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Introduction

War Crimes Trials and the Historian

PATRICIA HEBERER AND JÜRGEN MATTHÄUS

Confronted with new genocides and new issues of adjudicating state-sponsored crime across the globe, the international community looks to the past in its quest for a safer and more humane future. The specter of German atrocities committed during the Second World War appears both haunting and revealing. Much has been written on the history of trials against perpetrators of atrocities since 1945. The best-known chapter in this story is the effort of the International Military Tribunal (IMT) at Nuremberg to punish the top National Socialist leaders for waging aggressive war and perpetrating war crimes and crimes against humanity, including the implementation of what later became known as the Holocaust. Yet, in its historical and current implications, the issue transcends the Nuremberg case.

Despite the widespread desire to derive lessons from history, key questions relating to the origins and adjudication of extreme violence remain unanswered and have become the subject of considerable debate, both in our understanding of past trials of Nazi offenders and in our efforts to apply the principles of those prosecutions to present cases. What was originally perceived as a "war crime," an "act of atrocity," and a "crime against humanity," and how have these concepts and their application changed over time? How do the victors and the vanquished deal with mass violence and its universal, transnational, as well as societal, ramifications? In which contexts do investigations and trials take place, and how do these contexts influence their outcome? What is the relationship between historical reality, public perception, and their judicial treatment? Who are the perpetrators and what image—as a group as well as individuals—is portrayed of them in the course of the judicial process? How do historians, with the benefit of hindsight, judge the efforts by prosecutors and courts?

This book offers less clear-cut answers to these questions than it does evidence for the diversity and multifaceted nature of the subject matter in its his-

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toricity. The volume focuses on the murder of the European Jews—a crucial crime not only in itself, but also for our general understanding of the interrelation between atrocities and adjudication. The prosecution of Nazi offenders has continued with varying intensity for the past five decades, as has the attempt at coming to terms with the question of where to draw the line between legitimate and illegitimate violence in times of war. Although the number of court cases related to the Second World War has declined over the years, public interest in punishing crimes against humanity has increased due to the growing perception that they form less an aberration than a potentiality in the history of modern societies. If this book contributes to a better understanding of these crimes in their historical contexts, it will have achieved its goal.

War Crimes

Definitions of "war crimes" and their manifestations remain problematic. In public as well as in scholarly discourse, the term's connotations range from state-sponsored violence, atrocities, violations of the rules of war, military aggression, and crimes against humanity to genocide.[1] Since 1945 the changed understanding of the Holocaust corroborates the fact that the application of these terms to any specific historical set of events depends on the quality and scope of violence as much as on contemporary perceptions and interests. Today, reference to "Nazi crimes" can include legalized expropriation and state-sanctioned robbery suffered by Jews during the Third Reich; yet during the war, there was not even a word to properly describe the murder of the European Jews by Germany and its allies, other than the bizarre euphemism coined by the perpetrators—"Final Solution of the Jewish question." It was at least partly this terminological void that prompted Raphael Lemkin to devise the concept of genocide as a heuristic prerequisite for the understanding of this most troubling of all political phenomena.[2]

The mass atrocities that occurred throughout the twentieth century, and continue to occur, point to the inherent quandary of dealing with a subject that seems to transcend the limits of historiographical analysis. It is indeed understandable and tempting to give in to the desire to remove crimes of these proportions from history—for example, by pointing to innate, quasi-anthropological factors as the origins for hatred and aggression. The trials and inves-

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Historical Perspectives on the Politics of Prosecuting War Crimes
Edited by Patricia Heberer and Jürgen Matthäus

tigations presented here indicate both the potential and the danger of judicial investigation for comprehending state-sponsored crime. This duality manifests itself in various forms: on the one hand, prosecutors, judges, and even the defendants and their counsel proceeded along the lines of logic in their dealing with the settings, circumstances, and suspects of acts of atrocity. In the process, historical data—perpetrator documents, witness statements, and additional evidence—were accumulated; these often turn out to be invaluable to those particularly interested in the historical setting. The murder of the European Jews is no exception: since the IMT, investigations and trials have collected, as well as generated, massive amounts of material that no individual scholar can ever hope to read, much less comprehend. No study that aims for new empirical insights into the Holocaust can ignore these sources.

On the other hand, due to their raison d'être of establishing personal guilt in the context of a specific legal framework, these same proceedings tend to isolate the crimes at hand and to stress the importance of individual over other, group-related or societal factors. It goes without saying that each person is responsible for his or her actions, and that the last bulwark against participation in genocide is the existence of moral or analogous inhibitions. Yet, the more that judicial proceedings focus on perpetrator motivation, the less likely they are to get us closer to historical reality. Not only will the individual impulse for a deed more often than not remain shrouded in the mysteries of the past; this past itself also gets more blurry if we move away from the victims' experiences and the broader setting and root causes that facilitated the transformation of murder into genocide.

"Victors' justice," a term especially popular in postwar Germany, implies the imposition of an alien, largely inappropriate, and unfair legal procedure against the vanquished. In view of the cases presented here, it is obvious that if this kind of justice ever existed, it offered the only chance for legal retribution. The total defeat of Nazi Germany and the Allied seizure of its governmental records were crucial for conducting postwar trials according to due process, either in terms of military, international, or criminal legal standards. These trials formed the basis for the perception of the true scope and quality of German crimes. As exemplified by the Nuremberg precedent, the work of prosecutors and courts reflects the legal as well as the broader environment within which they oper-

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ate. In the aftermath of the Second World War, nations and governments were grappling with the effects of mass death, political disintegration, social crisis, and, in many cases, the legacy of collaboration. In one way or another, all these factors had an impact on the trials, producing what might appear from our current perspective as a streamlined, simplified, or distorted approach toward historical reality.[3]

Trials and History

Whoever wishes to perceive the phenomenon of war crimes and their adjudication based on historiographical findings must be aware that he or she stands on shifting ground. Nothing better attests to this fact than the interrelation between the Holocaust and its judicial treatment after 1945. According to conventional wisdom, especially the proceedings under Allied authority in the city of the Nazi Party rallies had a crucial and, for that matter, largely positive effect on the understanding of the Nazi system in general and of the Holocaust in particular. Michael Marrus has defined the IMT despite its shortcomings as "a turning point" in the public perception of the Holocaust as it "presented the first comprehensive definition and documentation to a non-Jewish audience of the persecution and massacre of European Jewry during World War II."[4] Other scholars have interpreted Nuremberg and its long-term impact similarly, first as it established the notion that the "Final Solution of the Jewish question" had been a deliberate aim of German politics until its culmination in the mass production of death in Auschwitz; and second by amassing an immense amount of incriminating material on the scope and quality of the murder of the European Jews.[5]

Recent scholarship has not refuted the claim that the IMT and subsequent Allied trials were of crucial importance for the postwar perception of Nazi crimes, yet its overall balance regarding their contribution to the proper understanding of the Holocaust is much more negative. Reconstructing the political framework of Holocaust-related trials in the first decade after the war, the British historian Donald Bloxham argues that "there was a fundamental dissonance between the *national* cleavage of the various trial programs in existence and the *international* nature of Nazi criminality in terms of both the locus of the crimes and the profile of the victims."[6] Consequently, the murder of the European

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Jews as a specific topic of judicial investigation is basically absent from the record, trials such as the one against former *Einsatzgruppen* members in Nuremberg and a few other isolated cases notwithstanding.[7] According to Bloxham, as the Western Allies' official reactions to the unfolding "Final Solution" were "characterized by a reluctance to recognize the specificity of Jewish suffering . . . , so too the prosecution of Axis criminality was based on wrongly applied principles of liberal universalism which refused to give appropriate weight to the particular anti-Semitic thrust of Nazi racism."[8]

This assessment ties in with other shortcomings as perceived by current historiography. Even sympathetic commentators such as Michael Marrus have criticized judges and prosecutors for making "mistakes in detail and in wider conception" and for leaving "much work to be done in order to understand what we have come to call the Holocaust."[9] Other critics share Donald Bloxham's interpretation that the effects of Nuremberg included the "depiction of the Holocaust as a by-product of a monolithical German-Nazi conspiracy for European domination through war" and the "removal of the question of individual motivation to murder by subordinating it totally to meta-historical forces."[10] The prosecution, it seems in this perspective, got it all wrong when it comes to the proper understanding of such key aspects as decision making in the Third Reich, the German concentration camp system, the murder of approximately two million Polish Jews during "*Aktion Reinhard*," and the exploitation of Jewish forced labor. Where they got it right, they did not go far enough beyond the immediate surroundings of those sitting in the dock.[11]

The revision of conventional wisdom about Nuremberg that has taken place in recent years is to a large extent the result of the changing perception of both the Holocaust and the underlying Nuremberg principles in the sense of their growing disconnect since the time of the proceedings. In the decades after Nuremberg and in conjunction with shifting trends in historiography, politics, and public opinion, the Holocaust came to be regarded not only as the defining element of the Nazi era but also as the archetypical evil.[12] The interpretation of the "Final Solution" fostered at Nuremberg as a blueprint conceived by top Nazi leaders around Hitler and executed by the lower echelons in the field remained strong in historiography until the 1990s saw an increased interest in the murderous events themselves. In the course of a series of case studies on

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the Holocaust in Eastern Europe, historians came to place greater emphasis on shared responsibilities within German society, on local initiative as distinguished from top-level intervention. As a result, the proceedings in Nuremberg appeared to have led scholars into a blind alley cut off from properly perceiving historic reality.

By highlighting the shortcomings of the IMT and other Allied proceedings in dealing with the Holocaust, current historiography helps debunk the persistent myth of the German nation taken hostage by a small band of Nazi criminals. Yet at the same time, scholars run the risk of applying ahistorical categories to the work of jurists and thus blaming the past for omissions and faults visible only from the vantage point of the present. What the current focus on the failures of Nuremberg tends either to ignore or to criticize are basically two aspects: first, the achievements of Allied adjudication in broadening the concept of legal culpability to more than the few individuals in the dock, most notably by defining "criminal organizations" such as the SS and the Gestapo, without applying blanket assumptions about guilt by association; and second, the prime interest of the Nuremberg prosecutors in the future development of international law to confront the constant threats of aggressive war and state-sponsored mass violence.

Interpretations

Neither Nuremberg nor any other trial immediately after the Second World War was designed as a primarily historical enterprise to document the murder of European Jews outside the context of other German crimes. For the lawyers presenting the case for the prosecution, legal considerations and concerns about the future prevailed. In his final report on the proceedings, Telford Taylor, Chief of Counsel for War Crimes, points to the "major contribution which the Nürnberg trials have made to the preservation of peace and the establishment of world order under the rule of law." In the chapter of his report entitled "Significance and Influence of the Trials," only implicit mention is made of the Holocaust (regarding the "'Aryanization' of Jewish property"); in an earlier chapter (on "The Charges"), Taylor refers to "the crimes the average man would think of as most characteristic of the Nazis," namely the persecution and extermination of "national, political, racial, religious, or other groups" that "cover the vast and ter-

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rible world of the Nürnberg laws, yellow arm bands, 'Aryanization,' concentration camps, medical experiments, extermination squads, and so on."[13]

Taylor and the other Nuremberg prosecutors were not historians—even if they came to be regarded as such due to their later activities and writings[14]—but had an active interest in contemporary politics as a means to counteract the imminent threat of the world relapsing into a condition of lawlessness and mass violence. While Taylor was clearly aware that "the documents and testimony of the Nuremberg record can be of the greatest value showing the Germans the truth about the recent past," he focused less on historical events than on preventing their recurrence in the future by establishing the mechanisms for a working system of international penal law.[15]

Recent historiography's critical interpretation of the Nuremberg proceedings is based on the notion that Taylor and his colleagues interpreted the murder of the Jews and indeed Nazi policy at large as a top-down process driven by the mechanics of order and compliance in combination with Hitler's ability to implant his blueprint for the Nazi millennium into the entire German state apparatus, if not into German society. This approach is generally referred to as "intentionalism," one of the two main camps in historiography from the late 1960s until well into the 1990s.[16] Supporters of the opposing interpretation, "functionalism," might get a sense of achievement out of their rivals' failing scholarly appeal, would it not come at a time when especially among German historians functionalism is criticized for its reluctance to address the issues of perpetration and Holocaust memory.[17]

From a broader perspective, one could turn this criticism around and ask what intentionalism, or for that matter any other historiographical school, has done to give a voice to survivors and their memory. Indeed, with notable exceptions such as Joseph Wulf, Leon Poliakov, and a few others, even Jewish scholars tended to rely heavily on documentation generated by perpetrators, most notably the massive body of sources entered into the Nuremberg evidence, in their efforts to identify the process character of the Holocaust, its agents, and driving forces.[18] The most influential and to this day authoritative monographs study on the Holocaust—Raul Hilberg's *Destruction of the European Jews*—attests to the crucial insights that can be gained from a thorough study of the massive mountain of documentation left by the Third Reich.

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After 1945, judicial proceedings had used mainly survivor testimony, if only marginally. While the Eichmann Trial brought about a sea change in the direction of firmly integrating live Holocaust memory into judicial proceedings, the Jerusalem court relied on survivor testimony less to attest to Eichmann's criminal record than to present the history of the Holocaust in general. Especially the national setting of subsequent trials has highlighted the problem of political utilization. Having no trials is as much a political statement as is conducting them in the public limelight; yet it is the latter that draws the most criticism. Hannah Arendt went as far as branding the Jerusalem proceedings a "show trial," an interpretation Lawrence Douglas has criticized for its formalistic nature;[19] still, the borderline between rendering justice based on specific charges and providing a forum for the public perception of monstrous crimes remains elusive.

With its broad definition of what legal proceedings should or can be about, the Eichmann Trial also changed the role of the defense lawyer. Instead of grounding their case on the conviction that the claim of the accused to innocence is correct, defense attorneys have increasingly criticized extra-legal influences on trials and the containment of perpetration, allegedly out of political expediency, to the person in the dock. Similarly, many lawyers and others active in the legal support of prominent politicians brought before a judge for having committed war and related crimes—Slobodan Milosevic, Saddam Hussein—attempt to transcend what prosecutors wrote in the indictment and to use court proceedings for what from their perspective looks like setting the historical record straight.

Perspectives

While the IMT and other prominent trials dominated the historian's perception of German crimes during the Nazi era, mainstream historiography ignored for a long time the later, more recent investigations and court proceedings against persons involved in one way or another in the implementation of the "Final Solution." In West Germany alone, more than 100,000 investigations into Nazi-related crimes carried out until 1992 led to roughly 6,500 guilty verdicts of which 85 percent related to lesser crimes or crimes committed prior to the outbreak of war.[20] With the exception of a few internationally recognized trials, the significance of cases against the large number of unknown but crucially impor-

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tant agents of genocide, including those who had not been former members of "criminal organizations" as defined at Nuremberg, remained unexplored by historians until fairly recently.

There are two principal reasons for this. First, public opinion in general and professional historians in particular in the countries where the trials were held took little notice of them.[21] Second, the legacy of Nuremberg, as perceived by most historians, implied that it would make more sense for the understanding of the "Final Solution" and its driving forces to investigate Hitler's *Weltanschauung*, high-level policy, and decision-making processes than to bother with the details of what appeared as the implementation of a preconceived grand design. Seen from this perspective, trials against the executors of the "Final Solution"—especially those posted on the eastern borders of the German wartime empire—seemed to be largely a forensic and much less an analytical enterprise, with few if any scholarly implications.

In recent years this situation has changed markedly, although there are still large numbers of cases—for example, the British war crimes program or early postwar proceedings at German courts[22]—that remain to be thoroughly researched. There is a wave of interest taken by international scholarship not only in the documentation collected in the course of post-Nuremberg trials and investigations but also in the history of these later and less well-known trials themselves. This broadening of the source base has led to some important modifications in our understanding of the Holocaust, especially in regard to perpetration. The image of the agents of genocide now incorporates institutions such as the German Army, the "ordinary men" of the German order police, or the health and labor administrations that before received little or no attention. Though often highly specialized, these studies have linked perpetration to other, ostensibly less destructive aspects of Nazi rule, such as race and resettlement policy, and have shown the many structural links between the persecution of Jews and other victims groups. A whole new subfield focuses on studying perpetrators, particularly on their motivation at the time of the crime. This is not surprising given the obvious desire to know why those who committed the murder of the European Jews did what they did; another reason is the heavy reliance of this new area of research on postwar judicial sources, especially testimony produced for trial purposes.[23]

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The interest historians currently display in the often graphic evidence generated by prosecutors and courts will no doubt generate further insights into the machinery of mass murder; yet it is not without problems. While the question of perpetrator motivation clearly played a role at court, especially in West German proceedings, the judicial record is extremely difficult to use for historical purposes, as are all postwar statements coming from the perpetrators themselves. Generally, the rule applies that the reliability of perpetrator testimony is greatest the further it is removed from the issue of personal guilt and the more it can be scrutinized against the background of other sources, such as witness testimonies, diaries, letters, or other wartime writings, rare as they usually are. Consequently, affidavits by the accused, created in the course of judicial investigations, should only be used with caution; they are a most problematic source to gauge personal motivation of perpetrators at the time of the crimes.

It is the task of historians to raise questions about the role of war crimes trials for our understanding of the past; at the same time, however, historical findings and the role of their originators cannot avoid becoming objects of critical reflection. As can be seen from the many trials that took place after 1945 to which historians paid little or no attention, lawyers displayed a greater and earlier interest in the historicity of the Holocaust than did the professional keepers of memory. Despite all progress and occasional claims to the contrary, there is no reason to believe that Holocaust historiography has reached its peak of insight. The broad and persistent interest taken in the "Holocaust in the courtroom" should not deflect our attention from the fact that the historical dimension—that is, the potential to document the murder of the European Jews—is just one and, given our limited ability to learn from the past in a positive sense, probably not the most important aspect of war crimes trials.

Instead of perceiving war crimes trials as mere tools to foster our understanding of the events under investigation, historians should place greater emphasis on analyzing the legal and political contexts of these trials. While innovative in historiographical terms, some aspects of the current criticism of Nuremberg have rather positivistic connotations by feeding into the skepticism vis-à-vis international mechanisms of adjudicating war crimes and by supporting the notion that in punishing these crimes political expediency often overrides legal principles. This seems especially problematic at a time when national attempts

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at punishment pose grave questions as to their moral legitimacy and judicial viability, be it as a result of extraterritorial incarceration, military justice, or the rulings of civilian courts, and when the definitions of war and its systems of rules are undergoing significant changes.

On the part of those involved in the prosecution, Nuremberg was as much an exercise in setting the historical record straight as it was a means to establish the mechanism for enforcing the rules of law in a future international setting. Telford Taylor wrote at the height of the Vietnam War in view of the atrocities committed by American troops: "As the principal sponsor, organizer, and executant of the Nuremberg trials, the United States is more deeply committed to their principles than any other nation."[24] With the benefit of hindsight and in view of the ongoing refusal by the U.S. government to subject its own citizens to an international criminal court, it seems that Taylor's analysis was overly optimistic. It may well be that, over time, the accuracy of Taylor's analysis will be measured by the outcome of the still ongoing American debate about the desirability of subjecting its own citizens to the jurisdiction of a permanent international criminal court.

Topics

Based on a wide range of archival sources, many of which have become available to researchers only since the early 1990s, this book provides both case studies and in-depth analyses on the historical and contemporary dimensions of applying the rules of law to state-sponsored crimes. Instead of aiming at an inevitably elusive comprehensiveness and finality, the contributions to this anthology present insights into the complexity of the issues involved that make it difficult to arrive at simple answers and all-encompassing generalizations. The balance may fall short in terms of justice being done to such a topic; yet, what holds the book together is the awareness that justice is, like historiography, an exercise in approximation. Beyond preserving the evidence of the crimes committed, it is part of the historian's task to do justice to the attempts by lawyers, judges, and the wider legal, political, and societal framework in coming to terms with war crimes in their deadly and destructive manifestations.

Part 1 of this volume explores precedents set in the adjudication of German war crimes in the twentieth century, both in the historical setting of the Wei-

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mar Republic and again in the very earliest months of Allied occupation of Germany following World War II. Articles in this segment examine the notion of what a war crime is and how the unprecedented scope of the Holocaust has altered and transformed this notion. In "The Lessons of Leipzig: Punishing German War Criminals after the First World War," volume co-editor Jürgen Matthäus shows how the failure of an Allied proposal to set up an international court in the wake of the Great War left adjudication of the crimes of the Kaiser's Germany to fledgling Weimar courts. With one degree of separation from "victors' justice," the German Supreme Court in Leipzig (*Reichsgericht*) largely failed to grapple with the issues of legitimate war crimes in a direct or impartial way. A stillborn effort at effective justice, Matthäus argues, these trials represented an unfinished prologue to later efforts at Nuremberg following yet another destructive European war.

In "Early Postwar Justice in the American Zone: The 'Hadamar Murder Factory' Trial," co-editor Patricia Heberer assays the expansion of the definition of "war crimes" in the face of extraordinary Nazi German criminality. In trying the personnel of the Hadamar "euthanasia" (T4) facility in October 1945, American prosecutors stepped beyond the traditional interpretations of "war crimes" in order to conduct the first mass atrocity trial in the U.S. zone of occupation. Their endeavors tested the reach of international law before the legal concept of "crimes against humanity," set down by the IMT at Nuremberg, greased the wheels of postwar justice. In "U.S. Army War Crimes Trials in Germany, 1945–1947," Lisa Yavnai further elucidates this trend, examining the work of U.S. military commissions in adjudicating classical violations of international law and Nazi atrocities in the American zone. In what was the largest-scale prosecution of military, civilian, and state-sponsored war crimes in history, Yavnai shows how essentially unprepared American prosecutors and officials struggled to bring Nazi perpetrators to book. She illustrates how particularly the American system of formulating "parent" cases for concentration camp settings in the U.S. zone became an valuable legacy for later generations of prosecutors and historians with important legal, political, and historical ramifications.

Part 2 of this volume, "Allied Courts and German Crimes in the Context of Nuremberg," puts the complex of trials following the International Military Tribunal—its successor Nuremberg cases and contemporary national and Al-

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lied zonal trials—at center stage. Here, not only the will to do justice but also the political agendas and expediencies associated with the Cold War brought their part to bear upon the development of these proceedings. Jonathan Friedman explores the difficulties and conflicts involved in American efforts to bring "major war criminals"[25] to justice in "Law and Politics in the Subsequent Nuremberg Trials, 1946–1949." After attempts to mount additional trials under quadripartite Allied auspices foundered with the conclusion of the IMT, prosecutors in the American zone forged on alone with twelve subsequent Nuremberg proceedings, focusing their aim on disparate professional groups and organizations that had taken part in Nazi criminality. Friedman examines the confluence of legal and geopolitical interests in shaping this network of trials. Following this, we examine one of the successor proceedings; in "The Nuremberg Doctors' Trial and the Limitations of Context," Michael R. Marrus shows how the first of these twelve subsequent trials held under American auspices at Nuremberg proved to be a missed opportunity to define the principal crimes of German physicians during the Third Reich. An overemphasis on the grisly aspects of medical experimentation, an underestimation of the scope of the deadly "euthanasia" program, and complete silence with regard to the Nazis' ambitious compulsory sterilization policy gave a distorted view of medical crimes perpetrated in the name of National Socialism. Prosecutors' narrowly legalistic approach and a lack of comprehension of both the degree and breadth of medicalized killing ended in a significant failure to lay bare the responsibility of the wider German medical community in the Holocaust and other Nazi offenses.

Next, Ulf Schmidt connects the dots between this so-called Doctors' Trial and efforts of other postwar powers to adjudicate similar crimes. In "'The Scars of Ravensbrück': Medical Experiments and British War Crimes Policy, 1945–1950," Schmidt examines the jostling of British, American, and Polish authorities to bring the same criminals to trial. In doing so, he delineates the contours of a British postwar proceeding long overshadowed by its more famous Nuremberg contemporary, while portraying a German medical establishment complicit in the most horrific aspects of human medical experimentation. Finally, Jonathan Friedman returns with an essay exploring a series of cases trying personnel of the infamous Sachsenhausen concentration camp under three separate politi-

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cal jurisdictions. In "The Sachsenhausen Trials: War Crimes Prosecution in the Soviet Occupation Zone and in West and East Germany," Friedman notes how the influences of the Cold War and the political structures and agendas of each of the adjudicating powers left its different mark upon the same complex of crimes. How the Soviet Union, East Germany, and the German Federal Republic adjudged perpetrators against the backdrop of Sachsenhausen has just as much to say about the political orientation, national identity, and geopolitical raison d'être of each entity as it has about the crimes themselves.

Part 3 of this anthology, "Postwar Society and the Nazi Past," goes further with the suggestion that a state trying crimes that have both national and universal significance often, in doing so, casts a reflection of its own public consciousness. Was—and is—it possible for the countries most intrinsically involved in the crimes of the Holocaust—here Germany and Austria—to adjudge these crimes in a way that serves both justice and their own national reconstruction? How does a nation deal with its own criminal past, and does its historical conceptualization of this past change over time? In "'No Ordinary Criminal': Georg Heuser, Other Mass Murderers, and West German Justice," Jürgen Matthäus examines the career of Heuser, whose bloody role in the murder of Jews as a leader in the command of the Security Police and SD (KdS) in Minsk did not prevent him from becoming chief of the criminal police in the state of Rhineland-Westphalia in 1956. In so doing, Matthäus shows that by the time more systematic mechanisms for prosecution were in place in the Federal Republic and there was the will to use them, many agents of Nazi criminality had eased their way back into positions of relative security and respectability in postwar society.

In a similar vein, Rebecca Wittmann's "Tainted Law: The West German Judiciary and the Prosecution of Nazi War Criminals" highlights the difficulties imposed by both societal constraints and the German legal structure in prosecuting Nazi criminals in the German context. Focusing upon the Frankfurt Auschwitz Trial, the abortive investigations of the *Reichssicherheitshauptamt* (RSHA) infrastructure, and the Majdanek proceedings held in Düsseldorf in the 1970s, Wittmann shows that the prosecutors' narrow interpretation of the law and the German penal code's own statutes governing homicide and other capital offenses proved unwieldy tools in trying crimes of such an unprecedented

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magnitude. Generational change in the 1960s ushered in not only a fresh societal perspective on the Nazi past, but also a new generation of jurists and prosecutors; still these developments proved inadequate to provide a framework for a more rigorous and efficacious determination of justice for the perpetrators of the Holocaust and related crimes.

Despite its ambiguous record, West Germany's efforts at postwar war crimes adjudication compares favorably with the example of its wartime partner, Austria. In "Justice in Austrian Courts? The Case of Josef W. and Austria's Difficult Relationship with Its Past," Patricia Heberer explores how Austria's self-styled postwar national identity as "first victim of Nazi aggression" allowed that nation to ignore the extensive involvement of native Austrians in the crimes of the Holocaust. For while West German courts realized nearly seven hundred trials of accused Nazi perpetrators between 1955 and 1978, Austrian jurisprudence generated only twenty-eight similar proceedings within roughly the same timeframe. The example of gas van driver Josef W.—acquitted of murder in 1970 despite his full confession on the stand—emblemizes Austria's continuing inability and unwillingness to deal with its National Socialist past in a significant way.

The final installment of this volume, part 4, examines the legal, political, and ethical implications of past and present instances of jurisprudence involving war crimes and crimes against humanity. It explores the legacy of Nuremberg and its "progeny" both in terms of historical significance and in its modern-day applications. In "Crimes-against-Humanity Trials in France and Their Historical and Legal Contexts: A Retrospective Look," Richard J. Golsan utilizes recent French court cases to question whether legal proceedings genuinely serve a historical purpose and fulfill our duty to remember. Reflecting on the Barbie, Touvier, Bousquet, and Papon cases of the late 1980s and 1990s, Golsan observes France's amnesia—and later obsession—with the *les années noires*, the "dark years" of its Vichy past. His examples also serve vividly to demonstrate the manner in which latter-day jurisprudence can blur legal and ethical lines and obscure the historical record.

Next, Donald Bloxham considers more closely the ambiguous legacy of the International Military Tribunal. In "Milestones and Mythologies: The Impact of Nuremberg," Bloxham ponders whether that first international court of its

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kind was truly efficacious in meting out justice, in bearing witness to what was later known as the Holocaust, or indeed in serving as a deterrent to future state-sponsored programs of mass murder. Nuremberg did not inspire social change in either the victor or the vanquished, Bloxham argues, but social change—and the advent of modern day-genocides in Rwanda and Darfur—have changed the way we look at Nuremberg. John K. Roth has the last word. In "Prosecution, Condemnation, and Punishment: Ethical Implications of Atrocities on Trial," Roth surveys the ethical ramifications of prosecuting and punishing humans guilty of inhuman crimes. Punishment of the perpetrators of the Holocaust is not equal to complete justice for those who suffered, nor can it restore "the losses that do not go away," for Shoah victims and their families; yet there is no choice other than to pursue legal proceedings for such crimes, Roth argues, agreeing with Nuremberg prosecutor Justice Robert H. Jackson that "'civilization cannot tolerate their being ignored because it cannot survive their being repeated.'" Roth explores the ethics inherent in the Sixth Commandment, "Thou shalt not murder," musing that until its moral imperative is examined and observed in the individual conscience and in political and societal infrastructures, "humankind is just civilized enough not to succumb completely to atrocity but not to keep it in check either."

This work would not have possible without the help and support of many individuals. The editors would like to thank Paul Shapiro for breathing life into a long-dormant project, Benton Arnovitz and Peter Black for taking it under their wings in a phase of transition, and, especially, our contributors for their patience, cooperation, and warm collegiality in the face of one of history's many bleak subjects.

This project was initiated under the direction of the late Sybil Milton (1941–2000), Senior Historian of the United States Holocaust Memorial Museum from 1993 to 1997. This volume is dedicated to her memory.

Notes

1. For an overview of the existing literature, see Donald Bloxham, "From Streicher to Sawoniuk: The Holocaust in the Courtroom," in *The Historiography of the Holocaust*, ed. Dan Stone, pp. 397–419 (Houndmills/Basingstoke: Palgrave Macmillan, 2004); A. Dirk Moses, "The Holocaust and Genocide," in Stone, *Historiography of the Holocaust*, pp. 533–55, as well as the literature offered in the bibliography of this volume.

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2. See Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington DC: Carnegie Endowment for International Peace, 1944). On Lemkin and his impact on genocide studies, see Samuel Totten and Steven L. Jacobs, eds., *Pioneers of Genocide Studies* (New Brunswick NJ: Transaction, 2002).
3. On the interrelation between postwar trials and representation, see Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick NJ: Transaction, 1997).
4. Michael Marrus, "The Holocaust at Nuremberg," *Yad Vashem Studies* 26 (1998): 5–41 (esp. 5–6); see also Jacob Robinson and Henry Sachs, *The Holocaust: The Nuremberg Evidence* (Jerusalem: Yad Vashem, 1976).
5. Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), pp. 1–3. Joseph E. Persico in his *Nuremberg: Infamy on Trial* (New York: Penguin Books, 1994), p. 441, argues that "the one indisputable good to come of the trial is that, to any sentient person, it documented beyond question Nazi Germany's crimes" and that it proved regarding the Holocaust "that it all happened."
6. Bloxham, "Holocaust in the Courtroom," p. 399 (emphases in the original); see also his contribution in this volume.
7. *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 4 (Washington DC: Government Printing Office, n.d.), Case 9: The *Einsatzgruppen* Case.
8. Bloxham, "Holocaust in the Courtroom," p. 401.
9. Marrus, "Nuremberg," p. 41; see also his "The Nuremberg Doctors' Trial in Historical Context" in this volume.
10. Bloxham, *Genocide on Trial*, p. 12.
11. See Bloxham, *Genocide on Trial*, p. 219; Hilary Earl, "Scales of Justice: History, Testimony, and the *Einsatzgruppen* Trial at Nuremberg," in *Lessons and Legacies*, vol. 6: *New Currents in Holocaust Research*, ed. Jeffry M. Diefendorf (Evanston IL: Northwestern University Press, 2004), pp. 325–51.
12. See John K. Roth, *Ethics during and after the Holocaust: In the Shadow of Birkenau* (Houndmills/Basingstoke: Palgrave Macmillan, 2005); Richard J. Bernstein, *Radical Evil: A Philosophical Interrogation* (Cambridge: Polity Press, 2002).
13. Telford Taylor, "Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10," Washington DC, 15 August 1949, pp. 64–71, 107–12 (quotes: 64, 112).
14. From among those involved with the Nuremberg proceedings, memoirs or similar accounts were written by Robert H. Jackson, Telford Taylor, Benjamin Ferencz, Whitney Harris, Drexel Sprecher, Robert M. W. Kempner, and Michael Musmanno.
15. Taylor, "Final Report", p. 112. See also Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Boston: Little, Brown, 1992), p. 641, where he stresses that "the laws of war do not apply only to the suspected criminals of the vanquished nations."
16. For a summary of the debate, see Christopher R. Browning, "Beyond 'Intentionalism' and 'Functionalism': The Decision for the Final Solution Reconsidered," in Christopher R. Browning, *The Path to Genocide: Essays on Launching the Final Solution* (Cambridge: Cambridge University Press, 1992), pp. 88–101.

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17. Nicolas Berg, *Der Holocaust und die westdeutschen Historiker: Erforschung und Erinnerung* (Göttingen: Wallstein Verlag, 2003); for an apt criticism of this book see Ian Kershaw, "Beware the Moral Highground," *Times Literary Supplement*, 10 October 2003.
18. See Dan Michman, *Holocaust Historiography: A Jewish Perspective: Conceptualizations, Terminology, Approaches, and Fundamental Issues* (London: Vallentine Mitchell, 2003).
19. Douglas, *Memory of Judgment*, pp. 110–12.
20. For the broader context see Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge MS: Harvard University Press, 2005), and her contribution to this volume.
21. See, e.g., Jürgen Wilke et al., *Holocaust und NS-Prozesse: Die Presseberichterstattung in Israel und Deutschland zwischen Aneignung und Abwehr* (Cologne: Böhlau, 1995).
22. The United Kingdom National Archive (former Public Record Office) in London holds records on c. 300 cases investigated between 1945 and 1950 that never made it to court. (We thank Stephen Tyas for this information.) The United States Holocaust Memorial Museum (USHMM) has microfilmed extensive collections of East German court cases against Nazi criminals at various German archives; these are available at the USHMM archive (see www.ushmm.org).
23. See, e.g., Alan E. Steinweis and Daniel E. Rogers, eds., *The Impact of Nazism: New Perspectives on the Third Reich and Its Legacy* (Lincoln: University of Nebraska Press, 2003); Diefendorf, *Lessons and Legacies* vol. 5; Jürgen Matthäus, "Historiography and the Perpetrators of the Holocaust," in Stone, *Historiography of the Holocaust*, pp. 197–215.
24. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), p. 14. Earlier in the book, Taylor quotes Robert H. Jackson's opening words at the Nuremberg tribunal: that despite its focus on German crimes, "if it is to serve any useful purpose it must condemn aggression by any other nations," including those sitting in judgment at the IMT (pp. 11–12). While rejecting the use of "Nuremberg" as a label without historical precedent (p. 16), Taylor directly compares depictions of German atrocities committed against Jews in Eastern Europe and civilians in Greece with American actions in Vietnam (pp. 124–25, 138–39).
25. The Moscow Declaration of 1943 defined alleged perpetrators as "lesser war criminals," whose crimes were limited to a distinct locality, and "major war criminals," whose crimes had no specific geographical jurisdiction.

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Contributors

Donald Bloxham is Reader in History at the University of Edinburgh. He is author of *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians* (Oxford: Oxford University Press, 2005); *The Holocaust: Critical Historical Approaches* (Manchester: Manchester University Press, 2005, with Tony Kushner), and *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001). He is editor, with Mark Levene, of the Oxford University Press monograph series *Zones of Violence*.

Jonathan C. Friedman is Director of Holocaust and Genocide Studies and Associate Professor of History at West Chester University in West Chester, Pennsylvania. He received his Ph.D. in 1996 in modern German and modern Jewish history from the University of Maryland, College Park, and is the author of four books: *The Lion and the Star: Gentile-Jewish Relations in Three Hessian Communities, 1919–1945* (Lexington: University Press of Kentucky, 1998); *Speaking the Unspeakable: Essays on Gender, Sexuality, and Holocaust Survivor Memory* (Lanham MD: University Press of America, 2002); *The Literary, Cultural, and Historical Significance of the 1937 Biblical Stage Play The Eternal Road* (Lewiston NY: Mellen Press, 2004); and *Rainbow Jews: Gay and Jewish Identity in the Performing Arts* (Lanham MD: Rowman and Littlefield, 2008).

Richard J. Golsan is Professor of French and head of the Department of European and Classical Languages at Texas A&M University. In 2001 he was a visiting professor at the Université Paris III–Sorbonne Nouvelle. He is a specialist of the Vichy period and its cultural and political legacies. He is the author of *French Writers and the Politics of Complicity: Crises of Democracy in the 1940s and 1990s* (Baltimore: Johns Hopkins University Press, 2006) and *Vichy's After-*

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life: History and Counterhistory in Postwar France (Lincoln: University of Nebraska Press, 2000). He has edited several books on Fascism and the trials for crimes against humanity of former Vichy collaborators René Bousquet, Paul Touvier, and Maurice Papon. He is editor of *South Central Review* (Johns Hopkins University Press).

Patricia Heberer is a historian with the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum. There she functions as the museum's in-house specialist on medical crimes and eugenics policies in Nazi Germany. A contributor and consultant historian for two United States Holocaust Memorial Museum publications, *1945: The Year of Liberation* and *In Pursuit of Justice: Examining Evidence of the Holocaust*, she has written and spoken widely on issues of postwar adjudication of war crimes, the Nazi "euthanasia" program, and medical and racial hygiene policies in Nazi Germany.

Michael R. Marrus is the Chancellor Rose and Ray Wolfe Professor of Holocaust Studies at the University of Toronto. A Fellow of the Royal Society of Canada, he has been a visiting fellow of St. Antony's College, Oxford, and the Institute for Advanced Studies of the Hebrew University of Jerusalem. He has taught as a visiting professor at the University of California, Los Angeles, and the University of Cape Town, South Africa. He is the author of numerous books, including *Vichy France and the Jews* (with Robert O. Paxton); *The Unwanted: European Refugees in the Twentieth Century*; *The Holocaust in History*; and *The Nuremberg War Crimes Trial, 1945–46*.

Jürgen Matthäus is a historian and currently Director for Applied Research at the Center for Advanced Holocaust Studies, a wing of the United States Holocaust Memorial Museum. His recent publications include *Deutsche, Juden, Völkermord: Der Holocaust als Gegenwart und Vergangenheit* (ed. with K.-M. Mallmann; Darmstadt: Wissenschaftliche Buchgesellschaft, 2006); and *Contemporary Responses to the Holocaust* (ed. with K. Kwiet; New York: Praeger/Greenwood 2004). He is a contributor to C. Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939–March 1942* (Lincoln: University of Nebraska Press; Jerusalem: Yad Vashem 2004).

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John K. Roth is the Edward J. Sexton Professor Emeritus of Philosophy and the founding Director of the Center for the Study of the Holocaust, Genocide, and Human Rights at Claremont McKenna College, where he had taught since 1966. His most recent books include *Genocide and Human Rights: A Philosophical Guide* and *Ethics during and after the Holocaust: In the Shadow of Birkenau*. His Holocaust-related research appointments have included a 2001 Koerner Visiting Fellowship at the Oxford Centre for Hebrew and Jewish Studies in England and a 2004–2005 appointment as the Ina Levine Invitational Scholar at the Center for Advanced Holocaust Studies, United States Holocaust Memorial Museum, Washington DC.

Ulf Schmidt is Senior Lecturer in Modern History at the University of Kent, Canterbury, and a fellow of the Royal Historical Society. His expertise is in the area of the history of modern medical ethics and policy in twentieth-century Europe and America. He has recently been awarded a major Wellcome Trust project grant to write the history of Britain's biological and chemical warfare experiments on humans during the cold war. He is the author of numerous articles, chapters in books, and book reviews, and three books: *Medical Films, Ethics and Euthanasia in Germany, 1933–1945* (Husum: Matthiesen, 2002); *Justice at Nuremberg: Leo Alexander and the Nazi Doctors' Trial* (Basingstoke: Macmillan/Palgrave, 2004, 2006); and *Karl Brandt, the Nazi Doctor: Medicine and Power in the Third Reich* (London: Continuum, 2007).

Rebecca Wittmann is Assistant Professor of History at the University of Toronto. Her research focuses on the Holocaust, postwar German trials of Nazi perpetrators, and German legal history. She has received fellowships from the United States Holocaust Memorial Museum, the DAAD (or German Academic Exchange Service), and the Holocaust Educational Foundation in Chicago. She has published articles in *Central European History*, *German History*, and *Lessons and Legacies*. Her book *Beyond Justice: The Auschwitz Trial* was published in 2005 with Harvard University Press. She is currently working on her next project: "Nazism and Terrorism: The Madjanek and Stammheim Trials in 1975 West Germany."

Lisa Yavnai is Director of the Visiting Scholars Programs at the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum.

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She earned a Ph.D. in International History from the London School of Economics and Political Science and a J.D. from Northeastern University. Prior to joining the museum, Dr. Yavnai worked as a research associate for the Presidential Advisory Commission on Holocaust Assets in the United States and served in the Israeli Army. She has written and presented papers on topics including war crimes trials, Nazi-looted Jewish property, and the postwar fate of concentration camp Kapos.

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