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CONSIGNING JUSTICE TO HISTORY: TRANSITIONAL TRIALS AFTER THE SECOND WORLD WAR*

KIM CHRISTIAN PRIEMEL
Humboldt University, Berlin

ABSTRACT. *This article reviews recent historical investigations of transitional trials held after the Second World War. It identifies three main strands of historiography. One group of studies has been dominated by the trials' participants who have shaped the perception of the trials' scope, their achievements, and their shortcomings, and pursued political, legal, or biographical agendas. A second group has treated the trials as a mere epilogue to the history of the deceased regimes. A third, more profound approach has conceptualized the trials as places where collective memory was assembled, configured, and shaped. This notion opens the debate to an analysis of how law and history on the one hand, jurisdiction, jurisprudence, and historiography on the other interact and how they impact on one another. The article compares and evaluates the benefits drawn from this research. It finds that historical analyses which take seriously the epistemological premises of the law as well as the courtroom's performativity manage to bypass well-trodden paths of interpretation which either deplore the limited, inadequate punishment meted out, or celebrate the triumphant march from Nuremberg to The Hague. The article concludes that such interdisciplinary readings help to avoid widespread disillusionment with the results of transitional trials.*

I

Transitional justice as a field of academic research has been 'on the upward trajectory'[1] for some two decades, stirred by the collapse of state socialism in central and eastern Europe, the demise of South American dictatorships, and the civil wars and genocidal crimes in Rwanda and the Balkans. Roughly defined as the wide array of legal means to confront the wrongdoings of

Department of History, Humboldt University, Unter den Linden 6, 10099 Berlin priemelk@cms.hu-berlin.de

* I have greatly benefited from many insightful discussions with Daniela Helbig, Alexa Stiller, and Charles Maier (who kindly allowed me to paraphrase his own 'Consigning the twentieth century to history') and from the helpful comments on an earlier draft by two anonymous referees of the *Historical Journal*.

[1] Kieran McEvoy, 'Beyond legalism: towards a thicker understanding of transitional justice', *Journal of Law and Society*, 34 (2007), pp. 411–40, at p. 412.

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predecessor regimes in periods of political change,[2] transitional justice still is a fluid concept embracing judicial as well as non-judicial approaches to regime change and human-rights violations. Participants in transitional justice institutions, the violations and crimes dealt with, and the means by which justice is dispensed, vary widely from lustration, purges, and domestic truth commissions to (inter)national tribunals and traditional communal law enforcement, and are not mutually exclusive. The present article focuses on transitional trials,[3] i.e. formal judicial proceedings which cover war crimes, murder, atrocity, and persecution cases but also civil law suits correlated to regime change while leaving aside the administrative and political dispensation of justice or policies of commemoration.[4]

So far, transitional justice has largely been the domain of lawyers, political scientists, and International Relations scholars with little conceptual input from historians.[5] Yet, the concept demarcates a research field where justice, jurisdiction, and jurisprudence on the one hand and truth, history, and historiography on the other intersect. Lately, however, this overlap has received more attention, and the present article explores this rapprochement of Clio and Justitia.[6] On the question of whether or not these two ought to share common ground, though, opinions habitually differ widely, and answers depend on who is asked and when. While Martha Gellhorn called the first

[2] See Ruti Teitel, 'Transitional justice genealogy, *Harvard Human Rights Journal*, 16 (2003), pp. 69–94; Transitional justice', in Antonio Cassese, ed.-in-chief, *The Oxford companion to international criminal justice* (Oxford, 2009), pp. 538–40; Jon Elster, *Closing the books: transitional justice in historical perspective* (New York, NY, 2004); Ruti Teitel, *Transitional justice* (Oxford, 2000); Martha Minow, *Between vengeance and forgiveness: facing history after genocide and mass violence* (Boston, MA, 1998).

[3] Eric A. Posner and Adrian Vermeule, 'Transitional justice as ordinary justice', *Harvard Law Review*, 117 (2004), pp. 761–825.

[4] In contrast to Paige Arthur, 'How "transitions" reshaped human rights: a conceptual history of transitional justice', *Human Rights Quarterly*, 31 (2009), pp. 329–67, I suggest not to restrict the use of 'transitional justice' to post-Cold War cases as the history of the idea has older roots, notably the 'successor trial' as outlined in Otto Kirchheimer, *Political justice: the use of legal procedure for political ends* (Princeton, NJ, 1961); see also Judith Shklar, *Legalism: law, morals, and political trials* (Cambridge, MA, 1964), pp. 153–68.

[5] Conversely, the otherwise excellent William A. Schabas and Nadia Bernaz, eds., *Routledge handbook of international criminal law* (London, 2011), does not feature a single historian among its contributors. Meanwhile, the historiography of human rights discourse has notably surged; e.g. Paul Kennedy, *The parliament of man: the past, present, and future of the United Nations* (New York, NY, 2006); Samuel Moyn, *The last utopia: human rights in history* (Cambridge, MA, 2010); Stefan-Ludwig Hoffmann, ed., *Moralpolitik: Geschichte der Menschenrechte im 20. Jahrhundert* (Göttingen, 2010); Akira Iriye, Petra Goedde, and William I. Hitchcock, eds., *The human rights revolution: an international history* (Oxford, 2012).

[6] For classical meditations on this relationship see Reinhart Koselleck, 'Geschichte, Recht und Gerechtigkeit', in Dieter Simon, ed., *Akten des 26. Deutschen Rechtshistorikertages* (Frankfurt, 1987), pp. 129–49; Marc Bloch, *The historian's craft* (New York, NY, 1992), pp. 114–19, 160; Carlo Ginzburg, *The judge and the historian: marginal notes and a late twentieth-century miscarriage of justice* (London, 1999), pp. 16–18.

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Nuremberg trial in 1945–6 a 'sign of hope',[7] Hannah Arendt, on witnessing the Eichmann case fifteen years later, determined that the marriage of law and history was doomed. 'The purpose of a trial', she declared, 'is to render justice and nothing else.'[8] Those in the defendants' dock, unsurprisingly, have consistently rejected the very idea of trials as 'victor's justice'.

The historiographical analysis of the pioneering transitional trials following the Second World War[9] thus needs to draw upon the humanities, the legal, and the social sciences alike. In doing this, contemporary history needs to overcome three obstacles which have long limited its contribution to the discussion. Historiographical prose on transitional trials has traditionally been characterized by an abundance of anecdote and a want of analytical rigour. Adapting theoretical frameworks from the neighbouring disciplines may therefore stimulate more systematic studies of the various forms of transitional justice. What is more, historiography is able to complement legal, political, and sociological analyses whose main allegiance lies with the present and the improvement of existing institutions of justice. Historiography can not only dig deeper for sources but also take a step back and look at the interplay between historical proceedings and the discourses by which they are shaped, academic and other. A history of transitional trials should strive for a triangular perspective which deals in facts, understands the media of justice – in whatever form they come – as discursive arenas, and reflects on their underlying epistemologies. This includes a perpetual process of self-reflection due to the generative capacities of transitional justice proceedings: the procurement of documents, the production of witness testimony, and the formulation of interpretations and narratives, all of which are structured by an idiosyncratic, yet historically contingent legal logic. Such an understanding of the systemic workings of jurisdiction[10] and of the epistemological differences between jurisprudential and historiographical inquiry, needs to inform historians' research – not in the least to avoid that ubiquitous sense of disappointment with the results of transitional trials which so many studies display.

In the following, the changes in subjects, methodology, and conclusions which research on transitional trials in Germany and Japan (on which the present review focuses for the sake of coherence)[11] has undergone will

[7] Printed in Steffen Radlmeier, ed., *Der Nürnberger Lernprozeß* (Frankfurt 2001), p. 336.

[8] Hannah Arendt, *Eichmann in Jerusalem: a report on the banality of evil* (London, 2006), p. 253; cf. Ian Buruma, *The wages of guilt: memories of war in Germany and Japan* (London, 1994), p. 142.

[9] The post-1918 trials are usually seen as flawed precedents; see James F. Willis, *Prologue to Nuremberg: the politics and diplomacy of punishing war criminals of the First World War* (Westport, CT, 1982); Alan Kramer, 'The first wave of international war crimes trials: Istanbul and Leipzig', *European Review*, 14 (2006), pp. 441–55; Gerd Hankel, *Die Leipziger Prozesse: deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburg, 2003).

[10] See Niklas Luhmann, *Law as a social system* (Oxford, 2004).

[11] The reckoning with collaboration which, in quantity and severity, far outweighed trials of Germans in the formerly occupied countries, is side-stepped, as is the Austrian case. The denazification programme affected much larger numbers than ever stood trial for statutory

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be discussed. As will become apparent, several recent contributions successfully chart the contested terrain of history and law and illustrate that both historians and lawyers are, in Raul Hilberg's words, 'in the truth business'[12] (if in the mode of approximation rather than attainment). While engaged in different professions, neither historians nor lawyers can ignore that they are active forces in both spheres. The empirical and heuristic gains from such interdisciplinary awareness are at the centre of the present review essay.

II

The mother of all books on transitional trials is Hannah Arendt's *Eichmann in Jerusalem*. No other work has become as influential, certainly none as controversial, as her coverage of the 1961 trial. The reason is fairly simple: Arendt has an argument to make (of which more later). Unfortunately, the same cannot be said of the older literature authored by contemporary protagonists. Intent to mark out their place in history, their writings must be considered self-congratulatory wherever they go beyond the descriptive. Indeed, there are few fields in which Hans Rothfels's old dictum that contemporary history is that part of the past which has been shared by the living,[13] is more to the point.

Indeed, participants in judicial trials have rarely been as prolific writers as in the thirteen Nuremberg cases, i.e. the first four-power tribunal and the twelve subsequent proceedings held under American auspices in 1946–9. Prosecutors and defence counsel, judges and defendants, witnesses and research assistants all penned their own version of the trials, some in the form of jurisprudential articles, others as historical narrative, many in the shape of memoirs. Most accounts are strong on judgements and inferences: whether or not a given judgement was disappointing in the light of the evidence; who should have received what sentence; how fair procedures actually were; what historical merit the trials accomplished. Curiously, the trials' personnel have also heavily engaged in the reviewing of Nuremberg-related publications – both of each

crimes; cf. István Deák, Jan Tomasz Gross, and Tony Judt, eds., *The politics of retribution in Europe: World War II and its aftermath* (Princeton, NJ, 2000); Klaus-Dietmar Henke, and Hans Woller, eds., *Politische Säuberung in Europa: die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg* (Munich, 1991); Claudia Kuretsidis-Haider, 'Die strafrechtliche Verfolgung von NS-Verbrechen durch die österreichische Justiz', in Jürgen Finger, Sven Keller, and Andreas Wirsching, eds., *Vom Recht zur Geschichte. Akten aus NS-Prozessen als Quellen der Zeitgeschichte* (Göttingen, 2009), pp. 74–83.

[12] Hilberg applies the term only to historians; cf. Yehuda Bauer, *Rethinking the Holocaust* (New Haven, CT, 2001), p. viii; for a sceptical assessment see Erich Haberer, 'History and justice: paradigms of the prosecution of Nazi crimes', Holocaust and Genocide Studies *(*HGS*)*, 19 (2005), pp. 487–519.

[13] Cf. Hans Rothfels, 'Zeitgeschichte als Aufgabe', *Vierteljahrshefte für Zeitgeschichte*, 1 (1953), pp. 1–8.

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other's (friend and foe) and of historiographical works.[14] The Tokyo and Jerusalem trials have, if to a lesser degree, added to this sub-genre of transitional justice literature.[15]

A volume recently edited by Guénaël Mettraux assembles a representative sample of the contemporaries' jurisprudential output. The tome reprints thirty-two articles by prosecutors and judges from Nuremberg and Tokyo, legal advisers, defence counsel, politicians, and scholars. They document the search for a legally valid and politically viable paradigm, accounting for the blend of a broad, innovative spectrum of crimes with the narrower label of war crimes. This tension resulted in disappointment among the prosecution as few tribunals bought into the widened notion of criminality which covered offences against a state's own nationals. The disappointment becomes easily apparent when the prosecutors' texts are compared to those penned by judges.

Several chapters betray an uneasy combination of pride taken in the historical achievement with disenchantment by the trials' failure to live up to the expectations of their architects.[16] These included the transformation of Germany and Japan into democratic societies but also the prevention of future wars and a 'New Deal world order' with an effective code of international criminal law – a dream vividly illustrated by Elizabeth Borgwardt but which Mark Mazower iconoclastically portrays as ideologically rooted in 'internationalist imperialism' and ethnic engineering.[17] Mettraux's volume attests to the protagonists' self-historicizing tendencies and the pervasiveness of narratives construed in the courtroom. Cases in question are Thomas Dodd's eulogy of Robert H. Jackson which has fostered an unfortunate glorification of the US

[14] E.g. Benjamin B. Ferencz, 'Review: Drexel Sprecher, inside the Nuremberg trial', *American Journal of International Law*, 93 (1999), pp. 760–1; Whitney Harris, 'Review: August v. Knierim, The Nuremberg trials', *American Journal of International Law*, 54 (1960), pp. 443–4; Taylor Telford, 'Review: Francis Biddle, In brief authority', *Harvard Law Review*, 77 (1963), pp. 201–4.

[15] Bert V. A. Röling, 'The Nuremberg and Tokyo trials in retrospect', in Guénaël Mettraux, ed., *Perspectives on the Nuremberg trial* (Oxford, 2008), pp. 455–72; Gideon Hausner, *Justice in Jerusalem* (New York, NY, 1966).

[16] Hans Kelsen, 'Will the judgment in the Nuremberg trial constitute a precedent in international law?', in Mettraux, ed., *Perspectives*, pp. 274–89.

[17] Elizabeth Borgwardt, *A new deal for the world: America's vision for human rights* (Cambridge, MA, 2005); Mark Mazower, *No enchanted palace: the end of empire and the ideological origins of the United Nations* (Princeton, NJ, 2009). Criticism from another direction is formulated by Peter Maguire, *Law and war: an American story* (rev. edn, New York, NY, 2010). Maguire sees Nuremberg as an exception from a traditionally pragmatic, opportunistic, and frequently chauvinistic US stance on multilateralism and limitations on warfare. Originally targeting what Maguire perceives as the humanitarian 'triumphalism' (p. viii) of the Clinton era, the abridged second edition claims vindication by the post-9/11 turn. In stark contrast stands a recent, bizarrely unscholarly attack on the 'partisanship and frivolity' of 'left-leaning lawyers' at the International Criminal Court, violating against 'the original intent of our founding fathers'; Steven T. Voigt, 'The International Criminal Court's antagonism to the United States constitution and our need to articulate an alternative', in Beth Griech-Polelle, ed., *The Nuremberg war crimes trial and its policy consequences today* (Baden-Baden, 2009), pp. 157–66.

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chief prosecutor before the International Military Tribunal (IMT),[18] or the German defence's arguments that they were disadvantaged by unfair procedures, violations of the ban on retroactive law, and the hypocrisy of Allies whose warfare had allegedly not differed much from that of Nazi Germany – arguments which appealed to large parts of the German public in the post-war decades.[19]

While this deluge of contemporary writing is of immense historical interest, historiographical criticism has been scant, and much of the eye-witness literature has been somewhat naively digested as secondary rather than primary source material. Also, virtually all major collections of primary sources have been compiled by Nuremberg personnel who had a vested interest in how the trials were commemorated. The three official editions of the IMT and Nuernberg Military Tribunals (NMT) records were by and large the work of the (American) prosecution with some help from defence attorneys and the tribunals' staff.[20] Jackson himself published a documentary collection, including his own correspondence with President Truman – with no clue as to what may have been left out for editorial, political, or personal reasons.[21] Jackson's successor Telford Taylor, the driving force behind the NMT, eventually turned into a part-time historian, spending much of his later career on writing books about the Third Reich and its elites that he had brought to trial. His opus magnum, *Anatomy of the Nuremberg trials* (a misnomer as it only deals with the IMT) is the most elaborate and complete of all eye-witness accounts and itself a peculiar mixture of biographical narrative interspersed with historiographical insights; personal memory and historical knowledge have become practically indistinguishable.

Meanwhile, historical research proper largely falls into three categories which, for the sake of convenience and with some deliberate simplification, may be labelled retrospective, prospective, and 'politics of the past'. The first largely treats the trials as the epilogue to the history of National Socialism and individual protagonists. Typically, such analyses appear as chapters in institutional histories, biographies, or grand narratives of the Third Reich. Also, the various journalistic accounts of the IMT largely fall into that first category: the gallows as a coda to National Socialism and its

[18] Thomas J. Dodd, 'The Nurnberg trials', in Mettraux, ed., *Perspectives*, pp. 190–9, cf. John Q. Barrett, '"One good man": the Jacksonian shape of Nuremberg', in Herbert Regenbogin and Christoph Safferling, eds., *The Nuremberg trials: international criminal law since 1945* (Munich, 2006), pp. 129–38.

[19] See the chapters by Otto Kranzbühler and Hans Laternser in Mettraux, *Perspectives*, pp. 433–44 and 473–91.

[20] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 Nov. 1945–1. Oct. 1946*, 42 vols. (Nuremberg 1947–49); *Nazi onspiracy and Aggression*, 10 vols. (Washington, DC, 1946–1948); *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, 15 vols. (Washington, 1949–53).

[21] *Report of Robert H. Jackson, United States representative, to the International Conference on Military Trials, London, 1945* (Washington, D. C, 1949).

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anti-heroes.[22] The second type conceives of the trials at Nuremberg and Tokyo as a major precedent in international criminal law, a key step towards its codification, and the prehistory of the international tribunals of the 1990s. Titles such as 'From Nuremberg to The Hague', popular among jurists and historians and happily repeated at each anniversary, give away the main argument.[23]

The most productive approach over the past twenty years, however, goes under the marker of Norbert Frei's oft-quoted 'politics of the past',[24] by which he means the confluence of political, administrative, and judicial measures to manage West Germany's transition from a genocidal dictatorship into a pluralist, peaceful democracy through a dialectical process of select punishment and lenient re-reintegration of perpetrators. If understood more broadly as a process of 'coming to terms with the past', most recent research can be subsumed under this heading. By drawing on a vast variety of discourses – political and popular, academic and artistic – these studies trace the confrontation of guilt and responsibility through various (though by no means linear) stages of denial and evasion, partial recognition, and increasingly critical reflection. What most analyses have in common is that they are more interested in the aftermath of the trials than in the actual courtroom proceedings, and that they fail to take up the transitional-justice thread from legal and social science discourse.[25]

It is in this respect that recent publications mark a significant turn. Several explore transitional trials as subjects of historical interest in their own right, establish an elaborate empirical basis and pay attention to the systemic logic of the law and courtroom dynamics which have often been eclipsed

[22] Joe Heydecker and Johannes Leeb, *Der Nürnberger Prozess: Bilanz der tausend Jahre* (Cologne, 1958); Robert Conot, *Justice at Nuremberg* (New York, NY, 1983); Ann Tusa and John Tusa, *The Nuremberg trial* (London, 1983); Joseph Persico, *Nuremberg: infamy on trial* (New York, NY, 1994).

[23] Theodor Meron, *War crimes law comes of age: essays* (Oxford, 1998), pp. 198–203; Andreas Zimmermann, 'Das juristische Erbe von Nürnberg – das Statut des Nürnberger Internationalen Militärtribunals und der Internationale Strafgerichtshof', in Regenbogin and Safferling, eds., *Nuremberg*, pp. 266–76; Guénaël Mettraux, 'Trial at Nuremberg', in Schabas and Bernaz, eds., *Handbook*, pp. 5–16; Hervé Ascensio, 'La justice pénale internationale de Nuremberg à La Haye', in Simone Gaboriau et Hélène Pauliat, eds., *La justice pénale international* (Paris, 2002), pp. 29–44, 30, however, notes 'une forte discontinuité' and repetitively aborted cycles of progress.

[24] Norbert Frei, *Adenauer's Germany and the Nazi past: the politics of amnesty and integration* (New York, NY, 2002); Norbert Frei, ed., *Transnationale Vergangenheitspolitik: der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg* (Göttingen, 2006); Ulrich Brochhagen, *Nach Nürnberg: Vergangenheitsbewältigung und Westintegration in der Ära Adenauer* (Hamburg, 1994); Peter Reichel, *Vergangenheitsbewältigung in Deutschland: die Auseinandersetzung mit der NS-Diktatur von 1945 bis heute* (Munich, 2001).

[25] See also Frank M. Buscher, *The U. S. war crimes program in Germany, 1946–1955* (New York, NY, 1989); Jeffrey Herf, *Divided memory: the Nazi past in the two Germanys* (Cambridge, MA, 1997); Robert G. Moeller, 'The Third Reich in post-war German memory', in Jane Caplan, ed., *Nazi Germany* (Oxford, 2008), pp. 246–66.

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by older studies, without ignoring the larger public and political context in which these trials were set. At their best, the books under review combine three different angles: the historical background of the alleged crimes as well as of the trials themselves; the double bind of legal parameters and the limitations of the historically knowable; and the interaction between different protagonists inside and outside the court. Communicative processes, narrative constructions, and changing conceptualizations of crimes, criminals, and criminal justice are at the heart of the best studies; clearly, the rallying cry of the cultural turn has not fallen on deaf ears. Others pay attention to the trials' international and transnational dimension. The legacies of world war, genocide, and appalling atrocities, and the complicated relations between various collectives of victors and vanquished, Allies, and antagonists, which have been reshuffled more than once during the past seven decades, reverberated widely and raised the stakes of the proceedings. This complex arrangement frequently made efforts to treat these cases as ordinary criminal trials rather futile.

III

That the IMT 'is among the best studied trials in history'[26] is a statement unlikely to provoke violent dissent. Yet, while the four-power tribunal may well be the most-studied transitional trial to this day, the numerous books and essays might disappoint readers new to the field. There has been no comprehensive study for some thirty years although mountains of material have become available in the meantime, and much of the literature is journalistic rather than historiographical in nature. While these books are highly readable they betray little analytical interest beyond the description of the spectacular. Thus, Bradley Smith's classic *Reaching judgment at Nuremberg* remains unsurpassed despite its exclusive focus on the lines of conflict among the judges and vis-à-vis the prosecution.[27] Smith's follow-up publication, a prequel, painstakingly recounts the debates among the American (and, in parts, the British) administration up to the London Conference in the summer of 1945. Placing the question of how to deal with Axis criminals within the larger debate of post-war occupation policy, it unfolds the now familiar narrative of two competing factions within the Roosevelt administration, one led by Henry Morgenthau, the other by Henry Stimson, advocating a tough peace and a constructive stand respectively. Eventually, Stimson's team gained the upper hand and tied together all crimes in one comprehensive indictment for conspiracy to launch aggressive war (which fitted well into the general trend of reaffirming national sovereignty sketched by Mazower) and to commit war crimes and crimes against

[26] Devin Pendas, 'Seeking justice, finding law: Nazi trials in postwar Europe', *Journal of Modern History*, 81 (2009), pp. 347–68, at p. 359.

[27] Bradley F. Smith, *Reaching judgment at Nuremberg* (London, 1977).

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humanity.[28] Despite its great merits, Smith's account comes at the cost of suggesting an almost unilateral American project, a deficit which has only partly been redressed by studies of the Soviet contribution, notably that of Aron N. Trainin who was instrumental in conceptualizing aggressive war as a crime.[29]

Surprisingly, the little we know about Soviet or Polish input (such as that of Raphael Lemkin, whose intense lobbying for the legal concept of genocide has recently been highlighted)[30] is not exceeded by what is available on the British and French sides.[31] While this may be largely due to the profound lack of enthusiasm which Whitehall displayed for any trials beyond traditional war crimes proceedings, or the lack of resources by the French provisional government, such explanations only go so far. There is evidence that both theoretical contributions – notably by the doyen of international law, Hersch Lauterpacht,[32] who advised the British War Crimes Executive and corresponded with Jackson – and historical evidence, e.g. by Léon Poliakov, added significantly to the trial design.[33]

This imbalance is remedied to some extent by Arieh Kochavi's study on the United Nations War Crimes Commission. Established in 1943, as a result of previous lobbying of the governments-in-exile but also, concomitant to the Moscow Declaration, an affirmation of the Allies' resolve to punish Axis criminals, the Commission has often been perceived as an inconsequential body, marginalized by the Anglo-American partners and ignored by the Soviet Union where trials started well before the end of the war.[34] Kochavi, while not denying the Commission's secondary status, argues convincingly that the Commission and its members functioned as a clearing-house for information

[28] Bradley Smith, *The Road to Nuremberg* (New York, NY, 1981); Bradley Smith, ed., *The American road to Nuremberg: the documentary record, 1944–1945* (Stanford, CA, 1982).

[29] Francine Hirsch, 'The Soviets at Nuremberg: international law, propaganda, and the making of the postwar order, *American Historical Review*, 113 (2008), pp. 701–30; George Ginsburgs, *Moscow's road to Nuremberg: the Soviet background to the trial* (The Hague, 1996).

[30] John Cooper, *Raphael Lemkin and the struggle for the Genocide Convention* (Basingstoke, 2008); Dirk Moses, 'Raphael Lemkin, culture, and the concept of genocide', in Donald Bloxham and Dirk Moses, eds., *The Oxford handbook on genocide studies* (Oxford, 2010), pp. 19–41; Daniel Segesser and Myriam Gessler, 'Raphael Lemkin and the international debate on the punishment of war crimes (1919–1948)', *Journal of Genocide Research*, 7 (2005), pp. 453–68.

[31] For broad sketches, see David Cesarani's and Hervé Ascensio's chapters in Regenbogin and Safferling, eds., *Nuremberg*; cf. Lothar Kettenacker, 'Die Behandlung der Kriegsverbrecher als anglo-amerikanisches Rechtsproblem', in Gerd R. Ueberschär, ed., *Der Nationalsozialismus vor Gericht: die alliierten Prozesse gegen Kriegsverbrecher und Soldaten, 1943–1952* (Frankfurt, 2000), pp. 17–31.

[32] Cf. Martti Koskenniemi, 'Hersch Lauterpacht and the development of international criminal law', *Journal of International Criminal Justice*, 2 (2004), pp. 804–82.

[33] Annette Wieviorka, 'Léon Poliakov (1910–1997)', in *Encyclopædia universalis* (www.universalis.fr/encyclopedie/leon-poliakov, accessed 27 Feb. 2012).

[34] Ilya Bourtman, 'Blood for blood, death for death: the Soviet military tribunal in Krasnodar, 1943, *HGS*, 22 (2008), pp. 246–65; Alexander Prusin, 'Fascist criminals to the gallows: the Holocaust and Soviet war crimes trials', *HGS*, 17 (2003), pp. 1–30.

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on individual criminals and, more importantly, as multipliers for debates on punishable war crimes, including aggression.[35]

Another such forum was the Office of Strategic Services (OSS), established in 1942. As the CIA's immediate predecessor and with the colourful William J. Donovan at its helm, the OSS has attracted much attention, including its intellectual hub, the Research & Analysis (R&A) branch which featured the likes of Edward Mason, Franz Neumann, or Carl Schorske.[36] Yet the question if and how R&A's ideas were transmitted to Nuremberg has been only briefly touched upon, despite the overlap in personnel and material.[37] The effects this had on the IMT's shape – but also on future proceedings or on scores of historians who have worked with the trial evidence and its underlying interpretative patterns – form a sizeable lacuna in our understanding of 'Nuremberg', especially as R&A intellectuals intensely debated how the transition of the old to a new Germany was to be achieved, siding with neither Morgenthau nor Stimson.[38]

The elaboration of the pre-history of the IMT has not been matched by an equivalent impulse in research on the IMT itself. Much of what has been published lately falls into the jubilee publication genre, typically comes in the shape of edited volumes, and is, more often than not, haphazard in composition and uneven in quality. While laudable in principle, most compilations suffer from overstretch, a lack of comparative methodology, and the mere enumeration of dates, names, and events.[39] In contrast, two monographs by Donald Bloxham and Lawrence Douglas have laid out the path for fresh research by engaging the relationship of law and history which is particularly fraught with difficulties when it comes to the Shoah. Despite much agreement, they differ in tone: while the historian Bloxham essentially tells a story of failure, the jurist Douglas, though not enthusiastic about the IMT's achievements, is willing to give it its due in the light of what can be expected of a trial.

[35] Arieh J. Kochavi, *Prelude to Nuremberg: allied war crimes policy and the question of punishment* (Chapel Hill, NC, 1998).

[36] Cf. Barry M. Kātz, *Foreign intelligence: research and analysis in the Office of Strategic Services, 1942–1945* (Cambridge, MA, 1989); Petra Marquardt-Bigman, *Amerikanische Geheimdienstanalysen über Deutschland, 1942–1949* (Munich, 1995), pp. 196–9.

[37] But cf. Michael Salter, *Nazi war crimes, US intelligence and selective prosecution at Nuremberg: controversies regarding the role of the Office of Strategic Services* (Abingdon, 2007), pp. 109–78. The OSS also shielded Nazi informants from prosecution, notably Himmler's chief aide Karl Wolff; cf. Kerstin von Lingen, *SS und Secret Service: 'Verschwörung des Schweigens', die Akte Karl Wolff* (Paderborn, 2010).

[38] See Marquardt-Bigman, *Geheimdienstanalysen*, pp. 75–6, 160–2.

[39] Ueberschär, *Nationalsozialismus*; Regenbogin and Safferling, eds., *Nuremberg*; Patricia Heberer and Jürgen Matthäus, eds., *Atrocities on trial: historical perspectives on the politics of prosecuting war crimes* (Lincoln, NB, 2008); Nathan Stoltzfus and Henry Friedlander, eds., *Nazi crimes and the law* (Cambridge, 2008); Griech-Polelle, *Nuremberg; Leipzig – Nürnberg – Den Haag: neue Fragestellungen und Forschungen zum Verhältnis von Menschenrechtsverbrechen, justizieller Säuberung und Völkerstrafrecht*, ed. Helia-Verena Daubach (Düsseldorf, 2009).

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Bloxham criticizes the American trial concept for bringing all Nazi crimes under the umbrella of the conspiracy to go to war. The 'tyranny of a construct' relegated war crimes and crimes against humanity to second place, misinterpreting the extermination policy as ancillary to Nazi policy rather than an end in itself. This effect was amplified by the near-complete absence of victims' voices in the courtroom. The decision to run a 'trial by document'[40] meant that crimes were phrased in the idiom of the murderers, and that experiences of loss and suffering were articulated only very rarely, omitting an essential dimension of the Holocaust. Even more problematic, Bloxham finds that the documentary trial tactics strongly appealed to historians and fuelled accounts of National Socialism which for a long time prioritized the perpetrators' perspective.[41]

Douglas concurs that there were 'serious shortcomings in the historical understanding of the Holocaust that emerged from Nuremberg'[42] but rightly points to the fact that in narrative and moral terms the Holocaust was very much present in the courtroom: to render credible what seemed incredible and to evoke the extent of German atrocities throughout Europe. This, however, came at the price of describing Nazi crimes in terms of atavism and barbarity, emphasizing the cultural distance of Germany from the Allies.[43] And although any effort 'to comprehend the Holocaust through the medium of the law' is likely to result in reductive concepts, Douglas concludes that Nuremberg represented an 'impressive act of legal will and intelligence'. Refuting Arendt's dictum, he finds that the didactic character of transitional trials is part of all criminal proceedings' rationale.[44]

Meanwhile, Bloxham can claim credit for re-directing attention to the Nuernberg Military Tribunals which he praises as 'an even more substantial undertaking' than the four-power trial.[45] Accordingly, work on the NMT has moved to the fore after decades of near-oblivion. Only in 2011, the first comprehensive study by a legal scholar was published,[46] and a historiographical equivalent is still missing. The sources account to some extent for that gap, though through their quantity rather than their absence. Researchers have long shied away from the roughly 120,000 mimeographed transcript pages, not counting tens of thousands of pages of evidence, preparatory records, and media reports. Moreover, the IMT has traditionally overshadowed the diminutively dubbed 'Subsequent Proceedings', implying that these were but an

[40] John Mendelsohn, 'Trial by document: the use of seized records in the United States proceedings at Nuernberg' (D.Phil. thesis., College Park, 1974).

[41] Donald Bloxham, *Genocide on trial: war criminals and the formation of Holocaust, history and memory* (Oxford, 2001), pp. 109–15, 206–7, 204–5; cf. Michael R. Marrus, *The Holocaust in history* (Toronto, 2000), p. 36.

[42] Lawrence Douglas, *The memory of judgment: making law and history in the trials of the Holocaust* (New Haven, CT, 2001), pp. 65–94, at p. 66.

[43] Ibid., pp. 85–7.

[44] Ibid., pp. 2, 6, 257.

[45] Bloxham, *Genocide*, pp. 4–5.

[46] Kevin Jon Heller, *The Nuremberg Military Tribunals and the origins of international criminal law* (Oxford, 2011).

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appendix to *the* Nuremberg trial, disposing of left-overs and minor defendants by means of second-rate personnel both on the bench and at the prosecution tables.

Several studies now challenge this view and point to the intricate interpretative patterns underlying the NMT. Among these, the Medical trial against twenty-three physicians and officials engaged in euthanasia, medical experiments on human beings, and mass murder has stood out for some time. One reason is the high-profile coverage of the trial, notably Alexander Mitscherlich's famous report.[47] Another is the Nuremberg Code of minimum standards for human experiments, requiring the subject's 'informed consent', which was formulated by the judges and has become generally accepted amongst medical practitioners, as Paul Weindling illustrates. In his wide research Weindling argues – in contrast to Michael Marrus's much more sceptical take on this issue[48] – that the prosecution conceived of human experiments not as a marginal note in the Nazi history of horrors but 'as pilot studies for genocide'.[49] The fact that the infamous euthanasia programme provided the organizational nucleus for the *Aktion Reinhardt* extermination camps fits into the overall picture.

While this context made the Medical trial a suitable opener for the NMT series, it also owed much to the evidence uncovered during the IMT and by British investigators.[50] Expectations to have a straightforward case, win easy convictions, and boost the larger endeavour were largely met,[51] yet the trial produced several stumbling stones for the prosecution. Horst Freyhofer's concise case-study shows how the effort to paint Nazi medicinal research in stark contrast to 'civilized' science'[52] induced the defence counsel to look into American practices, finding that experiments in US penitentiaries were not as remote from German procedures as the prosecution would have the court believe. Yet, with nothing as gruesome as the concentration camp experiments in sight, the tribunal found the majority of defendants guilty. But in what would become typical in the NMT, a third of the accused were acquitted on

[47] Alexander Mitscherlich and Fred Mielke, *Doctors of infamy: the story of the Nazi medical crimes* (New York, NY, 1949. Cf. Tobias Freimüller, 'Wie eine Flaschenpost: Alexander Mitscherlichs Dokumentation des Nürnberger Ärzteprozesses', *Zeithistorische Forschungen*, 7 (2010), pp. 145–51.

[48] Marrus argues that historical accuracy was a casualty of the conspiracy construct which was rejected by the tribunal; Michael R. Marrus, 'The Nuremberg doctors' trial and the limitations of context', in Heberer and Matthäus, eds., *Atrocities*, pp. 103–22.

[49] Paul Weindling, *Medicine and the Nuremberg trials: from medical war crimes to informed consent* (Basingstoke, 2004), p. 5.

[50] Weindling, *Medicine*; see also Michael S. Bryant, *Confronting the 'good death': Nazi euthanasia on trial, 1945–1953* (Boulder, CO, 2005), pp. 92–3.

[51] Weindling, *Medicine*, p. 106.

[52] Horst M. Freyhofer, *The Nuremberg medical trial: the Holocaust and the origin of the Nuremberg medical code* (New York, NY, 2004), pp. 23, 68, 78, 98.

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inconclusive evidence, a decision which to Freyhofer was historically questionable, but judicially fair.[53]

In terms of the severity of sentences – seven defendants were sent to the gallows – only one other trial would prove to be in the same league as the Medical case: that against twenty-four officers of the *Einsatzgruppen*, the mobile killing units responsible for the murder of the Soviet Jews. The *Einsatzgruppen* case reflected the early image of the SS as Nazi Germany's arch villains and became a substitute for the initially contemplated trial of the *Reichssicherheitshauptamt* (RSHA) and – in the absence of Adolf Eichmann who had successfully avoided apprehension – its role in planning and implementing the Holocaust. As Hilary Earl's in-depth analysis of the trial shows, even the judges came to think of the *Einsatzgruppen* as 'a travelling RSHA'.[54] Still, Case 9 stopped well short of becoming a comprehensive 'Holocaust trial', due to Taylor's misgivings as to the advisability of such a venture.[55] Moreover, the prosecution decided to run the case, even more so than the IMT, strictly on documents, firmly believing that the infamous *Einsatzmeldungen* – detailed, daily reports on the executions – would guarantee a prima facie case and easy convictions.[56]

With witnesses for the prosecution largely absent, the stage was left to the defence and especially one defendant, Otto Ohlendorf. Earl vividly illustrates how personal dynamics shaped the proceedings as Ohlendorf quickly assumed a position of authority. He streamlined the defence to a strategy which rested on the assumption that *Einsatzgruppen* units had been given unequivocal killing orders from the start – an allegation which would haunt historians searching for that order for decades. Well educated and intelligent, sober and highly articulate, Ohlendorf's assertions were more often than not accepted as truthful, coming under surprisingly little pressure from the prosecution. In fact, it was presiding judge Michael Musmanno, 'overly fond of the dramatic and a natural "showman" ',[57] who stepped in and effectively assumed the position of the defence's main antagonist by conducting piercing interrogations. Musmanno, who authored the opinion single-handedly, had little doubt about the guilt of any of the defendants but, disliking capital punishment, refrained

[53] Ibid., p. 87.

[54] 'Opinion and Judgment', *TWC*, IV, p. 490.

[55] An instructive document betrays Taylor's (then) failure to understand the extent and dynamics of the Holocaust which he conceived of as 'a Standing Operating Procedure in many fields of activity', not worth singling out in a separate trial; Jonathan A. Bush, 'The prehistory of corporations and conspiracy in international criminal law: what Nuremberg really said', *Columbia Law Review*, 109 (2009), pp. 1094–262, at p. 1262. Cf. Heller, *Nuremberg*, p. 81. Alexa Stiller argues that a broader, genocide- rather than Holocaust-centred approach was pursued in the 'RuSHA case' with its focus on ethnic engineering and deportations: 'Semantics of extermination: the use of the new term of genocide in the Nuremberg trials and the genesis of a master narrative', in Kim C. Priemel and Alexa Stiller, eds., *Reassessing the Nuremberg Military Tribunals: transitional justice, trial narratives, and historiography* (New York, NY, 2012), pp. 104–33.

[56] Hilary Earl, *The Nuremberg SS-Einsatzgruppen trial, 1945–1958: atrocity, law, and history* (Cambridge, 2009), p. 180.

[57] Ibid., p. 218.

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from uniformly handing out death sentences. While no one was acquitted, eight men got away with prison sentences.

This, however, was not the bottom line. Since the Medical trial whose sentences had been carried out swiftly, the climate had changed markedly. By mid-1947, Taylor was not only forced to scale down his ambitious programme to a dozen trials (about half of the original number), criticism of the proceedings in the light of reconstruction and Cold War was becoming increasingly vociferous on both sides of the Atlantic. A public campaign in support of German defendants was on its way by early 1948, gained momentum with the Berlin Airlift, and led to an effective freeze of all executions. From 1949, the war criminals question became a bone of contention in the talks over West German sovereignty, embracing not only businessmen or undersecretaries but also convicts whose claim to public sympathy would have seemed unlikely, including the *Einsatzgruppen* commanders. Several rounds of commutations later, only four men, including Ohlendorf, were hanged; all others would eventually go free by 1958.

This story of frustrations has been told in great detail, and nearly all reviewed books take up the thread, sometimes merely reiterating what is already known, sometimes adding new pieces to the jigsaw, as does Norman Goda's detailed account of how even the high-profile IMT convicts at Spandau figured in both public and behind-the-scenes campaigns which demanded that the era of transition (and retribution) should come to an end.[58] One of the more interesting arguments is made in Valerie Hébert's study of the last of the NMT proceedings, the so-called High Command trial against fourteen generals and field marshals. Hébert finds that, on balance, the prosecution established a historically accurate account of Wehrmacht crimes, especially in the East.[59] The evidence on the counts of war crimes and crimes against humanity was mostly precise although the notion of command responsibility, i.e. holding generals to account for not stopping criminal acts of their subordinated units, was at times rather strained, as in the case of Wilhelm Ritter von Leeb. Yet even unassailable proof of the Wehrmacht's participation in atrocities and genocide practically evaporated among the wider public. Case 12 became a key part of the anti-Nuremberg campaign – with the veteran generals explicitly blackmailing the Western allies to grant commutations in exchange for German remilitarization[60] – and indicated how much the momentum had shifted from the prosecution to the defence. The narrative which came out victorious was that of the valiant, untainted German army which would remain largely unchallenged until the 1990s.[61] This reversal of the NMT's intentions was

[58] Norman J. W. Goda, *Tales from Spandau: Nazi criminals and the Cold War* (Cambridge, 2007).

[59] Valerie Hébert, *Hitler's generals on trial: the last war crimes tribunal at Nuremberg* (Lawrence, KS, 2010).

[60] Cf. Alaric Searle, *Wehrmacht generals, West German society, and the debate on rearmament, 1949–1959* (Westport, CT, 2003).

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greatly helped by the US administration's decision not to print the German-language record of the trials. In contrast to the IMT, only the English proceedings were published and in strongly abridged form. While the 'failure of Nuremberg's educative mission' is thus assigned in equal measures to Germans and Americans, Hébert calls for a cognizant, emphatically didactic fusion of history and the law if the transitional potential of such trials is to be realized.[62]

The Wehrmacht representatives, not only those on trial but also the increasingly assertive veterans' organizations, were hardly alone in their effort to reconfigure their own role in the Third Reich. If the German generals were prolific writers, publishing a wide range of unvaryingly apologetic reminiscences of how they could have won the war if only the incompetent Führer had not interfered, the West German corporate elite summoned the services of historiography for their exculpatory purposes. A recent boom in business history has shed light on the role Nuremberg played in this process. Following on Jonathan Wiesen's pioneering study, several books look into the cases against representatives of Flick, Farben, Krupp, and Dresdner Bank and the strategies they developed in refuting the prosecution's allegation of intense, voluntary complicity of German corporations in and profits from Nazi crimes.[63] The defendants and their counsel – well trained by previous stints in Nuremberg – reconceptualized the image of greedy, unscrupulous tycoons and managers, replacing it with either the apolitical technician and merchant, or the oppositional, economically and politically liberal entrepreneur, or all at the same time. The gist of this strategy was to paint the Third Reich in starkly totalitarian colours by arguing that there had been no leeway, no scope of action whatsoever for private business. Complicity was transformed into compliance, responsibility into tragedy and perpetrators into victims.[64] All of these arguments would be rerun in the following decades to deflect restitution claims.[65]

This pattern fared surprisingly well at Nuremberg as both the Flick and Farben tribunals accepted the notion of necessity according to which German industrialists had been forced to co-operate with the regime for fear of life and property. The Krupp judges, however, rejected the argument and issued stern sentences – in the eyes of some observers unduly harsh[66] – against Alfried

[61] Hébert, *Generals*, pp. 197–8.

[62] Ibid., pp. 178–84, 206–7.

[63] S. Jonathan Wiesen, *West German industry and the challenge of the Nazi past, 1945–1955* (Chapel Hill, NC, 2001).

[64] Cf. Ralf Ahrens, *Die Dresdner Bank 1945–1957: Konsequenzen und Kontinuitäten nach dem Ende des NS-Regimes* (Munich, 2007); Norbert Frei et al., *Flick: Der Konzern, die Familie, die Macht* (Munich, 2009); Johannes Bähr et al., *Der Flick-Konzern im Dritten Reich* (Munich, 2008).

[65] See Joachim R. Rumpf, *Der Fall Wollheim gegen die I. G. Farbenindustrie AG in Liquidation: die erste Musterklage eines ehemaligen Zwangsarbeiters in der Bundesrepublik Deutschland – Prozess, Politik und Presse* (Frankfurt, 2010).

[66] Cf. Werner Abelshauser's chapter in Lothar Gall, ed., *Krupp im 20. Jahrhundert: die Geschichte des Unternehmens vom Ersten Weltkrieg bis zur Gründung der Stiftung* (Berlin, 2002), or Harold James, *Krupp: a history of the legendary German firm* (Princeton, NJ, 2012). More upsetting

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Krupp and his managers. The charge of aggressive war came out an unmitigated disaster. With the exception of Case 11 where three defendants were found guilty on parts of the aggressive war count (but notably none of the traditional Foreign Office staff who successfully crafted a narrative of two distinct offices, one made up by old-fashioned, ethical officials, the other by Nazi upstarts deficient in both manners and morals),[67] none of the NMT held the defendants responsible for the decision to go to war. While the legality of wars (*ius ad bellum*) receded into the background, the judicially less ambitious issues such as murder, forced labour, plunder, and other traditional concerns of *ius in bello*, i.e. the laws of war, became a fall-back position. It was on these counts that most of the convicted defendants were found guilty in the end, resulting in a 'jurisprudence of atrocity' rather than one of aggressive war as envisioned by Jackson.[68]

The recent NMT studies show how complex an undertaking the trials were. This was a project that went significantly beyond the IMT in terms not only of the sheer number of trials, defendants, scenes, and complexes of crime that were investigated, but also in depth and precision. There was a discernible shift away from the retributive character of the IMT design with its cast of high-profile leaders, and the very different NMT sample, following a pattern that emanated from an analysis of the Third Reich's governance structure. What appears – although substantial research for several trials is still missing – is an ambitious heuristic undertaking whose enormous benefit to historians worked, at least to some degree, to the detriment of the lawyers' more immediate goals. The trial series was devised as a text, with each case providing a different chapter to a grand historical narrative which legitimized the transformation of Germany. Understanding this narrative depended on reading all of its chapters. As criminal trials, however, each had to stand on its own feet, and the tribunals were unanimous in that they would judge their respective case purely on its own merits. The near-total failure of the counts of conspiracy and aggressive war, in contrast to the overall success of atrocity charges, might be seen as the epistemological fork in the road where historiography and jurisdiction headed in different directions.

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is Frank Gausmann, *Deutsche Großunternehmer vor Gericht: Vorgeschichte, Verlauf und Folgen der Nürnberger Industriellenprozesse, 1945–1948/51* (Hamburg, 2011). Although solidly researched, Gausmann ignores recent literature and fails to address pertinent questions as to the self-stylization of the defendants. He consistently and inquisitorially confounds 'Morgenthau boys', New Dealers, and exiled scholars in the OSS, branding them all anti-capitalist crusaders, a notion that does violence to the heterogeneity of backgrounds and convictions held by the prosecution staff.

[67] Eckart Conze et al., *Das Amt und die Vergangenheit: deutsche Diplomaten im Dritten Reich und in der Bundesrepublik* (Munich, 2010), pp. 413–14.

[68] Lawrence Douglas, 'From IMT to NMT: the emergence of a jurisprudence of atrocity', in Priemel and Stiller, eds., *Reassessing*, pp. 276–95.

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If the mixed record of the NMT is to be understood, one must take into account the different agendas of prosecutors and judges. While this distinction is often lost on contemporary and later observers who only saw Americans, Kevin Jon Heller's ground-breaking study shows from a jurisprudential perspective that this need not be so. Taylor's staff set out to stage transitional, educational trials by exploiting the innovative opportunities offered by Control Council Law No. 10 (e.g. extending jurisdiction to domestic crimes) and of precedents like the IMT or the Yamashita case which had established a wide notion of military command responsibility. Yet, to what extent the NMT would themselves furnish precedents as criminal trials was up to the tribunals, and these adopted the prosecution's views at best selectively, at times contradictorily, and frequently rejected them entirely. This was, Heller argues, not only because they were composed of second-rate jurists (although some were), but because the judges, mostly untrained in international law, stuck to their 'primary goal' of retribution[69] (yet, personal motives and dynamics also influenced the judgements as Hébert, Earl, and Maguire show).[70] Another major service rendered by Heller's meticulously researched study is his thorough investigation of the procedural aspects of the NMT which, despite some obvious exceptions such as the missing right to appeal, he finds to be 'impressively fair'.[71] While agreeing with Hébert that the trials' success as a means of transforming German society was 'mixed', the establishment of the documentary record was a 'resounding success' – although historians will be sceptical of the selection and arrangement of sources – and, most importantly from a lawyer's perspective, 'their inestimable contribution to the form and substance of international criminal law'.[72]

English-language studies of transitional justice trials for a long time have been Eurocentric, ignoring the International Military Tribunal for the Far East (IMTFE), the IMT's sibling. While modelled upon 'Nuremberg', 'Tokyo' assumed a very distinct shape, becoming what one scholar has recently labelled the 'first true' global war crimes trial.[73] The multinational composition of both prosecution and bench with representatives from eleven nations gave voice to victims of Japanese aggression and tempered US dominance. Conversely, Tokyo was fraught with differences of opinion, authority clashes, and organizational problems among the Allies. The atmosphere also differed significantly from Nuremberg as no crime of the Holocaust's proportions was at stake whereas Hiroshima and Nagasaki were ever present. In Europe and North America, though, the Tokyo tribunal aroused less interest than the media event

[69] Heller, *Nuremberg*, pp. 42, 369, 399.

[70] Hébert, *Generals*, pp. 134–50; Earl, *Einsatzgruppen*, pp. 239–64; Maguire, *Law*, pp. 149–62.

[71] Heller, *Nuremberg*, p. 181. Cf. Susanne Jung, *Die Rechtsprobleme der Nürnberg Prozesse, dargestellt am Verfahren gegen Friedrich Flick* (Tübingen, 1992).

[72] Heller, *Nuremberg*, pp. 400–1.

[73] James Sedgwick, 'Brother, black sheep, or bastard? Situating the Tokyo war crimes trial in the Nuremberg legacy, 1946–1948', in Griech-Polelle, ed., *Nuremberg*, pp. 63–76, at p. 75.

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IMT,[74] reflecting a lack in concern and expertise among Western observers which considerably hampered the prosecution efforts.[75]

It is therefore unsurprising, if unfortunate, that Richard Minear's book on the IMTFE has for a long time been the most significant work available. Minear's account is not only empirically under-researched, building primarily on indictment and judgement, but essentially is a historical document rather than a work of historiography. Explicitly looking at Tokyo through the prism of the Vietnam War, Minear found a trial flawed by hypocrisy and the misguided transfer of the Nuremberg paradigm to Tokyo.[76] Unsurprisingly, these polemics proved influential in Japan where the American author's criticism of victors' justice was greeted with satisfaction among revisionist scholars.[77] However, it would be quite wrong, as Madoka Futamura and Yuma Totani demonstrate, to assume that Japanese lawyers and historians uniformly opposed the IMTFE and its findings. Rather, the intention to compose an authoritative account of Japanese aggression and criminality incited an intense, multi-faceted and ongoing debate over the trial, its procedures, and conclusions.[78]

The frequent label as a 'forgotten' trial[79] is therefore off the mark, but Totani's fine analysis and a dense legal study by jurists Neil Boister and Robert Cryer show why Tokyo's status lags behind Nuremberg's. The improvised, multilateral organization of the tribunal, the confusing array of fifty-five counts in the indictment, levelled indifferently against all defendants, accounts for much of the trial's mixed record; personal dynamics in the prosecution and on the bench add another layer. Both the US prosecutor and the Australian presiding judge, the former vain and incompetent, the latter an 'isolated figure, hesitant, authoritarian',[80] failed desperately in synchronizing their respective colleagues. And the Nuremberg-inspired conspiracy charge proved taxing as

[74] See the anthology by Radlmeier, *Lernprozeß*.

[75] Neil Boister, 'The Tokyo trial', in Schabas and Bernaz, eds., *Handbook*, p. 19, notes the 'orientalism' of Tokyo's creators.

[76] Richard H. Minear, *Victors' justice: the Tokyo war crimes trial* (Princeton, NJ, 1971); Philip Piccigallos *The Japanese on trial: allied war crimes operations in the east, 1945–1951* (Austin, TX, 1979), is weak on analysis due to the author's emulation of 'historical objectivity in the Von Rankean tradition' (p. xv). The IMTFE transcript was co-edited by R. J. Pritchard who also published several articles on US and British war crimes trials in East Asia; R. John Pritchard and Sonia M. Zaide, eds., *The Tokyo war crimes trial: the complete transcripts of the proceedings of the International Military Tribunal for the Far East* (22 vols., New York, NY, 1981).

[77] E.g. Ushimura Kei, *Beyond the 'judgment of civilization': the intellectual legacy of the Japanese war crimes trials, 1946–1949* (Tokyo, 2003).

[78] Yuma Totani, *The Tokyo war crimes trial: the pursuit of justice in the wake of World War II* (Cambridge, MA, 2008), pp. 190–218; Madoka Futamura, *War crimes tribunals and transitional justice: the Tokyo trial and the Nuremberg legacy* (London, 2008), pp. 69–85.

[79] Étienne Jaudel, *Le procès de Tokyo: un Nuremberg oublié* (Paris, 2010); Futamura, *War*, p. 8. See also Arnold C. Brackman's *The other Nuremberg: the untold story of the Tokyo war crimes trials* (New York, NY, 1987), by a US reporter who covered the proceedings.

[80] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: a reappraisal* (Oxford, 2008), p. 82; Totani, *Tokyo*, pp. 32–42. Cf. their accompanying documentary volume *The Tokyo International Military Tribunal: judgment and documents* (Oxford, 2008).

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the defendants had not belonged to any group such as the Nazi organizations and had routinely engaged in heavy infighting. No less problematic was the historical narrative of Japanese aggression suggested by the prosecution; it remained unclear when exactly this project had started – with Pearl Harbor, the 1931 Mukden Incident, or still earlier?[81]

While in the end there remained little doubt as to Japanese atrocities such as the Rape of Nanking and the Bataan Death March, the haziness of the aggressive war charge was reflected in the various majority, concurring, and dissenting votes by the tribunal's members, some of which provided welcome ammunition to the trial's critics. In particular, the notorious 1,000 page quasi-indictment of Western imperialism submitted by Indian Judge Rhadabinod Pal would inspire Minear and others. Boister and Cryer try to salvage Pal's findings from comprehensive dismissal and argue that some of his conclusions were correct, if 'morally ugly': 'Crimes against peace did not exist prior to World War II. The Allies created a new crime, thus violating the principle of legality. No amount of "sweaty palmed" positivist justification of natural law ontology can avoid this conclusion' – an argument which would pertain to Nuremberg as well.[82]

It is here that the historian's reading differs strongly from the lawyers'. Thanks to a broader array of sources, Totani finds that Pal arrived at Tokyo with a pre-determined opinion which underwent little change as he deliberately missed large portions of the proceedings, already working on his judgement, which was coloured by his 'vision of Greater Asianism',[83] a context which Boister and Cryer underrate. Their résumé is ambiguous as 'the conduct of the trial did not meet the most elementary standards of international law', but also because Tokyo's transitional setting remains obscure.[84] Totani's assessment is considerably more positive, thanks to scrupulous research which allows her to refute widespread allegations that sexual slavery was not debated in the courtroom, or that Asian suffering was marginalized in comparison to that of white victims. It is not the least of its merits that Totani's book shows that such errors result from mistaking the judgement for the trial's only historical record.[85]

IV

The trial programme in post-war Japan went beyond the 'major war criminals' but the proceedings disposing of lower-ranking officials have largely escaped attention, with the notable exception of the Yamashita case whose 'command responsibility' theorem received bad press for its alleged failure to account for

[81] Totani, *Tokyo*, pp. 82–3, 88–97.
[82] Boister and Cryer, *Tokyo*, pp. 136–7; cf. Futamura, *War*, pp. 32–5.
[83] Totani, *Tokyo*, pp. 95–6, 226–8.
[84] Boister and Cryer, *Tokyo*, p. 114.
[85] Futamura, *War*, p. 58.

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the realities of war.[86] Historiographical ignorance of what has traditionally been perceived as minor trials used to be similarly pervasive in the German case. The proceedings organized by the Allies and both German states have met with little interest from writers who prefer famous names, and historians who hold that history is made by great or at least important men. These trials, mostly covering atrocities and war crimes *strictu sensu*, however, made for the vast majority of proceedings, defendants, and death sentences. In particular, proceedings against concentration camp guards tended to be as short as they were stern in meting out punishment. Differences between the four zones initially seem to have been rather slight whereas in later proceedings in the Soviet zone, justice, propaganda, and purges entered an unhappy union with little regard for the rule of law.[87]

That the British occupation forces settled for atrocity and war crimes trials hardly came as a surprise given London's initial reluctance to agree to the intricate Nuremberg paradigm. Accordingly, the British War Crimes Executive acted exclusively under the limited scope of the Royal Warrant of June 1945. While this did not mean that only soldiers and SS men were tried,[88] their cases constituted the bulk of prosecutions. But even these could transform into broad, 'historiographical' trials as in the cases against Field Marshals Albert Kesselring in Venice 1947 and Erich von Manstein in Hamburg two years later. This was partly due to similar personnel: the Hamburg prosecution was co-directed by a former British associate of Telford Taylor while the defence counsel in the Kesselring, Manstein, and the NMT cases overlapped. Indeed, the defence lawyers ventured to draw the larger picture and project the image of the unblemished German soldier. This made little headway with the judges in the Kesselring case which fell into the early, harsher period, and the former supreme commander in Italy was sentenced to death, primarily for his role in the Ardeatine massacre. In contrast, Manstein's trial, despite the prison

[86] Cf. A. Frank Reel, *The case of General Yamashita* (Chicago, IL, 1949); Richard Lael, *The Yamashita precedent: war crimes and command responsibility* (Wilmington, NC, 1982); Ann Marie Prévost, 'Race and war crimes: the 1945 war crimes trial of General Tomoyuki Yamashita', *Human Rights Quarterly*, 14 (1992), pp. 303–38.

[87] Mike Schmeitzner, 'Unter Ausschluss der Öffentlichkeit? Zur Verfolgung von NS-Verbrechen durch die sowjetische Sonderjustiz', in Jörg Osterloh and Clemens Vollnhals, eds., *NS-Prozesse und deutsche Öffentlichkeit: Besatzungszeit, frühe Bundesrepublik und DDR* (Göttingen, 2011), pp. 149–66; Annette Weinke, *Die Verfolgung von NS-Tätern im geteilten Deutschland: Vergangenheitsbewältigungen 1949–1969* (Paderborn, 2002), pp. 43–7. For the notorious Waldheim trials: ibid., pp. 68–75. The French trials are summarized by Yveline Pendaries, *Les procès de Rastatt (1946–1954): le jugement des crimes de guerre en zone française d'occupation en Allemagne* (Bern, 1995), and Claudia Moisel, *Frankreich und die deutschen Kriegsverbrechen: Politik und Praxis der Strafverfolgung nach dem Zweiten Weltkrieg* (Göttingen, 2004). A rare comparative perspective is taken by Jonathan Friedman, 'The Sachsenhausen trials: war crimes prosecution in the Soviet occupation zone and in West and East Germany', in Heberer and Matthäus, eds., *Atrocities*, pp. 159–84.

[88] Cf. Angelika Ebbinghaus, 'Der Prozeß gegen Tesch und Stabenow: von der Schädlingsbekämpfung zum Holocaust', *1999*, 13 (1998), pp. 16–71.

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sentence, was a major public relations disaster for the British authorities, with Churchill donating money for the field marshal's defence. In the end, both officers fared rather similarly and, after various commutations, were released in 1952–3, becoming symbols of and spokesmen for the Wehrmacht whitewashing lobby.[89]

If the finale of British war crimes trials in Germany was a fiasco, its start had paved the way of the transitional justice programme. The NMT's 'Doctors Trial', for instance, drew substantially on the British investigations of human experiments and euthanasia.[90] No less important was the Bergen Belsen case in 1945. Preceding the IMT, it became the first major trial and set an example on which many subsequent cases, especially those dealing with concentration camp personnel, were modelled. John Cramer argues that the Belsen trial's significance largely resulted from its conceptual approach of charging the defendants not only with individual offences but also with concerted action. In effect, this put the complex camp system rather than individual perpetrators on trial and broadened the allocation of responsibility significantly.[91] However, as the judges demanded proof of individual guilt, a double strategy was forged which first drew the big picture in which the defendants could then be placed. This concept would soon be adopted in the US zone's Dachau trials under the name of 'common design', as Tomaz Jardim demonstrates for the Mauthausen trial.[92] Similarities did not stop here. In both cases, survivors played a key role in preparing and managing the trial, compensating for the deficits of the understaffed and ill-prepared investigators. Identifying perpetrators, providing evidence and testimony, assisting in research and interrogations, the victims of Nazi brutality regained voice and agency – a key finding which qualifies previous assumptions about the Allies' marginalization of victims.[93]

This is not to say that witnesses always fared well in the courtroom. British and US defence counsel – not so different from German attorneys – did not hesitate to discredit their testimony, even by resorting to anti-Semitic stereotypes. The defendants showed little remorse, not even for tactical reasons, but instead chose apologetic explanations of how they had either not known what was going on or had been forced to comply. Some, Cramer incredulously notes, conceived of themselves as part of the same 'community of victims' as the camp inmates.[94]

[89] Cf. Kerstin von Lingen, *Kesselring's last battle: war crimes trials and Cold War politics, 1945–1960* (Lawrence, KS, 2009); Oliver von Wrochem, *Erich von Manstein – Akteur und Symbol: Vernichtungskrieg und Geschichtspolitik* (Paderborn, 2006).

[90] Weindling, *Medicine*, pp. 97–125.

[91] John Cramer, *Belsen trial 1945: der Lüneburger Prozess gegen Wachpersonal der Konzentrationslager Auschwitz und Bergen-Belsen* (Göttingen, 2011), pp. 117–18.

[92] Tomaz Jardim, *The Mauthausen trial: American military justice in Germany* (Cambridge, MA, 2012); Robert Sigel, *Im Interesse der Gerechtigkeit: die Dachauer Kriegsverbrecherprozesse* (Frankfurt, 1992); see also Lisa Yavnai's contributions to Heberer and Matthäus, eds., *Atrocities*, and Reginbogin and Safferling, eds., *Nuremberg*.

[93] Annette Wieviorka's *The era of the witness* (Ithaca, NY, 2006), traces the turn in the wake of the Eichmann trial.

[94] Cramer, *Belsen*, p. 206.

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Although neither tribunal bought into that narrative, the judgements differed markedly. The Mauthausen judges found all men guilty, sending the vast majority to the gallows. Their brethren in the Belsen trial came to a more nuanced finding, and less than one in four had to face death. Hence, the strikingly different conclusions of Cramer and Jardim: while the former holds that the judgement attested to the strictly implemented rule of law, the latter finds fault with the American procedures, especially the bizarre brevity of the trial and the serious misconceptions entertained by prosecution and tribunal. This raises the profound problem whether or not procedural flaws and material justice can be reconciled and what to do if justice comes at the expense of legality. In the age of Guantanamo, such questions resonate deeply.[95]

In many respects, the Allied concentration camp proceedings were the true precursors of German trials dealing with Nazi crimes. That these only came about with a significant time lag, which allowed many perpetrators to escape from retribution thanks to statutes of limitations, loss of evidence, or the death of witnesses, is well known. The 1958 Ulm trial, which dealt with mass murder on the German–Lithuanian border, has long been credited with changing the tide and instigating concerted judicial action. Several works by Annette Weinke, however, have cast doubt on this interpretation. She argues that the competition between the two German states, and the appreciation that the integration of prominent Third Reich officials made the Bonn republic vulnerable to attacks from East Berlin, accounted for the renewed interest in prosecuting Nazi crimes and led to the establishment of a central investigation office.[96] Its coming heralded a second phase of war crimes trials after the hiatus which had followed the post-war proceedings, nationally and internationally.[97]

Two cases stood out, the Auschwitz trial in Frankfurt (1963–5) and the Eichmann case in Jerusalem (1961). If the latter proved to be an idiosyncratic undertaking, the former would become, for better or for worse, a paradigmatic case. This was, most of all, due to the metonymic character of Auschwitz as a signifier of the Holocaust, a quality which state attorney Fritz Bauer, according to his biographer Irmtraud Wojak, immediately understood, seizing the opportunity to claim investigations for his Frankfurt office. As a Jewish Social Democrat, Bauer was an untypical character among German jurists. Following internment in 1933, he had emigrated to Scandinavia but chose to return after the war in

[95] Ibid., pp. 397–8.; Jardim, *Mauthausen*, p. 216. Building on Shklar, *Legalism*, Mark Osiel, *Mass atrocity, collective memory and the law* (New Brunswick, NJ, 1997), argues that the specific circumstances of transitional periods justify deviations from the rule of law, yet, the 'liberal' conduct of trials through due process remains a prerequisite for their social benefits to unfold.

[96] Annette Weinke, 'The German–German rivalry and the prosecution of Nazi war criminals during the Cold War, 1958–1965', in Stoltzfus and Friedlander, eds., *Nazi crimes*, pp. 151–72. See also Annette Weinke, *Eine Gesellschaft ermittelt gegen sich selbst: die Geschichte der Zentralen Stelle Ludwigsburg 1958–2008* (Darmstadt, 2008).

[97] See Andreas Eichmüller, 'Die strafrechtliche Verfolgung von NS-Verbrechen und die Öffentlichkeit in der frühen Bundesrepublik Deutschland, 1949–1958', in Osterloh and Vollnhals, eds., *NS-Prozesse*, pp. 53–73.

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order to contribute to Germany's moral, political, and legal reconstruction. Bauer soon emerged as a singular figure in the prosecution of Nazi criminals, instigating major investigations and helping to apprehend Eichmann. His main achievement, however, was the Auschwitz trial which he perceived as a unique opportunity to display the full extent and the organizational complexity of Nazi criminality: a history lesson writ large. As the British and American prosecutors two decades earlier, Bauer focused on the collective character of criminality, the dense network of co-operation and complicity of perpetrators. Accordingly, Bauer and his team of young state prosecutors indicted a range of defendants, from lowly *kapos* to the adjutants of the camp commanders.[98] Also, very much like the Mauthausen and Belsen cases, the Frankfurt trial relied on eye-witness testimony – from both victims and perpetrators – much of which was provided by survivors and their organizations and which, in yet another *déjà vu*, came under severe scrutiny and often vicious attack from the defence counsel led by Nuremberg veteran Hans Laternser.

Despite its significance, scale, and scope, the Auschwitz case did not turn out an unqualified success, a point on which all major studies – besides Wojak's biography there are two excellent monographs by Rebecca Wittmann and Devin Pendas[99] – agree. Betraying disappointment, Wittmann's analysis concludes that the judges' orthodox adherence to non-retroactivity and the peculiarities of German penal law with its strongly subjectivized notion of homicidal intent pre-empted the pedagogical effect.[100] While the strict ban on retroactive law meant that genocide could not be charged, individual culpability of particular murders was a sine qua non for a guilty verdict. Specific qualifications (such as base motives) had to be met if the defendants were to be found guilty of more than aiding and abetting their respective superiors. As a result, it was much easier to pin down subordinate men who had sadistically maltreated or killed the inmates whereas the camp's higher echelons, more remote from the barracks and chambers, got away with aiding and abetting. This focus on the 'excess perpetrators' who had acted on their own initiative,[101] amply seconded by frequently voyeuristic media coverage, would determine public perception of Nazi crimes and undermine Bauer's didactic concept.[102]

[98] Irmtrud Wojak, *Fritz Bauer, 1903–1968: eine Biographie* (Munich, 2009); for a more sceptical evaluation of Bauer's conceptual work: Werner Renz, 'Der 1. Frankfurter Auschwitz-Prozess, 1963–1965, und die deutsche Öffentlichkeit: Anmerkungen zur Entmythologisierung eines NSG-Verfahrens', in Osterloh and Vollnhals, eds., *NS-Prozesse*, pp. 349–62.

[99] The books validate each other as they exploit different sources, Wittmann the trial's audio recordings, Pendas exhaustive press coverage; Rebecca Wittmann, *Beyond justice: the Auschwitz trial* (Cambridge, MA, 2005); Devin Pendas, *The Frankfurt Auschwitz trial, 1963–1965: genocide, history, and the limits of the law* (Cambridge, 2006).

[100] Cf. Bryant, *Confronting*, pp. 108–11.

[101] Michael Bryant argues that the same tendency was discernible in the Dachau trials: 'Punishing the excess: sadism, bureaucratized atrocity, and the U. S. army concentration camp trials, 1945–1947', in Stoltzfus and Friedlander, eds., *Nazi crimes*, pp. 63–85.

[102] Wojak, *Bauer*, pp. 340–8.

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Once more, atrocity outdid genocide in terms of public interest and courtroom effect.

The judges added to this misinterpretation by insisting on handling the case as an ordinary murder trial, although it was anything but. Relying on an 'inadequate theory of individual agency', as Pendas elucidates, they failed to grasp the implications of state criminality.[103] Both Wittmann and Pendas find German criminal law particularly ill-suited to deal with a literally extraordinary type of criminality not accounted for in the penal code. Pendas, however, entertains considerable doubts whether any other judicial system would be much better equipped. His conclusion that the Auschwitz trial 'failed socially' because it tried to reduce the complexity and the systematic character of the Holocaust to 'the dynamics of individual psychology' would seem to pertain to transitional proceedings generally.[104]

At first sight, the Eichmann trial looked nothing like the Auschwitz proceedings. While in Frankfurt twenty-four men, practically unknown to the public, were put in the dock to represent Auschwitz's structure, the Eichmann trial had but one, prominent defendant. Yet the trials had a lot in common, notably in their goal to complement and rectify what had been missing or misrepresented in previous instances, i.e. Nuremberg. Both were explicitly conceptualized as Holocaust trials, focusing on the one crime which defined the Nazi regime more than anything else, not the aggression which Jackson had put centre stage in the IMT. Witnesses played a significant role in both courts, and the prosecution at Jerusalem made it a particular point to compensate for the Nuremberg trial by document.

In two crucial respects, however, the trials could not have differed more. First, the decision to build the trial on an inevitably retroactive law, as the State of Israel had not even existed at the time of the Holocaust, allowed to charge genocide. Second, the fact that the trial was staged in Israel, before a tribunal of German-Jewish émigrés, prepared by a Polish-born prosecutor, and marked by a vast number of survivors in the witness stand and in the audience made the setting as unlike from anything happening in Germany as could be. David Ben Gurion's comment that the Eichmann trial was the 'Nuremberg of the Jewish people'[105] was misleading in many ways. But it was indeed a transitional trial in so far as it served as 'a sort of national group therapy' for the Israeli nation in which the sufferings of millions were articulated and its statehood affirmed.[106] Meanwhile, the German audience was relegated to the TV screens[107] as the

[103] Pendas, *Frankfurt*, p. 303.

[104] Ibid., p. 302.

[105] Hannah Yablonka, *The State of Israel vs. Adolf Eichmann* (New York, NY, 2004), p. 50.

[106] Tom Segev, *The seventh million: the Israelis and the Holocaust* (New York, NY, 1993), p. 351; cf. Osiel, *Mass atrocity*, pp. 14–15, and Minow, *Vengeance*, p. 133.

[107] Peter Kraus, '"Eichmann und wir": die bundesdeutsche Öffentlichkeit und der Jerusalemer Eichmann-Prozess 1961', in Osterloh and Vollnhals, eds., *NS-Prozesse*, pp. 283–306; Norbert Kampe, Andreas Nachama, and Uwe Neumärker, eds., *Der Prozeß – Adolf Eichmann vor Gericht/Facing Justice – Adolf Eichmann on Trial* (Berlin, 2011), pp. 216–47.

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Bonn government was quick to disown all responsibility for Eichmann. The defence lawyers were usually the only Germans in the courtroom which led to a discernibly less aggressive stance towards those testifying; perpetrator witnesses would not enter Israel for fear of arrest. To Harry Mulisch this was a case of 'all against one'.[108]

The decision to transform the trial into a forum in which Holocaust survivors would gain a prominent voice was Chief Prosecutor Gideon Hausner's.[109] His team wanted the witnesses to testify on what the Holocaust had meant beyond mere numbers: the suffering it had entailed, the losses it had caused, the wounds which refused to heal. Much of this had little to do with Eichmann personally as many witnesses had never seen the defendant. This does not mean that the prosecution did not deem Eichmann important, on the contrary. If anything, Hausner overestimated Eichmann's significance, crediting him with more consistency than he had shown, as the formula of the 'two Adolfs' illustrates.[110] This twofold approach is amply visualized in a bilingual catalogue accompanying a recent Berlin exhibition. A large number of witnesses are presented with extracts from their testimony as well as biographies and photos, stressing that these men and women did not only appear as victims but as people with lives and faces. Eichmann's own statements, his lies and evasive replies, the often contradictory self-stylization as an insignificant idealist and a tragic figure are also given adequate room while the transcript excerpts show that the judges, overall, got more out of Eichmann in their respective interrogations than Hausner did, a feat reminiscent of the IMT and the *Einsatzgruppen* trial.[111]

These excerpts come in handy for the reader who, at the end of the day, wants to know whether or not Hannah Arendt got it right in portraying Eichmann in terms of the 'banality of evil'. As it is, virtually none of the recent publications on the subject comes out in her favour. In her famous book, Arendt made a double argument: first that Eichmann had been the perfect bureaucrat in a well-organized machine of mass murder but without any particular zeal beyond the compliance with orders and his sense of duty: a cog in the totalitarian machine, a reading which fitted nicely into Arendt's larger theoretical framework. Second, that the trial was flawed by its extra-legal tenets as displayed by the plethora of allegedly pointless victims' accounts or the non-engagement of contested issues such as the *Judenräte*'s collaboration.[112]

[108] Harry Mulisch, *Criminal case 40/61, the trial of Adolf Eichmann: an eyewitness account* (Philadelphia, PA, 2005), p. 4.

[109] For Ben Gurion's influence see Yablonka, *State*, pp. 51–4. For the earlier Kastner libel suit cf. Leora Bilsky, 'Judging evil in the trial of Kastner', *Law and History Review*, 19 (2001), pp. 117–60.

[110] Cf. Deborah E. Lipstadt, *The Eichmann trial* (New York, NY, 2011), p. 138.

[111] Kampe, Nachama, and Neumärker, eds., *Der Prozess*; cf. David Cesarani, *Becoming Eichmann: rethinking the life, crimes, and trial of a 'desk muderer'* (Cambridge, MA, 2006), pp. 282, 300–2, 313–14.

[112] Arendt, *Eichmann*, pp. 119–24, 209–10.

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Both interpretations have been influential but they have also been proven wrong or at least one-sided. David Cesarani's biography of Eichmann shows a man who was far more than the instrument of his superiors, who chose the destruction of European Jewry as a career path, and who smoothly turned from an expert in deportation to one of extermination so as not to be by-passed by other agencies. Incidences that he relished in his power, behaved cruelly, cherished the aggrandizement of his responsibility for the lives and deaths of millions were documented at his trial.[113] Meanwhile, Hannah Yablonka has shown that Arendt's critique of the trial design and its non-Eichmann related parts betrays a lack of understanding of what was at stake. The quality as a pivotal moment in the early history of the 'State of Israel', as Yablonka's title indicates, seems to have been beyond Arendt's comprehension.[114]

These deficits, as a concise book by Deborah Lipstadt argues, also resulted from Arendt missing most of the trial as she stayed in Jerusalem only for a short time. Even more poignant is the criticism of Arendt's diatribes against Israeli and Arabic culture or East European Jews like Hausner.[115] Although Lipstadt's nuanced account does not add much to the analyses by Cesarani and Yablonka, it is written with a broader audience in mind and might eventually replace Arendt's account which is by far the best-selling book on the subject. As such, Lipstadt's account is a welcome addition, yet some of the structuring devices are irritating, notably parallelizing the Eichmann trial with her own experience in a libel suit by notorious Holocaust-denier David Irving.[116] For all his malicious lies, Irving was neither a perpetrator nor the defendant; no issues of transitional justice were at stake; no sentence other than a fine was at risk in what was essentially a meta-trial about historiographical practice.[117]

Two other publications supplement Arendt's report. The Eichmann trial, like the IMT, was a media event with scores of observers flocking in the courtroom. Harry Mulisch's weekly columns betray a sense of strangeness very similar to that of Arendt. The Dutchman finds Israel far too religious for his liking, and is neither impressed with the proceedings nor with Hausner. Like Arendt, Mulisch takes much more easily to the German-born judges. Even the conclusions resemble Arendt's closely. In what seems to be a near paraphrase but might better be accounted for by the post-war discourse on the dangers of modernity and technocracy, Mulisch describes Eichmann as a 'calm, dutiful servant', 'obsessed with orders', and prototypical for 'modern mechanical people'. But in contrast to Arendt, he was still in the courtroom when the mask broke, noting with astonishment the 'intonation of a whip' and the

[113] Cesarani, *Eichmann*.
[114] Yablonka, *State*, pp. 90, 244.
[115] Lipstadt, *Eichmann*, pp. 152–80.
[116] Deborah E. Lipstadt, *History on trial: my day in court with David Irving* (New York, NY, 2005).
[117] Cf. Douglas, *Memory*, pp. 212–56, and Christopher R. Browning, 'Law, history, and Holocaust denial in the courtroom: the Zündel and Irving cases', in Stoltzfus and Friedlander, eds., *Nazi crimes*, pp. 197–215.

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'terrifying SS jargon' Eichmann used. But instead of reconsidering his earlier characterization, Mulisch referred to Eichmann's love of order: 'form and content were one'.[118]

Sergio Minerbi's trial diary, originally compiled for an Italian newspaper by the Rome-born writer and Israeli government official of later years, offers an alternative view. Lacking the literary talent of either Arendt or Mulisch, his account is of greatest interest where it differs from the two others as in his support of Hausner's strategy to broaden the trial's scope. While he agrees that Hausner's cross-examination effectively failed there is no implication of the prosecutor being ill-prepared or not up to the job. Instead, Minerbi accounts for Hausner's difficulties by referring to Eichmann's stubborn denial and 'his own brand of logic'.[119] Still, his perception of Eichmann as an obedient, pedantic character who speaks a 'bureaucratic language so prolix, abstruse, and technical', is not too far from Arendt and Mulisch either.[120] To the historian, such similarities are thought-provoking as it is hard to tell if they result from shared experience or mutual influence. Whether these overlapping characterizations reflect how Eichmann cast himself into the only role that seemed to offer at least a slight chance to save his life, or to what degree he believed in his guise of the cog in the machine, or if the image of the bureaucrat spread among journalists in Jerusalem we do not know. And so we are cautioned that the heuristic risks in using trial records do not stop at the submitted evidence or the trial transcripts but also pertain to contemporary observers and their often influential readings.[121]

How shady these can be and how thorny transitional trials may turn out in the long run was illustrated in the 2011 case of John 'Ivan' Demjanjuk in Munich which was fraught with problems. On trial was a former *travniki*, one of those Soviet POWs who had swapped captivity and starvation for guard service in Sobibor. After a first, farcical trial in Israel in 1987 (where Demjanjuk was sentenced to death after having been mistaken for another man), the Munich case was not the 'last great Nazi war-crimes trial',[122] but it signalled a turn in legal dogma: after decades, German justice finally adopted the Allied 'common design' concept. Demjanjuk was indicted and found guilty upon the theory that all camp personnel had knowingly and willingly participated in mass murder, even if they had come there under adverse conditions. An understanding of the Holocaust as a complex enterprise which had involved various layers of perpetrators with different motivations and with varying scope of action

[118] Mulisch, *Criminal case*, pp. 93, 11, 117, 119, 126.

[119] Sergio I. Minerbi, *The Eichmann trial diary* (New York, NY, 2011), p. 144.

[120] Ibid., p. 124.

[121] A valuable anthology now tackles these problems, covering theoretical and methodological issues as well as pragmatic how-to questions: Finger, Keller, and Wirsching, eds., *Recht.*

[122] Heinrich Wefing, *Der Fall Demjanjuk: der letzte große NS-Prozess* (Munich, 2011); cf. Lawrence Douglas, 'Ivan the Recumbent, or Demjanjuk in Munich', *Harper's Magazine* (Mar. 2012), pp. 45–52.

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pervaded the trial. As did the idea that no one who had participated in mass murder and genocide, however lowly, should escape from justice. That, however, was also the trial's Achilles' heel after German lawyers had failed to bring Demjanjuk's superiors and collaborators to trial. That the former perpetrator nation dispensed justice to someone with such an ambiguous biography as Demjanjuk seemed like a bizarre epitaph to some observers.[123]

V

Observing the Demjanjuk trial, one historian professed astonishment that most of the protagonists prioritized winning their case over ascertaining historical facts. 'Historians and lawyers', she concluded, 'don't get well along with each other.'[124] Such irritation betrays a time-honoured confusion of law and justice, very much like that of historical knowledge and truth. But it is precisely the achievement of recent publications on transitional trials that these correlations have come under scrutiny. Yet it is not only historians who frequently fail to appreciate the peculiarities of legal inquiry and courtroom performance. Jurisprudential views which conceive of transitional justice's obstacles as 'overblown versions of ordinary legal problems'[125] indicate a neglect of historical contingency and underrate the distinct quality of social disruption caused by regime change and rampant human rights abuse. Times of transitional justice are periods characterized by the density and intensity of judicial trials and politico-administrative procedures, providing a context which differs strongly from that of 'ordinary justice'. Moreover, as Ruti Teitel has argued, transitional justice is not only shaped by context but also helps to construct historical transition and to make it comprehensible to contemporary and retrospective observers.[126]

If the cultural turn has thus helped to stake out the common ground of jurisprudential and historiographical research, while also sponsoring a mutually intelligible language, interdisciplinary debate cannot do without reciprocal disciplinary awareness. If jurists ought to allow for historical contingency and the role of historical protagonists,[127] historians will benefit from appreciating due process as a 'meta-rule-of-law' and from understanding the legal challenges

[123] Wefing, *Fall*.

[124] Angelika Benz, *Der Henkersknecht: der Prozess gegen John (Iwan) Demjanjuk* (Berlin, 2011), pp. 234, 85.

[125] Posner and Vermeule, 'Transitional justice', p. 765. However, they rightly caution against too strict a differentiation between 'unstable' transitional and supposedly straightforward 'ordinary' justice.

[126] Ruti Teitel, 'Transitional jurisprudence: the role of law in political transformation', *Yale Law Journal*, 106 (1997), pp. 2009–80, at p. 2080.

[127] Cf. Gregory Shaffer and Tom Ginsburg, 'The empirical turn in international legal scholarship, *American Journal of International Law*, 106 (2012), pp. 1–46; for an example see Richard Ashby Wilson's study of the present international tribunals, *Writing history in international criminal trials* (Cambridge, 2011).

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implied in the identification of 'criminal liability with political responsibility'.[128] As transitional trials are unlikely to become obsolete anytime soon, such intellectual migration might help to appreciate the virtue of what Charles Maier has called 'feasible justice'.[129] In any case, both lawyers and historians are faced with the same caveat: '[c]losure is not possible'.[130]

[128] See Teitel, 'Transitional jurisprudence', pp. 2021, 2039.

[129] Charles Maier, 'Doing history, doing justice: the narrative of the historians and of the truth commissions', in Robert I. Rotberg and Dennis Thompson, eds., *Truth v. justice: the morality of truth commissions* (Princeton, NJ, 2000), pp. 261–78, at p. 261.

[130] Minow, *Vengeance*, p. 5.

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