Introduction

This book is a history of the Frankfurt Auschwitz Trial (1963–65), the largest, most public, and most important Nazi trial to take place in West German courts after 1945. It was the most dramatic and politically resonant of the more than 6,000 such trials that took place in between 1945 and 1980.[1] Yet if the Auschwitz Trial was unusual among such trials in its drama and significance, in two other important respects it was quite typical. First, like all West German Nazi trials after the Federal Republic regained full legal autonomy in the early 1950s, the Auschwitz Trial was conducted under ordinary statutory (as opposed to international) law. Second, like most such trials after the late 1950s, the Auschwitz Trial was a Holocaust trial, concerned at its core with the Nazi genocide of the Jews.[2] This book is thus an examination of how the Federal Republic of Germany tried to grapple with genocide by means of ordinary criminal law. How did this effort work in detail? What were its strengths and weaknesses, its limits and boundaries? What were the legal, political, and cultural ramifications of using domestic law to prosecute one's own genocidal history?

This book chooses to address these questions by means of a detailed history of a single trial. Twenty-two defendants stood in the dock at the start of the Auschwitz Trial; twenty remained at the end.[3] Of these, seven were

[1] Adalbert Rückerl, *NS-Verbrechen vor Gericht: Versuch einer Vergangenheitsbewältigung* (Heidelberg: C. F. Müller, 1984), p. 329.

[2] Falko Kruse, "NS-Prozesse und Restauration: Zur justitiellen Verfolgung von NS-Gewaltverbrechen in der Bundesrepublik," in Redaktion Kritische Justiz, ed., *Der Unrechts-Staat: Recht und Justiz im Nationalsozialismus*, vol. 1 (Baden-Baden: Nomos Verlagsgesellschaft, 1983), pp. 180–82.

[3] Two – Gerhard Neubert and Heinrich Bischoff – had their cases suspended for health reasons. Neubert was subsequently a defendant in the so-called Second Frankfurt Auschwitz Trial from December 14, 1965, to September 16, 1966. Bischoff died before his case could be brought back to trial. In addition, Hans Nierzwicki's case was dropped from the proceedings prior to the trial's opening.

convicted of murder, and ten of accessory to murder, and three were acquitted. Sentences ranged from three and one-quarter years to life in prison. Over the course of twenty months and 183 trial sessions, over 350 witnesses testified, including 211 survivors of Auschwitz. Dozens of attorneys, representing the prosecution, the defense, and civil plaintiffs from around the world, argued about the nature and meaning of mass murder, torture, and genocide. In its final judgment – both oral and written – the court attempted to render justice for the crimes of Auschwitz within the limits allowed by the law.[4] And the West German public watched it all with a curious blend of macabre fascination, hostile indifference, and heartfelt shame and remorse.

In the Auschwitz Trial, the law came up against the limits of its capacity to deal adequately with systematic genocide. West German criminal law was designed to deal primarily with very different kinds of crimes: ordinary crimes, committed for the most part by individuals or small groups driven by personal motives. Yet the legal categories developed to differentiate defendants according to their subjective relationship to the crime became at best misleading when applied to a crime whose implementation did not depend wholly on the specific individual motivation of any one of its numerous perpetrators. The Holocaust was not merely massive in scale but also bureaucratically organized and state-directed. Consequently, the personal motives of any of the thousands of perpetrators became subsidiary factors in a process of mass murder that extended well beyond any one of them. Auschwitz would certainly not have been possible without the willing participation of perpetrators such as those on trial in Frankfurt, but its terrible reality cannot be explained simply as a composite of individual crimes committed for individual reasons. The whole is, as it were, greater than the sum of its parts. Yet it is precisely this exponential character of Nazi genocide that the Auschwitz Trial found so difficult to encompass within the terms of German law.

Furthermore, the Auschwitz Trial has to be understood as a political trial. This is not to claim that it was an illegitimate attempt to use legal forms to pursue extra-legal ends, but rather to point out that rendering justice on Auschwitz necessarily raised important contemporary political questions.[5] The Cold War was a constant presence in the courtroom, but so too were questions about the nature of West German democracy and the relationship

[4] The judgment is now available in a full, critical edition: Friedrich-Martin Balzer and Werner Renz, eds., *Das Urteil im Frankfurter Auschwitz-Prozess, 1963–1965* (Bonn: Pahl-Rugenstein, 2004). However, I have chosen to quote from the older published edition of the judgment because it remains more widely accessible. See C. F. Rüter et al., eds., *Justiz und NS-Verbrechen: Sammlung Deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen, 1945–1966*, vol. 21 (Amsterdam: University Press Amsterdam, 1979).

[5] This is the classic understanding of political trials. See Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961). However, see Charles F. Abel and Frank H. Marsh, *In Defense of Political Trials* (Westport, Conn.: Greenwood Press, 1994).

between the German past and the German present. The trial was a political trial because Auschwitz was as much a contemporary political problem as it was a historical one.

The history of West German Nazi trials has to date been treated by scholars mostly at a quite general level. Broadly speaking, this historiography can be divided into three phases. In the 1960s, there were attempts to address the legal and political nature of contemporaneous Nazi trials.[6] Then, beginning in the 1980s, there were efforts at a preliminary overview, often either rather cursory or polemical.[7] Finally, in recent years there have been efforts at a more thorough, empirically grounded, and archivally researched analysis of such trials.[8] This most recent literature is particularly useful, demonstrating the full complexity – both political and legal – of the history of Nazi trials in the Federal Republic. It points out that one cannot properly speak of "Nazi trials" as a unitary whole but must rather consider them in all their variability and in their proper historical context.

[6] Reinhard Henkys, *Die nationalsozialistischen Gewaltverbrechen: Geschichte und Gericht*, ed. Dietrich Goldschmidt (Stuttgart: Kreuz Verlag, 1964); Hermann Langbein, *Im Namen des deutschen Volkes: Zwischenbilanz der Prozesse wegen nationalsozialistischer Verbrechen* (Vienna: Europa Verlag, 1963); Presse- und Informationsamt der Bundesregierung, *Die Verfolgung nationalsozialistischer Straftaten in der Bundesrepublik* (Flensburg: Christian Wolff, 1963); and Peter Schneider and Herman J. Meyer, eds., *Rechtliche und politische Aspekte der NS-Verbrecherprozesse: Gemeinschaftsvorlesung des studium generale Wintersemester 1966/67* (Mainz: Guttenberg-Universität Mainz, 1968).

[7] *Nationalsozialismus und Justiz: Die Aufarbeitung von Gewaltverbrechen damals und heute* (Münster: agenda Verlag, 1993); Volker Ducklau, "Die Befehlsproblematik bei NS-Tötungsverbrechen: Eine Untersuchung anhand von 900 Urteilen deutscher Gerichte von 1945 bis 1965," Ph.D. diss., Universität Freiburg, 1976; Jörg Friedrich, *Die kalte Amnestie: NS-Täter in der Bundesrepublik*, rev. ed. (Munich: Piper, 1994 [1984]); Albrecht Götz, *Bilanz der Verfolgung von NS-Straftaten* (Cologne: Bundesanzeiger Verlag, 1986); Bernd Hey, "NS-Prozesse: Versuch einer juristischen Vergangenheitsbewältigung," *Geschichte in Wissenschaft und Unterricht* 6 (1981): 51–70; Bernd Hey, "NS-Gewaltverbrechen: Wissenschaft und Öffentlichkeit. Anmerkungen zu einer interdisziplinären Tagung über die Vergangenheitsbewältigung," *Geschichte in Wissenschaft und Unterricht* 9 (1984): 86–91; Redaktion Kritische Justiz, ed., *Der Unrechts-Staat: Recht und Justiz im Nationalsozialismus*, 2 vols. (Baden-Baden: Nomos Verlag, 1983–84); Landeszentrale für Politische Bildung NRW, ed., *Vereint Vergessen? Justiz- und NS-Verbrechen in Deutschland* (Düsseldorf: Landeszentrale für Politische Bildung Nordrhein-Westfalen, 1993); Michael Ratz et al., *Die Justiz und die Nazis: Zur Strafverfolgung von Nazismus und Neonazismus seit 1945* (Frankfurt: Röderberg-Verlag, 1979); Rückerl, *NS-Verbrechen vor Gericht*; Julius H. Schoeps and Horst Hillerman, eds., *Justiz und Nationalsozialismus: Bewältigt-Verdrängt-Vergessen* (Stuttgart: Burg Verlag, 1987); Jürgen Weber and Peter Steinbach, eds., *Vergangenheitsbewältigung durch Strafverfahren? NS-Prozesse in der Bundesrepublik Deutschland* (Munich: Günter Olzog Verlag, 1984).

[8] Kerstin Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen* (Tübingen: Mohr Siebeck, 2002); Michael Greve, *Der justitielle und rechtspolitische Umgang mit den NS-Gewaltverbrechen in den sechziger Jahren* (Frankfurt: Peter Lang, 2001); Friedrich Hoffmann, *Die Verfolgung der nationalsozialistischen Gewaltverbrechen in Hessen* (Baden-Baden: Nomos, 2001); and Marc von Miquel, *Ahnden oder amnestieren? Westdeutsche Justiz und Vergangenheitspolitik in den sechziger Jahren* (Göttingen: Wallstein, 2004).

Yet for all its value, what none of this literature does is provide a comprehensive, empirically grounded history of any given trial. If, however, it is necessary to recognize the variability of Nazi trials across time, as well as to situate them in their proper political and legal context, then such detailed individual histories are urgently needed. Because the Auschwitz Trial was both the most prominent Nazi trial in the history of the Federal Republic and also one that was utterly typical of the 1960s in its subject matter and in its application of ordinary law to Nazi crimes, it offers a particularly useful opportunity for such an analysis.

The importance of the trial was immediately recognized by contemporaries. In addition to the massive press coverage of the trial (see chapter 9), several classic books about the trial appeared shortly after its conclusion. Hermann Langbein's two-volume "documentation" of the trial contains brief reflections on the origin of the trial but consists primarily of extensive excerpts from witness testimony, which Langbein took down personally during the trial.[9] The book is organized typologically, according to the camp's own organization, thus making plain that the book's true interest is less the Auschwitz Trial than Auschwitz itself. The book is, in effect, a history of the camp as told by eyewitnesses during the trial. Bernd Naumann's *Auschwitz: A Report on the Proceedings against Robert Karl Ludwig Mulka and Others before the Court at Frankfurt* is a compendium of the author's reportage on the trial for the *Frankfurter Allgemeine Zeitung*.[10] With subtle irony and a novelist's eye for telling detail, Naumann paints a vivid portrait of the trial as a lived experience. What he lacks, however, is a thorough analysis of the legal foundations of the trial, as well as the historian's retroactive ability to glimpse behind the curtain of events to discover the behind-the-scenes actions that drove the public occurrences. Finally, Peter Weiss's play, *The Investigation: An Oratorio in 11 Cantos*, presents dialogue taken verbatim from the trial in a form deliberately modeled on Greek tragedy.[11] As important for the history of twentieth-century drama as his earlier avant-garde work,

[9] Hermann Langbein, *Der Auschwitz Prozeß: Eine Dokumentation*, 2 vols. (Frankfurt: Verlag Neue Kritik, 1995 [1965]).

[10] First published in 1965, the book went through several revised and abbreviated editions, as well as an English translation. See Bernd Naumann, *Auschwitz: Bericht über die Strafsache gegen Mulka und andere vor dem Schwurgericht Frankfurt* (Frankfurt: Athenäum Verlag, 1965); Naumann, *Auschwitz: Bericht über die Strafsache gegen Mulka und andere vor dem Schwurgericht Frankfurt*, abridged and revised by the author (Frankfurt: Fischer Bücherei, 1968). There is now a new German reissue of the 1968 edition: Naumann, *Auschwitz: Bericht über die Strafsache gegen Mulka und andere vor dem Schwurgericht Frankfurt* (Berlin: Philo Verlag, 2004). For the English translation, see Naumann, *Auschwitz: A Report on the Proceedings against Robert Karl Ludwig Mulka and Others before the Court at Frankfurt*, trans. Jean Steinberg (New York: Frederick A. Praeger, 1966).

[11] Peter Weiss, *Die Ermittlung: Oratorium in elf Gesängen* (Frankfurt: Suhrkamp, 1965). In English: Peter Weiss, *The Investigation: Oratorio in 11 Cantos*, trans. Alexander Gross (London: Caldar and Boyers, 1966).

Marat/Sade, *The Investigation* is less a history of the Auschwitz Trial than it is a dramatic representation of the tragic character of modernity itself.[12]

In recent years, the trial has begun to attract growing scholarly interest as well. The efforts of the Fritz Bauer Institute in Frankfurt am Main have been particularly significant in fostering this new attention.[13] In addition to its archival work, the institute organized a major public exhibition on the history of the trial in 2004 and has published two collections of articles on the trial.[14] Among those working on the trial, Irmtrud Wojak, assistant director of the Fritz Bauer Institute; Werner Renz, its archivist, and Canadian historian Rebecca Wittmann particularly stand out. All have produced significant insights into the nature and history of the trial.[15] Wojak has examined the central role played by Hessian Attorney General Fritz Bauer and has pointed out the significance of the trial for the political culture of the Federal Republic in the 1960s, though with perhaps too little attention to the ambiguity of that impact.[16] Renz has done more than any previous scholar to trace in exacting and precise detail the internal trajectory of the trial based on the original documents.[17] Wittmann has highlighted what she considers

[12] Robert Cohen, *Understanding Peter Weiss* (Columbia: University of South Carolina Press, 1993); James E. Young, *Writing and Rewriting the Holocaust: Narrative and the Consequences of Interpretation* (Bloomington: Indiana University Press, 1988), pp. 64–80. More broadly: Stephan Braese, ed., *Rechenschaften: Juristischer und literarischer Diskurs in der Auseinandersetzung mit den NS-Massenverbrechen* (Göttingen: Wallstein, 2004).

[13] The institute now holds virtually all trial related files. In addition to copies of the original trial files, these include the prosecution's internal files ("Handakten"), numerous private papers from various trial participants, and a voluminous press-clipping file. The institute has also undertaken the massive project of digitalizing and transcribing the tape recordings made of the proceedings. Selections of the original recordings, together with the complete transcripts and numerous additional documents, are to be released on DVD sometime in the near future. Unfortunately, much of this project was completed too late to be evaluated fully for this book.

[14] The exhibition opened in March 2004 in the Haus Gallus in Frankfurt where much of the trial took place as well. See the exhibition catalogue: Irmtrud Wojak, ed., *Auschwitz-Prozeß 4 Ks 2/63, Frankfurt am Main* (Cologne: Snoeck Verlagsgesellschaft, 2004). The two collections of articles are Irmtrud Wojak, ed., *"Gerichtstag halten über uns selbst . . .": Geschichte und Wirkung des ersten Frankfurter Auschwitz-Prozesses* (Frankfurt: Campus Verlag, 2001), and Irmtrud Wojak and Susanne Meinl, eds., *Im Labyrinth der Schuld: Täter–Opfer–Ankläger* (Frankfurt: Campus Verlag, 2003).

[15] Not surprisingly, given the overlap in the sources used, many of these authors come to empirical conclusions that are substantially similar to those found in this book. I have endeavored to indicate this where relevant in the text, without, however, indicating every occasion on which I used the same documents or sources as these authors.

[16] Irmtrud Wojak, "Im Labyrinth der Schuld: Fritz Bauer und die Aufarbeitung der NS-Verbrechen nach 1945," in Wojak and Meinl, eds., *Im Labyrinth der Schuld,* pp. 17–40, and Irmtrud Wojak, "'Die Mauer des Schweigens durchbrochen': Die Erste Frankfurter Auschwitz-Prozeß 1963–1965," in Wojak, ed., *Gerichtstag Halten*, pp. 21–42.

[17] Werner Renz, "Der erste Frankfurter Auschwitz-Prozeß: Völkermord als Strafsache," *1999: Zeitschrift für Sozialgeschichte des 20. und 21. Jahrhunderts* 15 (2000): 11–48; Renz,

to be the central paradox of the Auschwitz Trial: namely, that the prosecution had to rely on Nazi norms and regulations to demonstrate that the defendants had exceeded these norms in the commission of their crimes.[18] While she is certainly right that the issue of individual initiative was crucial for the trial, I would argue that the prosecution's use of Nazi regulations and norms was perhaps less paradoxical than Wittmann claims, since the defendants were indicted (and convicted) both for exceeding and for obeying criminal orders. I would argue that the true paradox of the trial lies less in the attempt to indict Nazi crimes according to Nazi norms than in the fact that German law was oriented toward a radically different understanding of crime and human agency than that revealed in the Holocaust. Wittmann has also argued quite rightly for the centrality of survivor testimony for the trial. This was, as she points out, the overwhelming source of evidence in the trial.[19] She perhaps underestimates, however, the difficulties, both psychological and epistemological, confronting the witnesses in creating a coherent narrative of Auschwitz as a place of systematic mass murder. Nonetheless, these works, when taken together, enable us to begin to piece together the history of the Frankfurt Auschwitz Trial and its significance for postwar West German history. What remains necessary above all, however, is to begin to embed these insights into a more comprehensive understanding of the nature of German law and of the Federal Republic in the 1960s.[20]

To understand the Auschwitz Trial properly, one must also understand the role of Nazi trials in the Federal Republic more generally. The history of the Federal Republic of Germany in the first decades after the Second World War has been variously described as one of "democratization," "modernization," or "westernization."[21] Despite their differences in method and

"Auschwitz als Augenscheinsobjekt: Anmerkungen zur Erforschung der Wahrheit im ersten Frankfurter Auschwitz-Prozess," *Mittelweg 36* 1 (2001): 63–72; Renz, "Tatort Auschwitz: Ortstermin im Auschwitz-Prozess," *Tribüne* 40 (2001): 132–44; and Renz, "Opfer und Täter: Zeugen der Shoah. Ein Tondbandmitschnitt vom ersten Frankfurter Auschwitz-Prozess als Geschichtsquelle," *Tribüne* 41 (2002): 126–36.

[18] Rebecca Elisabeth Wittmann, "Indicting Auschwitz? The Paradox of the Frankfurt Auschwitz Trial," *German History* 21 (2003): 506; Wittmann, "Holocaust on Trial? The Frankfurt Auschwitz Trial in Historical Perspective," Ph.D. diss., University of Toronto, 2001, pp. 115–19.

[19] Rebecca Elisabeth Wittmann, "Telling the Story: Survivor Testimony and the Narration of the Frankfurt Auschwitz-Trial," *Bulletin of the German Historical Institute,* no. 32 (Spring 2003): 93–101.

[20] Rebecca Wittmann's book appeared too late to be evaluated for this text, though it also strives for such a contextual analysis. See Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge: Harvard University Press, 2005).

[21] For an overview of all these different approaches, see Ulrich Herbert, "Liberalisierung als Lernprozeß: Die Bundesrepublik in der deutschen Geschichte – eine Skizze," in Ulrich Herbert, ed., *Wandlungsprozesse in Westdeutschland: Belastung, Integration, Liberalisierung, 1945–1980* (Göttingen: Wallstein, 2002), pp. 7–49. For democratization, see Moritz Scheibe, "Auf der Suche nach der demokratischen Gesellschaft," in Herbert,

emphasis, what all of these approaches agree on is that until well into the 1960s democracy and liberalism had found at best a somewhat precarious home in West Germany. While the risk of a full-fledged neo-fascist restoration may have been less than some contemporaries feared, the legacy of Nazism – institutional, political, intellectual, and personal – still weighed heavily on the fledgling democracy.[22] So too did older authoritarian traditions stretching back to the nineteenth century.[23] The early decades of the Federal Republic were marked not only by a rupture with the German past, but also by continuity. Democracy in West Germany, thus, has to be understood not as a fact, accomplished institutionally with the passage of the *Grundgesetz* (Basic Law) in 1949 but, in the words of Ulrich Herbert, as a "learning process."[24] One key question for this learning process was what to do about the continuities of German history, specifically, what to do about the legacy of Nazism. That criminal trials would become, especially from the late 1950s, one of the central responses to this problem was by no means a forgone conclusion from the perspective of 1949 or even 1955.

The notion that Nazi atrocities represented not just unavoidable horrors of war but rather "crimes" in the full sense of that term originated during World War II and became a centerpiece of Allied policy toward Germany.[25] Beginning with the founding of the United Nations War Crimes Commission (UNWCC) in October 1942 and culminating with the Moscow Declaration in November 1943, the Allies made clear their intention to prosecute criminally those responsible after the war.[26] Implicitly excluding crimes against German citizens or stateless persons, the Moscow Declaration distinguished

ed., *Wandlungsprozesse*, pp. 245–77; Oscar W. Gabriel, "Demokratiezufriedenheit und demokratische Einstellungen in der Bundesrepublik," *Aus Politik und Wissenschaft* 22 (1987): 32–45; and David P. Conradt, "Changing German Political Culture," in Gabriel A. Almond and Sidney Verba, eds., *The Civic Culture Revisited* (Boston: Little Brown, 1980), pp. 212–72. For modernization, see Axel Schildt and Arnold Sywottek, eds., *Modernisierung im Wiederaufbau: Die westdeutsche Gesellschaft in der 50er Jahre* (Bonn: Dietz, 1998). For westernization, see Anselm Doering-Manteuffel, "Dimensionen von Amerikanisierung der deutschen Gesellschaft," *Archiv für Sozialgeschichte* 35 (1995): 1–35, and Anselm Doering-Manteuffel, *Wie westlich sind die Deutschen? Amerikanisierung und Westernisierung im 20. Jahrhundert* (Göttingen: Vandenhoeck & Ruprecht, 1999). Finally, for an attempt to problematize the "happy ending" of the second half of the twentieth century in Germany, see Michael Geyer, "Germany, or, The Twentieth Century as History," *South Atlantic Quarterly* 96 (Fall 1997): 663–702.

[22] For the most prominent statement of such fears, see Karl Jaspers, *Wohin treibt die Bundesrepublik? Tatsachen, Gefahren, Chancen* (Munich: Piper, 1966).

[23] Herbert, "Liberalisierung als Lernprozeß," p. 17.

[24] Ibid., p. 13.

[25] Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 1998).

[26] On the UNWCC, see Michel Fabréguet, "La Commission des Nations Unies pour les Crimes de Guerre et la Notion de Crimes contre l'Humanité (1943–1948)," *Revue d'Allemagne* 23 (Fall 1991): 519–53, and Kochavi, *Prelude*, pp. 54–62.

two categories of Nazi crimes: those committed in a specific locale and those committed by "principle criminals" whose crimes had no precise geographic boundaries. In the former case, the perpetrators were to be returned to the site of their crimes to stand trial under local jurisdiction; the fate of the latter was to be determined at war's end by a "joint decision of the Governments of the Allies."[27] Yet despite the promise of a joint decision on major war criminals, there remained considerable disagreement among the Allied leaders for the remainder of the war as to how exactly such principle criminals should be handled, whether through criminal trials or via summary executions.[28]

On June 26, 1945, the British government, in agreement with the United States, convened an Allied conference in London for the purpose of reaching an accord regarding the prosecution of the major war criminals in a court of law. After prolonged and difficult negotiations, marked by serious disagreements due to differences in legal tradition between the Anglo-Americans and their continental colleagues, as well as personal animosity between the chief U.S. and Soviet negotiators, the conference promulgated the so-called London Charter on August 8, 1945.[29] This provided the statutory basis for the International Military Tribunal that met at Nuremberg from October 29, 1945, to October 1, 1946, to try twenty-two leading Nazi officials.[30]

[27] Moscow Declaration, cited in Kochavi, *Prelude*, p. 57.

[28] At the Teheran Conference, Stalin proposed – perhaps facetiously – that 50,000 leading Nazis simply be shot. Churchill reacted with outrage, although he himself supported smaller scale summary executions. It was the Americans who pushed hardest for a formal legal prosecution, though here too there was considerable disagreement. Secretary of the Treasury Henry Morgenthau, Jr., supported summary executions in his famous plan for postwar Germany, while Secretary of War Henry Stimson argued decisively for criminal trials. In addition to Kochavi, *Prelude*, see the discussion in Warren F. Kimball, *Swords or Ploughshares? The Morgenthau Plan for Defeated Germany, 1943–1945* (Philadelphia: Lippincott, 1976), and Henri Meyrowitz, *La Répression par les Tribunaux Allemands des Crime contre L'Humanité et de L'Appartenance a une Organisation Criminelle en application de la Loi no. 10 du Conseil de Contrôle Allié* (Paris: Librarie Générale de Droit et de Jurisprudence, 1960), pp. 28–32.

[29] Kochavi, *Prelude*, pp. 222–30.

[30] There is an almost limitless literature on the Nuremberg Trial. The first source are the trial records themselves: International Military Tribunal, *The Trial of Major War Criminals before the International Military Tribunal, 14 November 1945–1 October 1946*, 42 vols.(Nuremberg: Secretariat of the Tribunal, 1947–49). Many of the participants in the trial have also left memoirs, the most valuable being: G. M. Gilbert, *Nuremberg Diary* (New York: Signet Books, 1947); Robert H. Jackson, *The Nuremberg Case* (New York: Cooper Square Publishers, 1971); and Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992). Although not technically a memoir, the account by Whitney Harris benefits from his participation on the staff of the U.S. Chief of Counsel: Whitney R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945–1946* (Dallas: Southern Methodist University Press, 1999 [1954]). There are also a variety of narrative accounts, including Richard E. Conot, *Justice at Nuremberg* (New York: Carroll & Graf, 1984); Eugene Davidson, *The Trial of the Germans: An Account of the Twenty-two Defendants before the International*

The London Charter also formed the basis for Allied Control Council Law No. 10, issued on December 20, 1945, which provided statutory authority for subsequent Allied trials against Nazi criminals (the twelve so-called successor trials at Nuremberg and others), as well as for trials conducted in German courts during the occupation period. Altogether, according to official statistics compiled by the West German government in 1965, a total of 5,025 Germans were convicted in (Western) Allied courts inside Germany during the occupation period.[31]

In this context, two things are particularly relevant about the Allied "war crimes program," as it was somewhat inaccurately called.[32] The first was its legal innovation in creating the category of "crimes against humanity," one of three crimes defined by the London Charter and extended to subsequent proceedings by CC Law No. 10.[33] Crimes against humanity provided legal protection against "murder, extermination, enslavement, deportation, and other inhumane acts" to civilian populations "before or during the war," as well as against "persecutions on political, racial or religious grounds" when committed in connection with other crimes defined by the charter.[34]

Essentially a derivation from the older category of war crimes, the category of crimes against humanity was distinct in that it extended protection to German citizens and stateless persons, that is, to precisely those victims excluded by the territoriality principle of the Moscow Declaration.[35] The

Military Tribunal at Nuremberg (New York: Collier Books, 1966); Ann and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1986); and Joseph Persico, *Nuremberg: Infamy on Trial* (New York: Viking, 1994). Though highly critical, the best scholarly account of the trial remains Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977). In recent years, other scholarly treatments have begun to emerge as well. See Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2003); Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001); and Peter Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2001). The best introduction to the extensive legal commentary on the trial is provided in George Ginsburgs and V. N. Kudriavtsev, eds., *The Nuremberg Trials and International Law* (Dodrecht: M. Nijhoff, 1990). Finally, although it is extremely brief, the account by Michael R. Marrus is not to be missed: *The Nuremberg War Crimes Trial, 1945–46: A Documentary History* (Boston: Bedford Books, 1997).

[31] Bundesministerium der Justiz, *Die Verfolgung nationalsozialistischer Straftaten im Gebiet der Bundesrepublik Deutschland seit 1945* (Bundestagsdrucksache IV/3124), p. 37. Of these, 806 received death sentences, of which 486 were actually carried out.

[32] Frank M. Buscher, *The U.S. War Crimes Trial Program in Germany, 1945–1955* (New York: Greenwood Press, 1989), p. 4.

[33] The London Charter is reprinted in the documents section of M. Cheriff Bassiouni, *Crimes against Humanity in International Criminal Law* (Dodrecht: M. Nijhoff, 1992). The other crimes defined by the London Charter were crimes against peace, designed to cover the planning and implementation of the German war of aggression, and war crimes, essentially a codification and restatement of existing international laws of war.

[34] Ibid.

[35] Ibid., p. 7.

true innovation lay in the claim that some acts were so egregious that the traditional immunity provided by the doctrine of national sovereignty to acts of state in the domestic sphere did not apply.[36] Although Nazi genocide clearly fell under the definition of crimes against humanity, as a legal category, it was not conceptualized as a law of genocide, but as a more general category applying to a wide variety of state acts including but not limited to mass murder and extermination.[37]

The second significant aspect of the Nuremberg and other Allied war crimes trials for the subsequent history of West German Nazi trials is the way that the Allies – the Americans, in particular – tried to deploy such criminal trials as part of a broader project to "reorient" German society away from authoritarianism, militarism, and Nazism. Criminal trials formed one pillar, alongside Denazification and formal reeducation programs, of this project.[38] It was hoped not only that justice would prevail at Nuremberg but that truth would emerge as well. In 1950, General Lucius D. Clay, former head of the American Military Government in Germany, said of the Nuremberg Trials that by revealing the full extent of Nazi criminality, they "completed the destruction of Nazism in Germany."[39] Unfortunately, whatever the successes and failures of the Allied war crimes trials program may have been, Clay's optimistic assessment of their popular impact in Germany cannot be sustained. It may be true, as Donald Bloxham suggests, that "the trial records remained, indelible."[40] However, the immediate impact on the German understanding of Nazism was far less than the Allies may have hoped.

In fact, the Nuremberg trials were not generally well received by the Germans, either among professional jurists or among the general populace.[41] Even among Germans who felt that Nazi actions were crimes and demanded some form of punishment, there was considerable trepidation at the form

[36] Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New York: New Press, 1999).

[37] Douglas, *The Memory of Judgment*, pp. 38–64, and Bloxham, *Genocide on Trial*, pp. 63–69. On the distinction between genocide as a legal category and crimes against humanity, see William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), pp. 10–12.

[38] Bloxham, *Genocide on Trial*, pp. 137–45, and Buscher, *U.S. War Crimes Trials Program*, pp. 2–3.

[39] Lucius D. Clay, *Decision in Germany* (New York: Doubleday, 1950), p. 250. For a more positive assessment of German reactions to Nuremberg, see Stephen Breyer, "Crimes against Humanity: Nuremberg, 1946," *New York University Law Review* 71 (1996): 1161–63.

[40] Bloxham, *Genocide on Trial*, p. 223.

[41] Heribert Ostendorf, "Die – widersprüchlichen – Auswirkungen der Nürnberger Prozesse auf die westdeutsche Justiz," in Gerd Hankel and Gerhard Stuby, eds., *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburg: Hamburger Edition, 1995), pp. 73–95.