THE NUREMBERG TRIALS AND THE OCCUPATION OF GERMANY

Donald Bloxham∗

This paper was presented on the conference panel “Law and the Construction of Memory: Trial as History.” Consequently it contains nothing by way of reflection on the great significance of the Nuremberg trials in the development of international law and the confrontation with criminal regimes in the present day; it is concerned exclusively with the impact of the courtroom proceedings and trial evidence on consciousness and understanding of Nazism and its deeds. I have written elsewhere on the role that the International Military Tribunal (IMT) case and the subsequent Nuremberg proceedings played in shaping and sometimes distorting historical understanding of Nazi criminality in the long term, as well as their undoubted success in establishing an invaluable base of documentary and oral evidence for exploitation by later historians.1 Yet the “construction of memory” in the short and medium terms was also a key aim of Robert Jackson’s prosecution staff, the Office of the Chief of Counsel for the Prosecution of Axis Criminality (OCCPAC), and Telford Taylor’s Office of the Chief of Counsel for War Crimes (OCCWC) thereafter, and it is that issue with which I am concerned here.

In the immediate post-war years, engineering a narrative of the Nazi period was seen as essential in the process of re-making the German body politic. Though trials were in part aimed at an international audience, both in terms of the publics that had been subjected to the demands of total war and of the many communities of victims who wished for some redress, the chief immediate target was the German populace. The Nuremberg and other trials, with their remit to address crimes and the perpetrators of crimes, complemented the occupation machinery put in place to confront—by “re-education”—the influence of Nazi thought and to purge—by “de-nazification”—


individuals particularly associated with the former regime. This essay focuses upon the reactions of West Germans to the policies of the western Allies.

Contrary to the assertions of a number of scholars,² the picture that emerges is of a society failing and refusing to confront the breadth and depth of its culpability. However positively the German public as a whole today views the Nuremberg trials, and however enthusiastic many German lawyers today are for innovations such as the International Criminal Court and genuinely universal jurisdiction for war crimes and crimes against humanity, at the time it mattered most, namely in the immediate aftermath of Nazi rule, both the medium and the message of trial were decisively rejected by the west German populace. The influence of generational change in the Federal Republic of Germany—particularly the youth movements of the 1960’s which brought with them a more open approach to “the crimes of the fathers,” plus economic stability—are the key factors in understanding Germany’s retrospective embracing of “Nuremberg,” not the beneficent and re-educative impact of the trials themselves, as wishful advocates of the integrative effects of trials at the Hague and Arusha would have us believe. To understand why the Nuremberg trials failed in this key sense, it is essential to understand the wider, changing socio-political and geopolitical landscape of the early post-war years, particularly the development of a revisionist German nationalism and the onset of the Cold War, and also to address the psychological state of the German people.

Even in their most intensive phase, at the time of the IMT proceedings in 1945-46, Allied trial and occupation policies in western Germany made no significant impact on German understanding of the recent past, nor did they inculcate a sense of responsibility for it. Scrutiny of German responses to the IMT trial and the wider “Schuldfrage,” or “guilt question,” of the time suggest that such attention as was given to those issues was shaped, on one hand, by the desire for individual self-exculpation, and on the other, by the sense that whatever Germany had inflicted was balanced if not exceeded by the suffering inflicted on Germans by Allied area bombing campaigns, the

mass rape of German women by Soviet forces in 1945, the legions of German POW’s lost to Soviet prison camps, and the Ally-approved forced expulsion into Germany of perhaps twelve million ethnic Germans from eastern and central Europe beginning in 1944.3

Within the context of reaction to the occupation, one factor was specific to the institution of trial: tedium. After the initial excitement at the instance of legal proceedings in 1945, there was a significant ebbing of interest,4 just as there was even among the judges on the International Military Tribunal.5 The pattern of “boredom” and attention around the IMT trial is in itself instructive, however, indicating more about the perceived relevance of each component part of the proceedings as its intrinsic interest value. Thus we only read of interest escalating again when the twenty-two defendants made their own concluding addresses to the court, the final act before judgment.6 The period of the attention lapse encompassed much of the substance of the trials: the cross-examinations of the individual defendants, the “criminal organization” hearings, and a good part of the presentation of the Soviet case, which contained the most graphic and extensive evidence on crimes against humanity. It is here that we encounter the interface between “boredom,” as in a lack of interest, and a somewhat different quality, namely a lack of concern. One group was certainly keen to monitor the progress of the organization cases: the fate of most of the inmates of the civilian internment camps hinged upon their outcome.7 The implication is that most of the remainder of the population was divided, in whatever ratio, between those who saw nothing of relevance in that part of the trial and those who deafened themselves to it. The part of Jackson’s opening speech in which he differentiated between Nazis and the mass of Germans met with much enthusiasm, as did those closing statements


6 OMGUS SURVEYS, supra note 4, at 121-22. This revealed a particular decline from February 1946 onward. OMGUS also recorded a diminution (within the general decline in attention) in the numbers of people reading trial reports in their entirety. See id. at 34. For the beginning of the decline, see Abroad: Penalties for War Crimes, N.Y. TIMES, Dec. 16, 1945, at S2; War-Crimes Trial Dull to Germans, N.Y. TIMES, Jan. 2, 1946, at 6.

7 Control Council for Germany (British Element) Intelligence Division Review, Nov. 1946, at 7 (on file with the Modern Records Centre, Warwick University, MSS.157/3/GE/1/4/1-21).
of the individual defendants which defended the German people. Indeed, there was a clamor for more substantial press coverage of the latter.\(^8\) This interpretation of the evidence is corroborated by the general absence of reaction to the verdicts on the organizations amidst a hail of criticism about the IMT’s acquittals of high-ranking individuals.\(^9\)

It was entirely understandable that many would think, as did a columnist of the left-wing newspaper *Telegraf* in May 1946, that the eyes of the world were on Germany’s reaction to the trial.\(^10\) “Appropriate” reactions were orchestrated in the Soviet zone at the conclusion of the case, yet, consistent with Stalinist thinking, these protests were specifically aimed at the acquitted former Minister of Economics Hjalmar Schacht, former Vice-Chancellor Franz von Papen, and former propagandist Hans Fritzsche as aristocratic or bourgeois enemies of the German people. That the same responses to the acquittals should be demonstrated spontaneously in the west indicates the extent to which Germans as a whole conceived of the prominent Nazis as “other,” or at least wished to give this impression. Thus, no matter how many criticized the IMT trial on grounds of legitimacy,\(^11\) at the time, clear majorities always averred that their former leaders deserved punishment.\(^12\) The same stimulus that provoked mass demonstrations against the acquittals also induced an entire row of the audience to abandon the most expensive seats in a Frankfurt cinema in protest against the passage of *Nürnberg und seine Lehren*—a documentary of the trial focusing on the individual convicts and showing footage of the concentration camps.\(^13\) The events in the film theater in turn bear a distinct resemblance to the response of Schacht when the concentration camp film was actually shown to the IMT: he “ostentatiously turned away” and sat “with his head held high in defiance.”\(^14\) For all these actors, the registering of disgust was a public expression of the perceived moral vacuum separating them from the criminals.

The only real sympathy—and, arguably, the related sentiment of

---

\(^8\) *War-Crimes Trial Dull to Germans*, supra note 6, at 6; Land Nordrhein-Westphalia Reaction Report, Sept. 1946, 6-7, 22-23, *in Personal Papers of Sir Victor Gollancz* (on file with the Modern Records Centre, Warwick University, MSS.157/3/GE/1/17/6).

\(^9\) German Reactions to the Nuremberg sentences (on file with The National Archives, London, FO 946/43) (discussing reactions in locations such as Hannover, Schleswig-Holstein, Düsseldorf, the Ruhr, and Hamburg).

\(^10\) *TELEGRAF*, May 4, 1946.


\(^12\) *War-Crimes Trial Dull to Germans*, supra note 6, at 6; Dana Adams Schmidt, *German Boards Face Test on Nazis*, *N.Y. TIMES*, Nov. 10, 1946, at 103.


empathy—with any of the “major war criminals” concerned those whom it was felt were not the highest initiators of Nazi policy. Hence amidst the general satisfaction displayed by the contemporary German public at the equity of the IMT proceedings and judgment, the most oft-voiced reservations concerned the fate of the service chiefs. Many did not feel that a soldier or sailor, no matter how deeply complicit, should share the sentence of the overtly political grouping that had compromised him. Thus the frequently made contrast between the IMT acquittals and the death sentences for General Alfred Jodl and Field Marshal Wilhelm Keitel. On its most basic level, the principle of differentiation suggested that a general should be executed by the bullet rather than the rope.  

15 A plea on the method of execution that was supported in the case of Jodl by the American and French judges. Letter from the Control Council for Germany to the Control Office for Germany and Austria, Oct. 10, 1946 (on file with The National Archives, London, FO 945/332); see also German Reactions to the Nuremberg Sentences (on file with The National Archives, London, FO 946/43) (discussing reactions in locations such as Hannover, Schleswig-Holstein, Düsseldorf, the Ruhr, and Hamburg).

16 FRANK BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955, at 92, 100-01, 109-10, 162-63 (1989); FREI, supra note 3; see also Alfred Streim, Saubere Wehrmacht?, in VERNICHTUNGSKRIEG: VERBRECHEN DER WEHRMACHT 1941 BIS 1944, at 569, 575 (Hannes Heer & Klaus Naumann eds., 1995) (discussing some of the spurious *tu quoque* arguments).
And thus arose also the imperative finally to discredit the trials by overturning the verdicts, or at the very least by securing the freedom of the convicts by pressuring the Allies. Effectively this was a move toward the “decriminalisation of the Nazi perpetrators,” and it acquired the epithet the “Endlösung der Kriegsverbrecherfrage”—the “final solution of the war criminals question.”

The arguments and aims now were of a different nature to the early popular excuses of ignorance and powerlessness, but they fed off their precursors. The shrewdest move made by the elites was to link the two strands in the identification of all war criminals—aside perhaps from some of the “political” IMT convicts—with the ethic of service to the state. Service, or “duty,” was equated at the time with obedience to senior orders. As Lord Wright of the United Nations War Crimes Commission observed, it was the unanimous rejection by the various “war crimes” courts of this principle as a defense which underpinned much of the objection to the trials. The best known and most emotive instances of these rejections predictably occurred in the trials of high-ranking soldiers, and so it is not surprising to note that when in the summer of 1946 a group of anti-Semitic students and faculty members of the University of Erlangen launched an attack on the Nuremberg trials, they threatened to form veterans associations to discourage “by word and deed” slurs on officerhood. Six years later, the Institut für Demoskopie enquired of Germans in the western zones which of the following group they considered justly imprisoned, and which unjustly: Field Marshal Albert Kesselring (who had been convicted by a British court), Grand Admiral Karl Dönitz, Albert Speer, Rudolf Hess, and Baldur von Schirach (all of whom had been convicted by the IMT). The aggregate of respondents placed the men in that order, with the greatest sympathy thus reserved for the two service chiefs.

18 BUSCHER, supra note 16, at 126, 163.
20 For instance, for the reporting of the defense arguments of the soldiers and the High Command and General Staff at Nuremburg, see CHRISTOF SCHNEIDER, NATIONALSOZIALISMUS ALS THEMA IM PROGRAMM DES NORDWESTDEUTSCHEN RUNDFUNKS (1945-1958), at 165 (1999).
21 JAMES F. TENT, MISSION ON THE RHINE 92 (1982).
22 THE GERMANS: PUBLIC OPINION POLLS, 1947-1966, at 202 (Elisabeth Noelle, Erich Peter Neumann, & Gerard Finan eds., 1981). Six percent of interviewees thought Kesselring was justly imprisoned, sixty-five percent thought not. The corresponding figures for Hess were twenty-two
reservoir of sympathy had been tapped into for Keitel and Jodl, and it was exploited more and more heavily as the new rhetoric identified all convicts with German soldiers, and increasingly regardless of their crime or the organization to which they belonged.23

In combination, these contentions underpinned the policy towards the Nazi past that was ultimately adopted by most West German political parties. The revisionist line was much more palatable for the majority of the population too,24 and as in the formation or re-formation of all national communities, a mythologizing re-write of the past was perhaps inevitable; Nazi genocide certainly could not fit any “optimistic theory” about the present or future.25 Certainly by 1947 the general impulse in West German society to “draw a final line” under the recent past—or at least on the suffering that they had caused, if not that which they felt as losers in the war—was in the ascendant.26 The flow of published accounts of the concentration camps by victims also dried up after 1947 and public discussion about that side of Nazi history was silenced, paving the way for the new master narratives of silence or obfuscation or emphasis on German victimhood, or indeed of continued anti-Semitism.27 This was attributable to a number of factors including growing assertiveness as the war distanced itself, mass discontent with the ill-managed and inequitable “de-nazification” policies, and, relatedly, disdain for the authorities as Allied infighting and difficulties in the running of the country removed their “aura of moral superiority.”28

By the second half of 1947, the second largest-selling newspaper in the British zone, the Christian Democrat Westfalenpost, said of the defendants in the Nuremberg “Doctor’s trial” that they were murderers and “public torturers,” but that “doubtless the interest of the German

23 Bernd Boll, Wehrmacht vor Gericht: Kriegsverbrecherprozesse der Vier Mächte nach 1945, 24 GESCHICHTE UND GESELLSCHAFT 570, 592-93 (1998); FREI, supra note 3, at 268-96.
24 A survey of 1,000 letters sent to U.S. High Commissioner John McCloy in 1951 requesting release of imprisoned war criminals was divided into three chief categories of argument: Christian forgiveness/brotherhood; political contentions (including the influence of the war criminals issue on German-American relations, the relevance of Soviet crimes against humanity, and the justification of harsh German military measures in the face of “‘partisans’”); and legal concerns. See Ulrich Brochhagen, Vergangene Vergangenheitsbewältigung, 36 MITTELWEG 145, 149 (1992-93).
25 HERF, supra note 2, at 392.
26 FREI, supra note 3, at 14.
people in the trial would have been greater if an objective professional German judge had sat on the bench.”

By the end of 1949, on the announcement of the eighteen-year prison term handed down by a British court to the prominent Field Marshal Erich von Manstein, August Haussleiter of the Bavarian section of the CDU reflected the further development of popular understandings of “justice” and victimhood. He suggested that such trials struck the public as “witchcraft trials” (“Hexenprozesse”) if there was no possibility of punishing under international jurisdiction crimes committed on the invasion of Germany and during the expulsion of Germans from eastern Europe.

Manstein’s defense counsel, Paul Leverkühn, had earlier asked rhetorically whether his client was to be “an offering on the altar of the Soviet Union or Poland, reeking with the blood of millions of Germans.”

The discourse was shifted from the subject matter of the war criminals cases to the legitimacy of the trials themselves: from the actions of Germany to the actions of the Allies and, by extension, to German victimhood. This explains why the later chancellor Konrad Adenauer could come to campaign against the death sentences passed against Einsatzgruppen leaders and members of the concentration camp hierarchy, or why Martin Niemöller could petition on behalf of such people as Erich Koch, the notorious Reichskommissar of the Ukraine: Koch and the Nazi executioners were fellow Germans to be saved rather than criminals to be punished. This concerted assault on the very idea of trial even succeeded in retrospectively influencing German opinion on the IMT trial. In October 1950, the reactions analysis staff of the U.S. High Commission encountered the greatest shift in German societal attitudes ever recorded to that time. Only thirty-eight percent of a sample of 2,000 people regarded the IMT trial as having been conducted fairly, compared to the seventy-eight percent registered with that view four years earlier.

The German elites were gifted a potent lever against Allied trial and re-education policy with the onset of the Cold War. The need to placate these leading Germans, and with them broader national

---

sentiment, in the interests of German allegiance in the burgeoning political conflict with the USSR, led first to a winding-down of the war crimes trials programs in all western occupation zones in the context of a general easing of occupation policy. Later it resulted in a series of “sentence reviews” for convicted war criminals that by the early 1950’s sought to “solve” the “war criminals question” by the simple expedient of releasing them all. In this process, given the moves in the 1950’s to re-arm western Germany, the Allies became particularly sensitive to rhetoric about “wrongly” imprisoned soldiers.34

In the course of 1946-47, the Americans moderated their intentions from “re-education” to “reorientation,” and substituted the more lenient occupation statute “Joint Chiefs-of-Staff [JCS] 1779” for its predecessor, JCS 1067. Whereas JCS 1067 stipulated that Germany should be treated not as a liberated country but as an occupied territory, JCS 1779 aspired to the re-establishment of a “stable and productive Germany.” The U.S. military government was instructed to expedite the swift completion of its war crimes trial program as the foreign policy “realists” exerted their influence and the Truman doctrine was enunciated.35 The titanic efforts of Telford Taylor and OCCWC in continuing to the end of the 1940’s with what was in the eyes of Congress and the British Parliament an increasingly controversial attempt to give more substance to some of the principles established at the IMT trial by the pursuit of “major war criminals of the second rank” were substantially undermined by the collapse of American—and British—legal machinery in the 1950’s, such that jails in the former U.S. zone were emptied of war criminals by 1958—and in the erstwhile British zone by 1957. (Those imprisoned in the IMT trial were held under quadripartite authority in Spandau jail, and thus could not be released because of the need for Soviet agreement.) Most telling of all in the sorry tale of the failed re-education mission that was the subsequent Nuremberg trial program is that the edited highlights of the twelve trials, known after publication in Washington DC from 1949-53 as the fifteen “green volumes,” were never published in Germany.

In conclusion, in reaction to trials which were to become a touchstone of the whole guilt question,36 the German public could either identify themselves against war criminals or with them. In the first


36 FREI, supra note 3, § 2.
instance, the major war criminals could then be induced to bear the sins
of the whole. In the second, as with the growing rejection of Allied
authority, it was necessary to claim that there had been no sin, or at least
to “relativize” that sin. Over time, the latter trends became dominant in
western Germany. In an attempt to explain this process, Jeffrey Herf
has observed that in the early years of the Federal Republic of Germany
there was an inherent “tension between democracy on the one hand and
memory and justice on the other.” 37 The accurate implication is that the
sensibilities of most Germans would not allow sustained judicial and
public investigation of the past. Yet the phrasing of Herf’s dichotomy is
not precise. While democracy and justice may have been opposed,
justice may not be directly equated with memory. Justice, as enacted
against the few at Nuremberg, did not correspond to disclosure to the
many in Germany as a whole, nor did criminal conviction transmute to
public consciousness.

37 HERF, supra note 2, at 202-03.