Donald Bloxham

Genocide on Trial: Law and Collective Memory

Introduction: (Mis-)Remembering Nuremberg

Assessing the impact of the Nuremberg trials on something as amorphous as 'collective memory' will inevitably be a subjective exercise, coloured strongly by the indicators one selects. While the trial records themselves provide an indelible record of what was said at Nuremberg, and thus a fixed point for the historian of the trials per se, ideas of what 'Nuremberg' as a whole meant and means are far from fixed. At the most basic level, there is confusion as to what is meant by 'the Nuremberg trials', since some use that formula to refer exclusively to the quadripartite International Military Tribunal (IMT) 'trial of the major war criminals' of 1945-6, and some more inclusively to refer to both the IMT trial and the twelve subsequent Nuremberg trials conducted under solely American auspices. The distinction between these categories is not just academic: while the subsequent trials went into much greater detail than the IMT proceedings on specific aspects of Nazi criminality, they were simultaneously much less significant in the process of popular memory-formation in the 1940s and 1950s. General comprehension has not been aided by the single most important popular representation of 'Nuremberg', Abby Mann's Judgment at Nuremberg. This Hollywood production spliced together with considerable artistic license episodes from both the IMT trial and some of the subsequent proceedings.

Perceptions of 'Nuremberg' continue to change to this day. The introductory notes to this panel in the present conference programme, for instance, tell us that the trials 'aimed to restore justice both to the defendants and to the history and memory of the Holocaust.' This is strongly reminiscent of a conference held at the Benjamin B. Cardozo Law School in New York in March 2005, 'The Nuremberg Trials: A Reappraisal and their Legacy'. There, the introductory sessions were filled with depictions of the Nuremberg confrontation with perpetrators of genocide, disregarding the fact that the primary thrust of the trials, from the dominant American perspective at least, was the aggressive war making of the Nazi regime. We were told in that conference programme that the gathering sought 'to recall and reaffirm the lessons – the legacy – of Nuremberg that underlay the trials' deliberations: that the Nazi regime almost succeeded because of the pathologies of hate and evil, as well as the crimes of indifference and silence.' It is almost as if these pronouncements too were influenced by Judgment at Nuremberg, which was, in relation to the proceedings it purported to represent, disproportionately concerned with crimes against humanity as opposed to the crime of aggressive war. Such genocide-centric conceptions of 'Nuremberg' may tell us much about the way that we in a most Holocaust-conscious world would like to think the trials were conducted; they tell us less about the priorities of the Allied law-makers and trial participants, or about the balance of everyday practice and discussion in courtroom 600 in 1945-6.

At Nuremberg addressing crimes against humanity as a whole was an important but ultimately subsidiary end to the primary goal of tackling 'crimes against peace'; addressing what we now know as the Holocaust was subsidiary even to that subsidiary end. For the most part, when they were considered at the IMT trial, crimes against Jews qua Jews tended to be subsumed within the larger whole of Nazi atrocity, left ill-defined within the mass of murder, enslavement and war-related destruction affecting other groups in Europe. It is possible to argue, by piecing together disparate pieces of evidence marshalled in the Nuremberg courtroom, that the IMT trial presented a more-or-less representative if rudimentary outline of the 'final solution of the Jewish question'. This, however is a far different matter to attributing a conscious plan for such an outcome to the Allied prosecutors (left to his own devices US chief prosecutor Robert Jackson would not have had Einsatzgruppe leader Otto Ohlendorf testify at Nuremberg, while the other witness who did something to animate the 'final solution', former Auschwitz commandant Rudolf Höß, was actually brought to the stand by the defence rather than the prosecution). It is also a world away from proving anything at all about the effect of such a
representation on audiences then or latterly. More importantly, it is probably to fall into the trap of finding what one wants to find in the historical record.¹

Writing about the exaggeration in some recent scholarship on the British Empire of the impact that the imperial experience had on domestic British society, Bernard Porter has observed that it is imperative to look at the empire's impact on British society in context; to survey ... the whole site. It will not do simply to look for 'imperial' evidence without being aware of what lies around it; or even, perhaps, to look for imperial evidence at all. People who look for things sometimes find them when they are not there; especially — in this case — if they are looking through distorting lenses. Even when you can avoid that, there is still the temptation to exaggerate the significance of what you have found. There is a lot of genuinely 'imperialist' material from this period, which if corralled together looks impressive, and even overwhelming, but which really needs to be viewed in situ and against the background of other kinds of evidence if its real importance and meaning are to be adjudged.² If we were to substitute 'the Holocaust' for 'the Empire' in the first sentence, and likewise 'the trial of the major war criminals' for 'British society', and read the rest of the paragraph around those two new referents, we have the basis for a trenchant critique of the idea that the trial of the major war criminals did 'justice' to the Holocaust or any other Nazi genocide.

For present purposes, any discussion of the relationship between collective memory and the trials must recognise that the very fact and the shape of the trials, as well as the profile of the tried, were at least as significant as was the actual substance of the trials in terms of the day-to-day proceedings and the evidence adduced there. This may even be truer in the IMT case than in other instances, owing on one hand to the contentious, ex post facto nature of the laws applied and, on the other hand to the dry, tedious documentary approach favoured by the dominant US prosecution team, OCCPAC (Office, Chief of Counsel for the Prosecution of Axis Criminality). The crux of my argument hereafter is that whatever hugely significant things they achieved as a precedent for trying leaders of state for international crimes, in creating a huge documentary database for future historians of Nazism, and tempering vengeance with a measure of justice, the Nuremberg trials did little by way of influencing a collective memory of Nazi criminality. Other instructional media and propaganda forms were more significant than the courtroom. Moreover, the victim groups of the war era that most preoccupied most countries either conducting or on the receiving end of trials tended not to be the main target-groups of Nazi genocide, but instead whichever groups best served national agendas. Already by the 1950s, in those places where there was still the remotest interest in 'Nuremberg', for which we can read primarily Germany, these more powerful influences had successfully occluded what the trials had endeavoured to transmit. Subsequent 'rediscoveries' of Nuremberg, and reassessments of its 'true' lessons and legacies have had as much to do with the values of the time of the reassessments as with what 'Nuremberg' itself actually was.

**National agendas and international crimes**

Martin Conway has observed that the shape and character of the various purges and prosecutions provide an excellent means of analyzing the dynamics of European societies in the immediate post-war

¹ Donald Bloxham, Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory (Oxford: Oxford University Press, 2001), chs. 1, 2 and 3; contrary views about the effectiveness of the Nuremberg trial in informing about the Holocaust are held in Michael Marrus, 'The Holocaust at Nuremberg', Yad Vashem Studies, vol. 26 (1998), 5-41; Jürgen Wilke et al, Holocaust and NS-Prozesse (Cologne: Bühlaus, 1993); Jürgen Wilke, "Ein früher Beginn der 'Vergangenheitsbewältigung': der Nürnberger Prozess und wie darüber berichtet wurde", Frankfurter Allgemeine Zeitung 15 November 1995; and, with much more nuance, and a different focus, Lawrence Douglas, The Memory of Judgment: Making Law and History in the Trials of the Holocaust (New Haven, Conn.: Yale University Press, 2001), part one. For analysis of the idea of 'crimes against peace' as the supreme crime, see Jonathan A Bush, "'The Supreme ... Crime' and its Origins: The Lost Legislative History of the Crime of Aggressive War", Columbia Law Review, vol. 12, no. 8 (December 2002), 2324-2423. On the testimony of the Nazi perpetrators mentioned, see Bloxham, Genocide on Trial, pp. 61-2, 105-6.

years. The devising and implementation of the structures of justice constituted a highly politicised arena in which mass pressures and elite concerns were focused with a rare intensity. In other words, the trials of the post-war years provide an insight into the societies bringing trial as much as into the actions of the accused. In the post-war era, the trial programmes of the victorious Allies and the liberated Europeans reveal a series of concerns related primarily to the reformation of national communities of identity and the writing of ‘usable’ historical records. These tendencies were all influenced, if often simply reinforced, by the developing cold war environment.

By far the greatest concentration of prosecutions of war and Nazi occupation-related offences occurred in the five years following the end of the war. In that time the British authorities in Europe tried more than a thousand Axis nationals, primarily Germans, for war crimes, and the USA tried more than 1,800. Neither would convict another war criminal until the London trial of the Belorussian collaborator-murderer Anthony Sawoniuk in 1999. Soviet figures are imprecise but we know that in May 1950, Soviet camps held 13,532 inmates convicted of war-related offences. In the same five-year period, in the Soviet zone of Germany, later the DDR, there were 12,177 convictions for Nazi- and war-related crimes; thereafter, there were only 630 such convictions up to 1964, and thence only 54 convictions to 1978. The French authorities in occupied Germany and in French military courts tried more than 2,000 individuals for war crimes and crimes against humanity from 1945-54, the majority in the first half of the period; the gauntlet was only picked-up again in 1987, with the trial of the Gestapo officer Klaus Barbie in Lyons. In Austria, 1945-55 saw 13,607 convictions, to be followed in the succeeding 17 years by only a further 18.

It is entirely natural that the immediate aftermath of war should have seen such a reckoning, as passions for retribution ran high and suspects were more easily identified. But what precisely were these suspects tried for? As Adalbert Rückerl observes, where figures are available, they indicate that the scale of trials for collaborators is of a different order to that of trials of war criminals proper. In Poland, the ratio was approximately 2:1; in Western Europe, collaboration trials accounted for thousands and tens of thousands rather than tens or hundreds as was the case with war criminals. The countries that had been under occupation by Germany seemed more interested in purging themselves of fascists and collaborators – or at least in some cases merely giving the appearance of a purge – then they were with charting substantive war crimes. In the immediate aftermath of the liberation of the Netherlands, for instance, a staggering 450,000 Dutch citizens were arrested. And ‘the purification’ – ‘l’épuration’ – of collaborators in France was much more important symbolically to the French people than the trials of German war criminals, quantitatively much more significant, and touched the lives of many more people. Before the establishment of the post-liberation French government after August 1944, some 9,000 French citizens were executed summarily or after ‘kangaroo’ trials. From 1945 onwards properly-constituted French courts passed another 1,500 death sentences, and 40,000 prison sentences.

There was a fundamental dissonance between the national cleavage of the various trial programmes in existence and the international nature of Nazi criminality in terms of both the locus of the crimes and the profile of the victims. This particularly affected the confrontation with crimes against Europe’s Romanies and Jews. As diaspora communities, who was to take up the cause of Jewish and Romany suffering in a world in which mass pressures and elite concerns were focused with a rare intensity? This question still remains to be answered in the case of the Romanies, for neither at Nuremberg nor any national legal forum was that situation addressed. In other words, the search for a ‘usable past’ was not mirrored in the places where the events occurred. On the contrary, it was the USA and the Soviet zone of the Reich that took the most thoroughgoing steps to bring to justice the perpetrators of war-related crimes.

3 Adalbert Rückerl, NS-Verbrechen vor Gericht (Heidelberg: CF Müller, 1982), pp. 102-4.
4 Deak, Gross and Judt (eds.), The Politics of Retribution in Europe.
case of genocide addressed either in the post-war years or since, illustrating again the influence of prevailing national and cultural norms – in this case, clearly chauvinist norms – in shaping the legal confrontation with the past.) Further, in states that had colluded by omission or commission in the ‘final solution of the Jewish question’, proper confrontation with that crime was a victim of the logic of state re-formation based on the myth of opposition to Nazism and its crimes. The latter imperative would only be reinforced as, approximately from mid-1947, the cold war began to descend on Europe, as we shall see shortly.

Aspects of the IMT trial itself were marked by the national and ideological agendas of each of the ‘big four’ Allied powers. In a sense, despite its eponymous aspiration to be an ‘international’ forum, it remained in significant ways quadripartite. This was certainly how it was regarded by many of the governments and former governments-in-exile that had been involved in the United Nations War Crimes Commission and that pressed in vain in 1945 for separate national representation at the trial, feeling that their interests could only be represented in such an environment by their own delegates. The same went for those Jewish organisations that petitioned the USA and the UK for a representative presence on the prosecution. Let us briefly consider as illustration of the influence of national agendas some aspects of the Soviet and French presentations at the IMT trial.

In the official Marxist-Leninist Soviet comprehension of Nazism, Auschwitz, like the Majdanek concentration camp, was promoted as a symbol of the ‘martyrdom’ of the international ‘victims of fascism’ rather than any particular ethnic group. In evidence at the trial a Soviet extraordinary state commission report concluded that the camp had consumed ‘four million [sic] citizens of the USSR, Poland, France, Yugoslavia, Czechoslovakia, Romania, Hungary, Bulgaria, Holland, Belgium and other countries’. The failure to mention Jews as victims was duplicated in the Soviet prosecution’s courtroom references to Treblinka and, uniquely in the Allied presentations, Chelmno.8

Characteristic of a post-war regime that sought to locate all of the blame for the chequered French war record on the Nazis, and exaggerated the part of the French resistance, heroes of the resistance were prominent on the French section of the IMT bench and amongst the French prosecutors.9 In the French prosecution case on war crimes and crimes against humanity in Western Europe, Jews were for the most part notable by their absence, most starkly so in the closing address of the French chief prosecutor François de Menthon.10 Even the one French witness who shed as much light at Nuremberg as any victim on the fate of the Jews at the largest Nazi extermination centre was representationally problematic. Marie-Claude Vaillant-Couturier had been transported from Ravensbrück to Auschwitz, there to witness the selection process for the gas chambers. The memory of this formidable witness proved accurate in every respect except those on which she could only speculate.11 But in addition to her strength of character and memory, Vaillant-Couturier had one quality as a witness that made her attractive to the French, so much so that the French authorities used her in other contexts beyond the trial.12 She had been deported to Auschwitz as a member of the resistance.

The case of Britain was slightly different. Britain had been a classic ‘bystander’ state to genocide, but, uniquely in Europe, had neither been militarily occupied or defeated. Nevertheless, Britain followed the rest of Europe in being heavily concerned in its war crimes trial programme with crimes committed against British servicemen. Like the other powers occupying Germany, it also acquired a responsibility for reckoning with offences committed within its zone of occupation. This zone

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effectively became part of Britain’s ‘backyard’, and the trials of various concentration, labour and prison camps constituted the other major component of the British trial programme.\textsuperscript{13}

British perceptions of Nazi criminality were shaped, and remained so for decades, by the institutions that British troops encountered as they occupied German territory. In much the same way that Buchenwald and Dachau were to colour American perceptions, the Bergen-Belsen concentration camp came to symbolise German perfidy. However the Belsen that the British media described to the domestic audience was not the same as that remembered today, primarily because of the silence surrounding the preponderance of Jewish inmates; a silence stemming, it seems, from the prevailing British institutional determination not to be seen to be fighting a war on behalf of the Jews.\textsuperscript{14} Moreover, Belsen was clearly not representative of the extremes of Nazi population policy in that it was not the same as the Polish extermination centres of the ‘final solution’. The rather partial picture of Nazi criminality presented by the western concentration camps liberated by the western Allies was also widely disseminated in Germany through occupation films, newspapers, newsreels and inmate memoirs licensed for publication, and through forcing the German public to visit the camps.\textsuperscript{15}

If Britain effectively domesticated a German institution of atrocity for its own war memory, Germany itself remained entirely insular in its preoccupations. Given the extent of German criminality in WWII it is perhaps understandable that many latter-day historians have seen in German self-pity only a cynical diversionary tactic. However, not only did the concern with the national fate mirror such concerns elsewhere, the sheer dimensions of German suffering at the close of the war and the rather sudden onset of such suffering within national boundaries were inevitably to colour any German perception. The influx of millions of ‘Volksdeutsche’ refugees and expellees from eastern- and southern-central Europe, the experience of increasingly massive area bombing, and the loss of further millions of menfolk either on the battlefield or to Soviet POW camps, combined with the effect of military defeat and occupation had a traumatic effect that was not diminished in German eyes by the objective fact that its cause lay in the Nazi campaigns of aggression.\textsuperscript{16} As for the Nuremberg and other trials, these were seen by many Germans – however perversely – as another form of victimisation, a simple extension of the punitive occupation of the country.

The other popular German reaction to the trial of the major war criminals – besides ignorance and nigh ubiquitous boredom – was to place all of the blame for Germany’s misfortunes on the men in the dock, and thus to exculpate the German masses and, indeed, anyone below the very highest rank of perpetrators. There was a particular enthusiasm in this connection to protest against any indictment of German servicemen. Ultimately the concept of the serviceman was extended not just to all of the military and indeed paramilitary forces of the Third Reich, but also to the majority of state functionaries – hence the enduring popularity of the flawed defence that Germans were only obeying senior orders. Moreover, Germans were not slow to point out that the German concentration camps that the Allies were so keen to highlight contained many Germans targeted by the Nazi regime, thus providing another spurious defence concerning the distance between the Nazi leadership and the people.\textsuperscript{17} The commonality between these varying responses was that in none of them were Germans really interested in courtroom information about Nazi atrocities, but simply in distancing themselves from such deeds either by focusing upon the perceived inequities of the trial medium – as ex post facto justice, or ‘victor’s justice’, or whatever – or by averring that the trials and their subject-matter had nothing to do with them anyway.

\textsuperscript{15} Bloxham, Genocide on Trial, pp. 80-90.
\textsuperscript{17} On German responses to the IMT trial and the occupation, see Bloxham, Genocide on Trial, pp. 80-88, 137-53.
There is one clear exception to the generalisation about narrow national interest amongst all parties. The American agenda at Nuremberg, as opposed to the US Dachau trial programme, and irrespective of any inconsistencies of problems that we might identify with it, was quite consciously intended as a universalistic exercise with genuinely international ramifications and aspirations for the regulation of international affairs in future. One suspects that it was easier for American representatives to take a broader view at this time since of all the big four powers the USA had been by far the least affected by the hardships of war, and therefore was least concerned with a ‘national’ reckoning; at the same time, the ‘big idea’ of Nuremberg was consistent with certain traditions of American optimism about the regulatory role that law might play in international affairs as in domestic, constitution-bound life. Whatever the precise combination of reasons, the American approach to Nuremberg stands in sharp contrast, for example, to the initial British refusal to engage with the idea of an international court for international crimes, and indeed the legal conservatism of the British in everything they did outside of their association with the USA at Nuremberg. Moreover, the American commitment to the goals of the IMT prosecution was strong enough to ensure the single-handed extension of the effort through the subsequent proceedings programme.

Paradoxically, it was the very universalism of American intentions that prevented a more extensive focus on the ‘final solution’ in the US prosecution effort. The ‘final solution’ and contingent parts thereof were to be used simply as illustrations of the crimes emerging from the ‘supreme crime’ of aggressive war; indeed, they would be used more-or-less interchangeably with what were in US Chief Prosecutor Robert Jackson’s lexicon called ‘representative examples’ of atrocity selected from across the full spectrum of Nazi criminality. This notion of ‘representative examples’ actually provided leeway for the use by France and the USSR of instances favourable to their own agendas, while the Anglo-Saxons continued as a rule to prefer evidence from German concentration camps rather than eastern extermination centres. More than this, some of the (Anglo-)American ambivalences evinced in responses to the ‘final solution’ during the war were also manifest in an apparent reluctance to give the Jewish fate in its specificity too great a proportion of attention at the trial.

When confronted with Jewish organisations requesting representation on the prosecution this was refused by Jackson, but not on the grounds given in reply to a similar request by the Polish Government, namely that it was logistically impossible to give time and space to all interested parties. Rather, as Jackson recalled, he had wished to ‘get away from the racial aspects of the situation’: ‘we didn’t want to exaggerate racial tensions’. ‘The only thing to do about that was to avoid making [Nuremberg] a vengeance trial’, he claimed, thus playing unfortunately into the stereotype of the vengeful Jew. Jackson was prepared to admit Chaim Weizmann as an expert witness for the prosecution on the murder of the Jews, but only on the condition of prior presentation of a statement carefully prepared in advance; Weizmann demurred. (The British remained faithful to their perennial line in insisting that it would be preferable to have non-Jews testify.) Colonel Murray Bernays, the inventor of the ‘conspiracy – criminal organisation plan’ had earlier gone a little further still, and suggested that it would give ‘added authority’ to the American case if ‘the Jewish problem [was] assigned to a group of high churchmen’ for presentation in court.

Tied into knots by his strategic-cum-ideological dilemma, Jackson was happy to have Jewish lawyers on his team, as long as they were not involved in presenting the Jewish case. As he said, “we

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19 Donald Bloxham, Genocide on Trial, pp. 62-3.
thought it would be just as bad not to let any appear as it would be to let too many appear.”

Likewise, both Jackson and the British were prepared to seek information pertaining to the Holocaust from Jewish sources, provided, as the British put it, they were ‘reliable’ conduits (which presumably implied them not being stridently Zionist).

But Jews could not be allowed to be seen to describe the fate of their kin either as prosecutors or witnesses; this was the task of ‘objective’ Nazi documentation on the one hand, and the voice of ‘universal’ opinion – personified in US Supreme Court Justice Jackson – on the other. By the same token, no individual crime against a specific group, however vast, could be allowed to supplant the quasi-universalist focus on prosecuting the waging of aggressive warfare. But irrespective of the precise balance of representation in the IMT’s proceedings, the key point to bear in mind in terms of collective memory-formation is that for aforementioned reasons the courtroom discussions fell largely on deaf ears.

The subsequent Nuremberg trials continued the titanic American effort, and their main thrust was to try to reinforce what had only tentatively been established by the IMT about the scope of German military and industrial responsibility for the Nazi campaigns of aggressive war. Nevertheless, other criminal complexes were also examined, including some of the primary agencies of the ‘final solution’ (if the most obviously relevant case, that of Ohlendorf and other Einsatzgruppen leaders, was only brought, despite it being a relatively lowly priority, because the surviving Nazi documentation promised a swift, open-and-shut case). Yet it is a sad truth that public attention and media coverage dwindled almost in inverse relation to the degree to which the detail and extent of Nazi criminality was being laid bare in court. Most of the subsequent trials were conducted amid virtual press silence, and when the trials were made the focus of public discourse this was to criticise the trial medium rather than the message.

In a more unambiguous fashion than in 1945–6 with the IMT trial, the subsequent Nuremberg trials became the focus of a revisionist nationalism whose concerns were re-establishing German sovereignty and removing the taint on the German name that war crimes trials represented. In October 1950, the reactions analysis staff of the US 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 four years earlier.

The increasingly strident West German rejection of the Allied trial programmes was, like the German attitude to the wartime atrocities themselves, not as exceptional as it might at first glance appear. If each country had its own concerns to highlight or downplay in the post-war years, the development of these national agendas was, equally, bound together in a series of temporal waves. ‘Mastering the past’ – ‘Vergangenheitsbewältigung’ – was everywhere aided by the cold war.

The rhythms of the ‘post-war decade’

Across the European board, among the countries liberated from Nazi rule in the period, the years 1944–5 saw the aforementioned purges, where rough justice and political solutions frequently preceded
any formal legal reckoning. Thereafter for perhaps another year – the period that Jeffrey Herf labels the ‘Nuremberg interregnum’, but which might better be characterised by the epithet the last year of the ‘antifascist consensus’ – the determination for a reckoning with the past was clearly still evident, despite early signs of a rift between Western and Eastern Allies. The IMT trial, the high watermark of judicial process at a point shortly succeeding the open bloodletting, therefore also occurred within this time-frame.

In Germany, the years 1945-6 were the harshest occupation years, with non-fraternization regulations strictly enforced in the spirit of the earlier demand for unconditional surrender, and denazification in full force. While British and American domestic constituencies were rapidly losing interest in issues of trial and occupation, and starting to address the needs of demobilisation and reconstruction, so much so that midway through the IMT trial the British chief prosecutor Hartley Shawcross had to plead with the press magnate Lord Beaverbrook to devote more column inches to the case in his newspapers, and that the BBC had withdrawn its reporter by the beginning of 1946, the Allied ‘re-education’ programmes continued to focus on the issues of complicity in Nazism, and the aforementioned concentration camp imagery was used extensively both to shame the populace and ram home the justification for occupation.

The decline and fall of the anti-fascist consensus was also the beginning of the cold war proper. The year 1947 brought with it serious schisms in the council of foreign ministers of the ‘big four’ powers; the announcement of the Truman Doctrine; intensified Stalinization in eastern Germany and throughout the Soviet sphere; and the eviction of socialists from a number of coalition governments in the west. Even earlier than this, during the course of 1946, the British government had decided for good realpolitik reasons that there was no utility in proceeding with a mooted second quadripartite trial of major war criminals, and was accordingly instrumental in scuppering French and Soviet plans for the trial. In the changed international environment of 1947, purges and war crimes trials programmes everywhere were being wound down, their focuses ever more narrowly brought to bear on matters of solely national interest before they were closed down altogether in the succeeding months and, at most, very few years. States in the west were now ‘allowed’, if not encouraged, to put aside awkward wartime memories while emphasizing their anticommunist credentials; states in the communist east were encouraged to overlap wartime antifascism and resistance. On both sides many state functionaries compromised in the war years were kept in post, illustrating the limits of denazification across the board.

As the cold war set in, so too did an increasingly explicit tendency on either side of the iron curtain to use and abuse for political ends the record of Nazi atrocity. Whereas in 1945-6 there had been a certain plurality of victim voices in both East and West Germany, these were rendered increasingly uniform thereafter. Thus, for instance, we see the promotion in the Soviet-controlled media of the East German zone of individuals like Walter Bartel, the former head of Buchenwald’s International Resistance Committee, a communist with distinctly anti-western leanings. Owing to the leftist-dominated prisoner rising in Buchenwald, that camp became a particular focus of eastern German remembrance, but at Sachsenhausen too political prisoners were prioritised in memory by the large memorial obelisk bedecked with a red triangle alone, while the ruins of the crematoria mentioned only the Soviet POWs murdered there (in an interesting inversion of the pattern of memory in the west, where the massive tragedy of millions of POW deaths has long been ignored). Corresponding to the

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39 Bloxham, Genocide on Trial, p. 147.
40 Donald Bloxham, ‘The Trial That Never Was’: Why there was no Second International Trial of Major War Criminals at Nuremberg?’, History, vol. 87, no. 285 (2002), 41-60.
41 Desk, Gross and Judt (eds.), The Politics of Retribution; Frei, Vergangenheitspolitik.
grossly disproportional emphasis on the resistance movements within these camps and within the Soviet sphere as a whole, there was little emphasis on other camp inmates, be they homosexuals, Romanies or Jews.\textsuperscript{33}

The symbolic significance of individual survivor-witnesses and institutions was not lost on the British and the American occupiers either. Indeed, contrary to stock generalisations about the difficulties the Allies had in getting to grips with the scale and complexity of Nazi criminality, the Allied authorities in Germany showed themselves aware about and adept at selecting from the range of Nazi crimes. A report produced in April 1945 by the influential Psychological Warfare Department (PWD) of the joint Allied supreme command SHAES\textsuperscript{34} on the making of a documentary on the concentration camps aimed to ‘promote German acceptance of the justice of the Allied occupiers by reminding Germans of their past acquiescence’ and therefore, their ‘responsibility’. However it also aimed to show specific crimes committed in the German name to rouse the populace against the Nazis. The latter was to be accomplished specifically by focusing upon German victims of atrocities, and if possible, personalising them by establishing their individual identities.\textsuperscript{35}

Finding iconic ‘good’ Germans who had been mistreated by the Nazis was naturally an important part of leading the country towards democracy in illustrating by example the existence of political alternatives and moral choice. Yet the straightforward message could and would be subverted, notably in the case of the military ‘resistance’ in Germany, whose most ostentatious act was the bomb plot on their leader’s life on 20 July 1944. Their actions, as recorded in 1946 in Schlabendorff’s \textit{Offiziere gegen Hitler} and in 1947-8 in Allen Dulles’s \textit{Germany’s Underground} \textsuperscript{36} and Hans Bernd Gisevius’s \textit{Bis zum bitteren Ende} \textsuperscript{37} provided apparent testimony to both Germany and the west\textsuperscript{38} to the rift between the established order and Nazism, and 20 July remains a touchstone of all those wishing to mitigate German guilt, regardless of the true and often tainted motives and characters of the resisters.\textsuperscript{39}

Once again, the institutions in which iconic Germans such as some of the aforementioned, and the likes of the prominent Christian Martin Niemöller, had been incarcerated were orthodox concentration camps. PWD consciously deployed these camps in its metamorphosing propaganda campaign, as for instance in its sponsorship of the writing of a treatise on the camp system by the survivor of Buchenwald (and another prominent Christian) Eugen Kogon. Interestingly, the final chapters of the second (German) edition of Kogon’s \textit{Der SS-Staat} and the first edition in English translation, \textit{The Theory and Practice of Hell} (1948), are given over to a comparative examination of the use of prison camps in the USSR under Stalin. This nourished the parallel Allied trend towards using the concentration camps as generic symbols of totalitarian domination rather than specific manifestations of Nazism - an approach adopted in British information policy in May 1948 when it was decided for anti-communist reasons to broadcast information on Soviet camps and Stalinist deportations.\textsuperscript{40} There was certainly no place now for the depiction of Soviet citizens as victims of Germany.

\textsuperscript{33} Mary Fulbrook, German National Identity after the Holocaust (Cambridge: Polity Press, 1999), pp. 28-35. See also Peter Reichel, Politik mit der Erinnerung. Gedächtnisorte im Streit um die nationalsozialistische Vergangenheit (Munich: Hanser, 1995).

\textsuperscript{34} On the PWD, Kurt Koszyk, Pressepolitik für Deutsche 1945-49. Geschichte der deutschen Presse Teil IV (Berlin: Colloquium, 1986), pp. 21-3.

\textsuperscript{35} University of Warwick, Modern Records Centre, Crossman papers, MSS.154/3/PW/1/1-211. SHAES PWD report, 25 April 1945.

\textsuperscript{36} New York, 1947.

\textsuperscript{37} Vols. 1 and 2, Darmstadt, 1947/8.


\textsuperscript{40} Koszyk, Pressepolitik für Deutsche, 233.
While ‘western’ atrocity propaganda policies never went as far as its ‘eastern’ counterpart in suggesting that the legacy of Nazism had been fully dealt with, the ‘western’ focus on German icons of suffering and its increasing anticommunism was ever less well equipped to counteract the German nationalist propaganda of the time. One thing, though, is for certain: despite their differences in focus, one hugely significant commonality in both propaganda approaches was the substantial omission of reference to Jews, the ‘final solution’, and the eastern extermination centres.

Again, the major exception to these generalisations about the cold war and changing depictions of Nazi criminality is the subsequent Nuremberg trials. That the American trial structures survived into 1950 despite significant political and (thus) budgetary pressure from within Congress, and despite the 1947 shift in US occupation policy from ‘re-education’ to the milder ‘re-orientation’, is testament to the huge commitment of Telford Taylor and his liberal, Harvard Law School-oriented staff, and of the US zonal military governor, Lucius Clay. As I have argued elsewhere, however, had Clay had less autonomy in his sphere and been subject to the same sort of close control by the State Department as the British representatives in Germany had been by the Foreign Office, it is not at all clear that the subsequent proceedings venture would long have survived 1947. Less hypothetically, the wider changes in US occupation policy meant that the subsequent proceedings were left increasingly exposed to German nationalist – and right-wing American – attack as an ‘unnecessary’ vestige of early occupation policy. Once again, whatever was said in the courtrooms of the subsequent proceedings was drowned-out in the wave of nationalist rhetoric that was primarily concerned with German interests and victimhood.

The swift disintegration of the Nuremberg edifice from the early 1950s on the watch of High Commissioner John J. McCloy and in the succeeding years was all the more spectacular for the surprising length of time that it had survived in the late 1940s. This collapse was, in the eyes of political contemporaries (if not their legal counterparts, who could still point to the legal record as history and as precedent), complete by 1958. By that point, all of the convicted war criminals incarcerated in the American zone jail at Landsberg – including prominent Einsatzgruppen leaders and leading members of the concentration camp administration – had been released, and many of them well before the exhaustion of their original sentences, as the result of a series of politically-related measures of clemency and sentence review designed to appease German nationalist sentiment in a cold war context of prospective German rearmament. The British jails at Werl and Wittlich were emptied a year earlier. The timetable of releases brought the hitherto exceptional American trial venture back into synchronisation with other national trial and purge programmes as what Tony Judt has called the ‘post-war decade’ of approximately 1945-56 drew to a close. The only prisoners not to benefit from this chronic bout of leniency were those major war criminals still serving sentences passed down by the IMT: under quadripartite control in Spandau jail, they could not be released without gaining a near-impossible four power consensus.

The context of remilitarisation in the 1950s explains why McCloy was at pains to point out that the honour of the German army had not been brought into question by the earlier American prosecution of a number of its most prominent soldiers. On the back of the manipulation of national memory by the Adenauer government, and the prevalent focus on German wartime and post-war suffering, this reversal of American priorities and the undermining of Telford Taylor’s work served simply to reinforce the

41 Bloxham, Genocide on Trial, pp. 54-5.
44 See Judt’s preface to Judt, Desk and Gross (eds.), The Politics of Retribution in Europe, p. ix.
45 PRO, LCO 2/4428, HiCoG Public Relations Division APO 757-A, p. 6.
popular west German wisdom that the Nuremberg trials could be disposed of as merely a form of victor's justice.

**Aftermaths**

Much has changed since the 1950s in German attitudes towards Nuremberg and the crimes addressed - at least in part - there. Germany today has some of the most enthusiastic proponents of the International Criminal Court and of the international prosecution of the perpetrators not just of war crimes and of crimes against humanity but also of aggressive war. It would, however, be a mistake to infer from these self-evident facts that the Nuremberg trials were somehow ultimately responsible for such shifts in opinion. This would be to confuse cause and effect. Rather, the re-evaluation of 'Nuremberg' has been a mere function of the changing German attitudes towards the Nazi past as a whole.

In the 1960s and 1970s the Nuremberg trials served in West Germany as a dual-faceted symbol of guilt and the imposition of punishment by alien powers. They also became a stick with which to beat other states in a way that was partly founded on legitimate criticism but was also partly an extension of the *tu quoque* charge. During the Vietnam War, evidence of American atrocities and the suspicion of imperialist ends elicited criticism of the American hypocrisy in the conduct of international affairs and a comparison of American guilt with that of the Nazis. Manifestly symbolic also was the inauguration by the German Greens of a 'war crimes' tribunal in Nuremberg at the height of the arms race, designed to draw attention to American nuclear strategy. A less defensive engagement with the trials gradually developed in relation to a growing acquaintance with the Holocaust and other Nazi crimes in the final decades of the Federal Republic. This was primarily an outcome of a generational shift in values and perspectives.

Germany's present confrontation with its past is more extensive and intensive than any equivalent commitment by a former perpetrator state anywhere in the world. This is testament to the success of educational initiatives in an atmosphere of strong civic responsibility. Of the key moments in the development of 'Holocaust-awareness', however, the Nuremberg trials are notable by their absence. The popularisation of the story of Anne Frank was vital, though it was surpassed by the screening in 1979 on national television of the American mini-series Holocaust; but these in turn would not have had such an impact had not the ground been prepared by the student movement of the late 1960s, in which the 'guilt of the fathers' was brought to the fore by a German youth that implicitly felt itself to be innocent. And since Germans born in the decades after the war could clearly have no personal responsibility for Germany's crimes of aggression and murder, they also saw less need than their 'fathers' and 'mothers' to reject the accusations of criminality launched at the latter in Nuremberg.

In other words, cultural changes have influenced as a by-product the way the legal event is viewed in Germany (and elsewhere); the legal event did not shape the cultural change. This observation is of contemporary importance, since, alongside the popular but unproven and probably unprovable assertion of the deterrent effect of war crimes trials, they are also commonly promoted as re-educational media, a contention that the experience of the Nuremberg trials does not support. The other relevant part of a burgeoning 'Nuremberg hagiography' is the notion, addressed at the outset of this paper, that the IMT trial had as one of its primary foci the Nazi genocide of the Jews and its perpetrators. It may well be that this is simply how collective memory works, that in a Holocaust-conscious world we will see the Holocaust where we wish to see it, and where better than at Nuremberg, in that now-idealised forum of

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American-inspired reckoning with Nazism? And better still that this Holocaust-conscious representation of the past ties in with current agendas for ‘humanitarian intervention’ in genocidal states. Yet above all others, scholars of the Holocaust should be aware of the perils of allowing the historical record to be distorted by ex post facto considerations, however these may support our designs to regulate the affairs of today’s turbulent world.

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50 The recent rise of a much less critical overall approach to the Nuremberg trial – less critical, that is, than approaches that pointed out firstly technical, legal and procedural problems with the trial, secondly the issues of Anglo-French-American collaboration with prosecutors from a genocidal regime (in the USSR), and thirdly the elision of such issues as area bombing that would have been susceptible to the *tu quoque* charge – is presumably in part a function of the end of the Cold War. With the end of overarching bi-polar superpower politics and the pure geopolitical ‘realism’ that accompanied foreign policy decision-making on both sides in that era, it has become possible again to pay lip-service to the rule of law in international affairs and the principle of universal jurisdiction that Nuremberg did so much too establish – always allowing, of course, that the current world hegemon, the USA, reserves the right not to play by the rules it is happy to insist on selectively elsewhere, as illustrated by its recent illegal invasion of Iraq and opposition to the Rome Treaty for the International Criminal Court. (On which, see Michael P. Scharf, “The ICC’s Jurisdiction over the Nationals of Non-Party States: a Critique of the US Position”, Law and Contemporary Problems, vol. 64, no. 1 (2001), 67-117.)
Donald Bloxham

Völkermord vor Gericht: Recht und kollektives Gedächtnis