poison gas through an air shaft in the Führer’s bunker, only to find the shaft sealed off.

Speer, the most attractive defendant at Nuremberg, had been debriefed by interrogators avid for his special knowledge of how German war factories managed to keep humming despite immense Allied bombing. Some saw him as just the kind of man needed to rehabilitate postwar Germany. Under cross-examination, he got mostly easy questions, typically prefaced by Jackson’s disclaimer, “I am not attempting to say that you were personally responsible for these conditions.”

That Speer actually received a 20-year sentence seems remarkable, given his adroit performance. That his equally (or perhaps less) culpable colleague, Fritz Sauckel—brutal, lowborn, ill spoken—was sentenced to death, seems as legally unfair as it was morally deserved.

After Robert Jackson’s powerful summation of the trial’s “mad and melancholy record,” the case went to the trial judges, from whom no appeal was permitted. The great unspoken issue at

Nuremberg was the question of collective guilt, and hindsight clarifies the extraordinary dilemma those eight judges faced 50 years ago. Collective guilt had tainted the Versailles treaty and helped ignite the Holocaust. It is the fuel of human barbarism, currently on display from Rwanda to Serbia. And though the Nuremberg judges were given every reason to savage the Nazi tyranny, they came to believe that justice could be served only by asserting the principle of individual responsibility. Justice required, in fact, a virtual rejection of the United States' whole grand conspiracy concept.

The Nazi Party founders had been charged with conspiring for 26 years (1919–45) to launch World War II and related atrocities. All 22 defendants (including Bormann) stood accused of planning aggressive war; 18 were charged with wartime crimes and crimes against humanity, such as genocide. If the court approved, seven Nazi organizations would also be convicted, rendering all their thousands of members guilty without trial.

The problem was that conspiracy is a crime of joint participation. Conviction required proof that two or more people knowingly agreed at a specific time and place to use criminal means to achieve criminal ends. But the distinguished French judge, Donnedieu de Vabres, urged his colleagues to observe that the defendants had seemed to act less in cahoots with, than in bondage to, a megalomaniac. Jackson's documents showed the "Führer Principle" in practice—the

madness of Hitler's erratic orders, executed by lackeys too blind, venal or terrified to disobey. The evidence seemingly proved chaos, not organized conspiracy.

The judges, risking a backlash from Europe's Nazi victims by sharply limiting their verdicts to the hard evidence, ruled that the war conspiracy began not in 1919 but on November 5, 1937, at the "Hossbach conference" in which Hitler's aides heard his schemes for conquering Germany's neighbors.

The conspiracy charge (Count One) was restricted to eight defendants (led by Göring) who knowingly carried out Hitler's war plans from 1938 onward. In effect, the defendants were liable only for actual wartime crimes beginning September 1, 1939—a dizzying number of crimes but one that eliminated perhaps a third of the prosecution's evidence and produced three acquittals, including that of Schacht.

Under such an approach, guilt for simply belonging to the Nazi organizations was impossible. The court held that only the SS, the Gestapo-SD and the top Nazi leadership had been proved "criminal," meaning that their members had voluntarily joined in committing war crimes after 1939. That left several million potential defendants for lower courts to handle. But since the Nuremberg judges ruled them all innocent until proven guilty, relatively few were ever tried—the prosecutorial job was too formidable.

The trial removed 11 of the most despicable Nazis from life itself. In the early morning hours of Wednesday, October

16, 1946, ten men died in the courthouse gymnasium in a botched hanging that left several strangling to death for as long as 25 minutes. Ribbentrop departed with dignity, saying, "God protect Germany." Göring had cheated the hangman 2 1/2 hours earlier. He killed himself in his cell, using a cyanide capsule he had managed to hide until then. In one of four suicide notes, he wrote, "I would have consented anytime to be shot. But the Reichsmarschall of Germany cannot be hanged."

The Nuremberg trial never remotely enabled the world to outlaw war. By 1991, the wars of the 20th century had killed more than 107 million people. And given Nuremberg's uniqueness—winners in total control of losers—the court of 1945 may seem irrelevant to the wars of the 1990s, in which ethnic killers, such as Gen. Ratko Mladic, the Bosnian Serb implicated in the mass murder of unarmed prisoners, manage to avoid justice.

Yet the United Nations' seven "Nuremberg Principles" hold that no accused war criminal in any place or position is above the law. What the Nuremberg judges really achieved, in fact, has never been more relevant. By rejecting group guilt and mass purges, the 1945 judges defied hatred and struck a blow for peace that may yet, half a century later, help temper the madness of war.

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