Introduction

Nazi Crimes and the Law

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Although there are substantial differences between the Nuremberg trials and more recent international efforts to bring wartime criminals to justice, there has been a growing literature presenting the Nuremberg trials as a model for prosecuting state-sponsored mass murder.[1] For that reason, the German Historical Institute sponsored a conference in Amsterdam in August 2003 to examine the way the Allied nations and the Germans themselves used the law to prosecute those who had carried out the German state's genocidal crimes during the Nazi period. This volume grew out of papers delivered at that conference. We know a great deal about the crimes of the Nazi regime through the publication of official documents and scholarly works since World War II.[2] The intention of this volume is to discuss and analyze how international as well as national law was used to prosecute Nazi criminals.

Due to its war of aggression and its mass murder of European Jews, Germany must figure centrally in any account of state-sponsored crimes and trials for crimes against humanity. It was clear at the end of the war that the question of what to do about Germany would be crucial to Europe's reconstruction and stability. The victorious Allies intended for their judicial

1 See, for example, Gerhard Werle, *Principles of International Criminal Law* (The Hague, 2005); William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge, 2001); Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London, 1999).

2 On the history of Nazi genocide and the Holocaust, see Raul Hilberg, *The Destruction of the European Jews* (Chicago, 1961; rev. ed., 3 vols., New Haven, 2003); Gerald Reitlinger, *The Final Solution: The Attempt to Exterminate the Jews of Europe, 1939–1945* (New York, 1953); Gerhard L. Weinberg, *A World at Arms: A Global History of World War II* (Cambridge, 1994); Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill, 1995); Saul Friedlander, *Nazi Germany and the Jews: The Years of Persecution, 1933–1939* (New York, 1997) and *Nazi Germany and the Jews 1939–1945: The Years of Extermination* (New York, 2007); Christopher R. Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939–March 1942* (Lincoln, NE, and Jerusalem, 2004).

and political decisions, including the creation of the United Nations, to serve as the basis for a new world order. Proposals for the summary execution of suspected German war criminals were rejected, as was U.S. Secretary of the Treasury Henry Morgenthau's plan to cripple Germany's industrial capacity. Instead, an American-led plan to hold the German leaders accountable before an international court subject to public scrutiny prevailed, "thus pointing the way to an evolution of international law" and the hope of "historical-political enlightenment."[3]

How the international trial of the Nazi leaders fit into the new world order was explained succinctly by the chief U.S. prosecutor at Nuremberg, Supreme Court Associate Justice Robert Jackson, in his opening statement on November 20, 1945: "That four great nations, flushed with victory and stung with injury, would stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason."[4] Jackson saw it as his task to "establish incredible events by credible evidence," prove that the defendants were responsible for these incredible crimes, and see that they were found guilty.[5] The responsibility of Germans generally in the immediate postwar era was to accept the Nuremberg verdicts and to punish independently those Nazi criminals not tried by the Allies. In time, the West Germans' pursuit of Nazi criminals came to be seen as an indicator of their country's progress toward democracy. Furthermore, as Annette Weinke argues in her contribution to this volume, the pursuit of war criminals itself became a medium for West Germany's democratization.[6]

In the years following VE day, within a Europe Winston Churchill called "a rubble-heap, a charnel house, a breeding ground of pestilence and hate," Germany was ruled by several different authorities that simultaneously pursued justice for the victims of the Nazi regime.[7] In the weeks and months immediately following the German surrender, the U.S. military tried Nazi criminals through newly established military commissions. Patricia Heberer argues in this volume that the chances of justice being done were greatest

3 Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration* (New York, 2002), 97. For an overview of the origins of the Nuremberg Trial's charge of "crimes against peace," see Jonathan Bush, "'The Supreme Crime' and Its Origins: The Lost Legislative History of the Crime of Aggressive War," *Columbia Law Review* 102/8 (2002): 2324–424.

4 Cited in Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York, 1992), 167.

5 Robert H. Jackson, *The Nürnberg Case* (New York, 1947), 10.

6 Annette Weinke, "The German-German Rivalry and the Prosecution of Nazi War Criminals During the Cold War, 1958–1965."

7 Churchill's speech in London, May 14, 1947, in *Winston S. Churchill: His Complete Speeches, 1897–1963*, ed. Robert Rhodes James (New York, 1974), 7484.

during the immediate postwar period. Later, even with the great advantage of new tools and precedents, West German jurists failed to convict or even investigate other war criminals. Thus, perpetrators who could lie low initially, living on false papers or enjoying the protection of German professional communities, might escape prosecution altogether; those who had painstakingly organized and implemented Nazi crimes, yet could be linked to those crimes only through time-consuming investigation and tenacious prosecution, could evade prosecution and get away with murder.[8]

In December 1945, in the month following the opening of the trial of "major" Nazis at Nuremberg, the quadripartite Allied Control Council promulgated Law Number 10 authorizing military authorities in the four occupation zones to level charges of crimes against peace, war crimes, membership in an illegal organization, or crimes against humanity for wartime offenses committed in their respective jurisdictions. The four powers occupying Germany – the United States, Great Britain, the Soviet Union, and the French Republic – began to prosecute Nazi criminals in their zones even as they also prosecuted the major war criminals at Nuremberg before what is known as the IMT, the International Military Tribunal.[9] The IMT was able to draw on a series of international agreements that, taken together, had established the core elements of the laws of war.

The turn of the twentieth century saw major advances in the effort to regulate warfare by law. The Hague Convention of 1899 represented a breakthrough by codifying the international effort to establish rules on the conduct of war. The treatment of prisoners of war and the rights of civilian noncombatants were the focus of the Hague Convention of 1907, which was signed by even more states than its predecessor. It also prohibited attacks on enemy soldiers who had already surrendered. The Hague Conventions specified no means of enforcement or penalties for violations, but "the major powers and many other nations" incorporated the substance of many Hague provisions into their military laws. By 1914, the Hague Conventions, as well as previous efforts with similar goals, "had internationalized the whole subject of limits on warfare and laid the basis for an extraordinary expansion of public and political concern with 'war crimes.'"[10]

Like their victorious successors at Nuremberg following the Second World War, the three major victorious powers of the First World War saw the 1919 Paris Peace Conference as an opportunity to salvage meaning from

8 Patricia Heberer, "The American Military Commission Trials of 1945."
9 See also Henry Friedlander, "The Judiciary and Nazi Crimes in Postwar Germany," *Simon Wiesenthal Center Annual* 1 (1984): 27–44.
10 Taylor, *Anatomy*, 10–11.

the war's horrendous toll. President Woodrow Wilson, the most idealistic of the leaders at the conference, had voiced his hope that the Great War would be "the war to end all wars" and would ultimately serve to "make the world safe for democracy." The punishment of war crimes was the first topic on the agenda at Paris, but the "Big Three" – Wilson, David Lloyd George, and Georges Clemenceau – could not agree on what should be done. The provisions of the Versailles Treaty concerning Germany held the Germans collectively responsible for war damages by demanding reparations from Germany, and Kaiser Wilhelm II was held personally responsible. The treaty stipulated that he be arraigned before an international tribunal of judges on charges not of war crimes but of "a supreme offence against international morality and the sanctity of treaties."[11]

Postwar politics soon interfered. World powers, including those whose statesmen had signed the Treaty of Versailles, soon came to believe it had been unfair to hold only Germany responsible for the war, creating a cornerstone of appeasement policy by the Western powers. Early initiatives to put non-Germans on trial for war crimes quickly failed, and little was done about the most egregious violation of human rights, the Turkish genocide of the Armenians; by provision of the Hague Conventions, a state was not criminally liable for actions taken against its own subjects. Brutality against Belgian civilians during the first months of the war topped a list of Germany's offenses. Although Germany would pay reparations until 1932, the Kaiser never faced extradition to stand trial due to the "sovereign immunity" of heads of state. The victors ultimately resolved their disagreement on how Germans should be tried by leaving the matter to Germany. By February 1920, the Allies had instructed German leaders to press for the prosecution of some 854 military and political officials, including such prominent figures as Alfred von Tirpitz and Generals Paul von Hindenberg and Erich Ludendorff. In the face of official German protests, diplomats reached a new agreement for the arraignment of forty-five Germans before the German Supreme Court (Reichsgericht) in Leipzig. The court accepted the superior-orders defense in the case of a German submarine commander who had sunk a British hospital ship; it acquitted him. To the outrage of the French and Belgians in particular, the German court tried just twelve of the forty-five accused and convicted only six, two of whom escaped, apparently with the help of prison guards.[12]

In his opening statement before the Nuremberg tribunal a quarter of a century later, Justice Jackson pointed to the Leipzig trials as an illustration of

11 Ibid., 16.
12 Peter H. Maguire, *Law and War: An American Story* (New York, 2001), 80–2.

the "futility" of allowing a vanquished nation to adjudicate the war crimes of its own nationals.[13] At that point, six months after the end of World War II, the scope of generally accepted laws of warfare did not differ much from that of the Hague Conventions, although public as well as official attitudes had changed, reflected by the agreement of many more nations to be bound by those laws. The Geneva Convention of 1925 had prohibited the use of poisonous gas, and the subsequent Geneva Convention of 1929 specified conditions of care for prisoners of war and those wounded in war. By the mid-1920s, Germany, no longer the pariah of World War I, was an accepted partner in international relations and law. In 1928, it joined other major powers in signing the Kellogg-Briand Pact renouncing war as an instrument of national policy. The following year, Germany agreed to the Geneva Conventions, and in 1930 it became a signatory of the London Treaty regulating submarine warfare. However, by the time of Germany's disregard of the Munich Agreement of October 1938, the notion that wars might be regulated by such international accords had fallen into disrepute: "The summary acquittals at Leipzig, the disengagement of the United States from Versailles and the League of Nations, the complete breakdown of the regulatory regimes for submarines and aerial bombing and the mockery of Kellogg-Briand all suggested that the so-called law of war was bad policy, law, and politics."[14]

Within the first year of the German attack on Poland in September 1939 that started World War II, four governments had officially protested German crimes during the occupation of their countries. Shortly before the United States entered the war, President Franklin D. Roosevelt and Prime Minister Winston Churchill issued statements condemning Germany's execution of "scores of innocent hostages." In November 1941 and again in January 1942, the Soviet Union followed by accusing the German government of "criminal, systematic, and deliberate violation of international law" in its treatment of POWs as well as against innocent civilians and property. The St. James Declaration issued in the name of nine European countries in January 1942 "was the first step toward the formulation of a systematic program" for dealing with war criminals, according to the Nuremberg prosecutor Telford Taylor; it "pointed out that international solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the

13 Paul Betts, "Germany, International Justice and the Twentieth Century," *History & Memory* 17 (2005): 45–86, 59. Etiene Mantou, *The Carthaginian Peace, or the Economic Consequences of Mr. Keynes* (New York, 1952), shows that in effect Germany never paid any reparations. On the Armenian genocide, see, for example, Sybil Milton, "Armin T. Wegner: Polemicist for Armenian and Jewish Rights," *Armenian Review* 42, no. 4/168 (Winter 1989): 17–40.

14 Bush, "'The Supreme Crime' and Its Origins," 2336.

civilized world."[15] The second major step in developing an international war crimes program came with the simultaneous announcements on October 7, 1942, by President Roosevelt and British Lord Chancellor John Simon that their countries would join with other nations to establish a "United Nations Committee for the Investigation of War Crimes." In all, seventeen nations participated in the committee.[16] The third major step and the only major agreement on the punishment of German war criminals the three major Allies reached during the war was the Moscow Declaration of November 1, 1943. It condemned the Germans responsible for violations of the laws of war and promised that the Allied powers would "pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done." While suspected criminals were to be sent to stand trial to the countries where they had committed crimes, "major criminals" were to "be punished by the joint decision of the Governments of the Allies."[17]

The scale of the trials of suspected war criminals after 1945 was unprecedented.[18] The first prosecutions of the Nazi criminals were undertaken by the signatories of the United Nations Declaration of 1942. It is not surprising then that justice under the initial Nuremberg trial in some ways reflected but also departed in several important respects from the pursuit of justice following World War I. The context in Germany, too, was significantly different. During World War I, not a shot had been fired on German soil, making it easy for militarist nationalists to claim the German army had not lost on the battlefield but had been stabbed in the back. In 1945, Germany lay in ruins and, having surrendered unconditionally, was completely subject to Allied will. There was no question about Germany's responsibility for the war, and the Nazi regime itself had left behind comprehensive documentation of many of its atrocities. The nature and extent of German war crimes prompted not only prosecutions on an unprecedented scale, but also significant adjustments to the letter of the law.

First, the court introduced a category of actionable cause called "crimes against humanity," which undermined traditional defenses. The court rejected the superior-orders defense that had prevailed at Leipzig, claiming that a person who had acted according to official orders was necessarily

15 Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials* (Buffalo, 1997 [orig. 1949]), 126–7.
16 Ibid., 26.
17 Arieh Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, 1998), 57.
18 Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945–1946: A Documentary History* (New York, 1997), 242.

innocent. Acting according to the laws in the circumstances within which persons found themselves was not sufficient cause for acquittal. Following Jackson's criticism of the Leipzig trials, the Germans were not immediately put in charge of judging Germany's suspected wartime criminals. In addition, the court recognized "crimes against peace" as violations of international law, thus repudiating the notion that "reasons of the state" and state sovereignty were inviolable. Also, rejecting the premise of American objections to trying the Kaiser, the Nuremberg court maintained that international law applied to any and all persons, including heads of sovereign states.[19]

The IMT's judgments reflected the premise of the London Charter that individuals were accountable under international law regardless of national law: "crimes against international law are committed by men, not abstract entities . . . individuals have international duties which transcend the national obligations of obedience imposed by the individual state." Collective guilt was no longer an operative concept. Thus, the IMT accepted Robert Jackson's view in his opening statement: "Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons."[20]

The IMT judges aimed to set a precedent illustrating a fair international judicial response to crimes of aggression and mass murder that would serve to prevent future crimes against humanity. The victorious Allies hoped to build on precedents established in prosecuting Nazi crimes for economic reconstruction and establishment of a new political order. Politics quickly impeded the realization of these aspirations, however: "What had begun in the name of a better future, one illuminated by an imposition of international law, ended on the low ground of political opportunity."[21]

While rebuilding the new economic and political order went hand in hand with a new resolve in the West to contain communism, prosecution of Nazi criminals did not. Rebuilding, in fact, led quickly to reintegration rather than prosecution of Nazi functionaries and other criminals. Germans' views on the Nuremberg trial and on their own responsibility for prosecuting German nationals accused of Nazi-era crimes varied. Especially among nationalists and conservatives, there was little enthusiasm for putting former officials and military personnel on trial. This is not surprising, since Hitler had been generally very popular among the Germans. Furthermore, the

19 Betts, "Germany, International Justice and the Twentieth Century," 58–9.
20 Jackson, *The Nürnberg Case*, 88. See also Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague, 1999), 527–8.
21 Frei, *Adenauer's Germany*, 230.

postwar Federal Republic judiciary tended to accept court rulings issued during the Nazi period as valid. Convictions under laws peculiar to the Nazi period (e.g., those dealing with "asocials") were deemed legal in postwar Germany, and those imprisoned under Nazism remained in prison after the war to serve out their terms.[22] The influence of Nazi-era court decisions on the postwar prosecution of Nazi crimes is examined in this volume by Dick de Mildt, who uses the 1943 conviction of an SS officer by an SS court for breaching military discipline in taking the initiative in murdering Ukrainian Jews as a case study. De Mildt's findings confirm Jon Elster's observation that, "In Germany, judges harnessed their undeniable competence to the task of minimizing the guilt of all members of the Nazi regime, beginning with themselves."[23]

The West German judicial system charged with prosecuting Nazi perpetrators was embedded within a society whose members had, by and large, consented to the Nazi dictatorship. Ninety percent of all German judicial officials had belonged to the Nazi Party and had welcomed the self-proclaimed law-and-order state following the disaster of Weimar. Nazi legal guidelines had called for laws to be written in clear, easily understandable language that reflected the "national feeling for justice and morality," as Henry Friedlander writes in this volume. The judicial system played a decisive role in the Nazi regime's efforts to provide the majority with a sense of *Rechtssicherheit*, of stability and legal predictability. Adhering to the formal appearance of the rule of law, the regime anchored the disenfranchisement and dispossession of the German Jews in German law and thereby turned the law into a means of persecution. The German judicial system was one reason the Holocaust resembled machine-like mass murder rather than a Czarist pogrom.[24]

In treating Nazi-era judicial decisions as consistent with the rule of law, West German judges had public opinion solidly behind them, at least during the early years of the Federal Republic's existence. Opinion polls conducted in the 1950s found, for example, that the majority of West Germans thought National Socialism had been more good than bad and that Hitler's would-be assassins had been traitors. In postwar West Germany,

22 Nikolaus Wachsmann, "From Indefinite Confinement to Extermination: Habitual Criminals in the Third Reich," in *Social Outsiders in Nazi Germany*, ed. Robert Gellately and Nathan Stoltzfus (Princeton, 2001), 165–9l, 183. See generally Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven, 2004).

23 Jon Elster, "Introduction," *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge; 2006), 1–14, 10. See generally Ingo Muller, *Hitler's Justice*, trans. Deborah Lucas Schneider (Cambridge, MA, 1991).

24 Henry Friedlander, "German Law and Nazi Crimes."

convicted war criminals were not generally ostracized by the population at large; in fact, "the fewer the number of war criminals sitting in Allied prisons, the more uncompromising the solidarity being expressed for them; public pronunciations in the opposite direction were hard to find."[25]

West German public opinion was strongly reinforced by Chancellor Konrad Adenauer's position on former Nazis and war criminals. Like many other Germans, Adenauer was inclined to exonerate professionals who had been part of the bureaucratic apparatus that carried out the "Final Solution" and to shift blame to rougher-hewn members of the working class. Examining the Dachau trials, Michael Bryant shows in his contribution to this volume that traditional social images had considerable impact on West German prosecution of suspected Nazi perpetrators. With the rapid escalation of the Cold War, the Adenauer government increasingly traded German cooperation in the Western alliance for the release of war criminals, and prisons were emptied of convicts during the first half of the 1950s.[26]

Generally, "over time transitional justice in Germany after 1945 became increasingly endogenous and as a result increasingly lenient."[27] Only a small percentage of the West Germans who stood trial for Nazi-era crimes were convicted. In the German Democratic Republic, trials became increasingly awkward not just due to the new political alliances but also because its leaders claimed "the imperialist and Nazi past 'was mastered and overcome long ago.'"[28] Trials and purges were in fact more extensive in East Germany than in the West, even though the Eastern authorities avoided prosecuting certain groups, such as members of the Wehrmacht, and trials tended to target anti-communists as well as Nazis.[29]

West Germany's so-called cold amnesty returned to public service many functionaries, bureaucrats, members of the judiciary, and others whom denazification had removed.[30] By the mid-1950s, many former Nazis were integrated within the public and private sectors in West Germany. When the Adenauer government established an army for the Federal Republic, the Bundeswehr, it relied heavily on Wehrmacht veterans. Of course, the United States, Canada, East Germany, and other countries also drew on the services of many thousands of former Nazis, and continuities of personnel marked the Italian army in the postwar republic as well. Hans Globke, a former interior ministry official who had helped draft amendments to the

25 Frei, *Adenauer's Germany*, 207.
26 David Cohen, "Transitional Justice in Divided Germany after 1945," in Elster, *Retribution and Reparation*, 59–88, 66, 87.
27 Elster, "Introduction," 4.
28 Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge, MA, 1997), 195.
29 Elster, "Introduction," 4, 7.
30 Cohen, "Transitional Justice," 87.

infamous Nuremberg Laws, famously became Adenauer's national security advisor. It is now known that the CIA helped shield Globke from incriminating statements made by Adolf Eichmann. Moreover, the United States refused to pursue Eichmann even though American officials knew where to find him as early as 1958.[31]

West Germany was in step with its main alliance partner in integrating rather than prosecuting Nazi perpetrators. Thus, by the mid-1950s, as Norbert Frei notes, "little was now left of the moral sweep implicit in a decision to expiate crimes of the 'Third Reich' according to principles of elementary law." The sudden arrival of the Cold War and the division of Germany and Europe played an important role. In addition to these international factors, the transfer of jurisdiction to West Germany resulted in more lenient prosecution and punishment of Nazi crimes. Ultimately, "the most important factor of all was the determined German resistance to the legal efforts nigh from the beginning."[32]

Ironically, during the late 1950s and 1960s, competition between the two Germanys as they jockeyed for legitimacy while casting aspersions on one another, spurred West Germany on to renewed efforts to deal with the Nazi past, as Annette Weinke argues in these pages. Wehrmacht crimes remained an exception, particularly in West Germany, where the myth of the unblemished Wehrmacht held sway for decades. Also, the German judiciary serving during the Nazi period survived virtually intact and was skeptical about, even hostile toward, using the new "crimes against humanity" code to nullify traditional legal arguments that there could be no punishment without preexisting law. Contrary to the impression created by much of the literature on the subject, the pressures of the Cold War were not the sole or most decisive factor behind West Germany's failure to bring Wehrmacht war criminals to justice, as Nathan Stoltzfus illustrates in this volume with a review of the decisions in 1968 and again in 2006 not to prosecute former Wehrmacht members responsible for the massacre of thousands of Italian troops on the Greek island of Cephalonia in September 1943. Persistent German resistance to trials of Nazi-era criminals was the primary reason why no Wehrmacht veteran served prison time in West Germany for war crimes. In fact, while the judiciary had quietly discontinued the case in 1968, the 2006 decision, widely publicized to international protest, accepts the perspective of ex-Wehrmacht officers and in effect shores up the flagging Wehrmacht myth. Since 2002, however, activists have been

31 Scott Shane, "C.I.A. Knew Where Eichmann Was Hiding, Documents Show," *New York Times*, June 7, 2006.
32 Frei, *Adenauer's Germany*, 230.