



# GENOCIDE TRIAL

**War Crimes Trials and the Formation  
of Holocaust History and Memory**

*Donald Bloxham*

# Genocide on Trial

War Crimes Trials and  
the Formation of Holocaust  
History and Memory

DONALD BLOXHAM

OXFORD  
UNIVERSITY PRESS

*This book has been printed digitally and produced in a standard specification  
in order to ensure its continuing availability*

**OXFORD**  
UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi  
Kuala Lumpur Madrid Melbourne Mexico City Nairobi  
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece  
Guatemala Hungary Italy Japan South Korea Poland Portugal  
Singapore Switzerland Thailand Turkey Ukraine Vietnam

Oxford is a registered trade mark of Oxford University Press  
in the UK and in certain other countries

Published in the United States  
by Oxford University Press Inc., New York

Oxford is a registered trade mark of Oxford University Press  
in the UK and in certain other countries

Published in the United States  
by Oxford University Press Inc., New York

© Donald Bloxham 2001

The moral rights of the author have been asserted

Database right Oxford University Press (maker)

Reprinted 2005



All rights reserved. No part of this publication may be reproduced,  
stored in a retrieval system, or transmitted, in any form or by any means,  
without the prior permission in writing of Oxford University Press,  
or as expressly permitted by law, or under terms agreed with the appropriate  
reprographics rights organization. Enquiries concerning reproduction  
outside the scope of the above should be sent to the Rights Department,  
Oxford University Press, at the address above

You must not circulate this book in any other binding or cover  
And you must impose this same condition on any acquirer

ISBN 0-19-925904-6

## *Preface*

Knowing what we now do of Nazi atrocity in the Second World War, the heated debates of that era on the legitimacy of trying the perpetrators can appear rather unreal. Yet in the years around 1945 a variety of moral and political justifications were required to prevent, on the one hand, mass and summary executions of Germans and their accomplices and, on the other, the passage of the majority of the iniquitous back, unnoticed, into ordinary civilian life. The idea of legal redress for state crimes was novel and contentious, and there was no certainty as to whom to try, or the precise crimes with which to charge them. The arguments employed in favour of trials in 1945 can be divided into two general categories: punishment/deterrent and education. The first of these is at the heart of most of the critiques of the postwar punishment programmes, which centre upon the legal bases and legacies of the various 'war crimes trials' and often feature the extensive re-creation of the events of the courtroom. The second is more complex. It encompasses the didactic aims of illustrating to the conquered peoples the benefits of due legal process, whilst simultaneously creating a historical record for the edification of victors, vanquished, and posterity alike. That second function is the concern of this book.

By opting for legal action, the Allied nations succeeded in establishing a record of Nazi criminality and aggression. Unwittingly, however, in the conduct of the trials they also laid bare much about their own attitudes to what had transpired in Europe. There is an important connection between these two areas, and one which has not been brought out in the historiography of either the trials or Nazi atrocity; that connection concerns how the practices of those who conducted the trial affected the portrayal of the acts of the tried through the medium of the courtroom.

The trials were not disinterested conduits of that which they were instituted to consider. They were not blank pages onto which the history of the Nazi years was inscribed in an 'objective' fashion. At the most basic level, considerations such as the rules of courtroom procedure, the role of judicial precedent, and the difference between legal and historical evidence meant that trials had the potential to re-shape their subject matter. Overtly political influences were another matter again, and must be considered in relation to each polity that played a part in the trials.

In order to explain the development of representations of Nazi crime through the trial medium, it is necessary to understand the approaches that the Allied and formerly occupied nations employed in dealing with suspected 'war criminals'. In other words, we need to see precisely what the prosecuting powers were attempting to achieve by trial, and how they went about achieving it. This

analysis of trial policy—or rather policies—requires exploration in the realms of international legal, political, and social history.

Furthermore, just as the representations of atrocity that the trials created were only abstracts when standing alone, outside the context in which they were formed, it is of limited value to examine them without considering the impact they made on the understanding of their subject. Therefore, to assess the ways in which trial representations informed perceptions of Axis criminality both contemporaneously and subsequently, this book will encompass apprehensions of the subject from the end of the war until the present day. In sum then, what follows is a form of deconstruction, showing how understandings of a particular past or set of pasts have been mediated by factors that were not themselves of that past.

How to go about the task in hand? First, it is necessary to specify the particular Nazi crimes on which we will concentrate. Secondly, it is equally important to identify the trials—the prisms through which the crimes were viewed—to be studied. Thirdly, it remains to establish the criteria by which the value of those trials as informative media is to be assessed.

On the criminal side, the focus will be upon the destruction of European Jewry in what is now called ‘the Holocaust’. If justification is required for this choice, it may be found in the proposition of the German philosopher Edmund Husserl that comprehension of any phenomenon requires comprehension of its essential features. Since this book is written from the viewpoint that the racial murders committed by the Third Reich were expressions of the essential quality of the regime, understanding those crimes was and is fundamental to understanding Nazism. And of all the genocidal schemes embarked upon between 1939 and 1945, the murder of the Jews stands out as the most total, the most determinedly pursued, and hence that which has most to tell us about the *essence* of Nazism.

However, the Holocaust is an ill-defined area of investigation for two related reasons that may be termed ‘historical’ and ‘epistemological’. In the first category, we should consider the Nazi killing programmes as a whole. These were so complex and interrelated that examination of the murder of the Jews on its own is actually rather ahistorical, as the work of Götz Aly, Suzanne Heim, and Christian Gerlach, among others, has illustrated. The Jews were murdered where and when they were not just because of Nazi antisemitism, but because that antisemitism was allied with other racisms—pre-eminently anti-Slavism—and with anti-Bolshevism and perhaps amoral utilitarianism in a context of extreme wartime radicalization and barbarization. The chronological and conceptual parameters of the ‘Holocaust’ are unclear; in short, and this brings us to the second (epistemological) problem identified above—the Holocaust is a construct.

Adopting this position does not imply any doubt that approximately 6 million Jews died at the hands of the Nazis and their accomplices during World War Two, but simply asserts that the infinitely complex constituent parts of that murder process may not be neatly packaged under the popular epithet. The prosecutors

at the war crimes trials did not encounter the murder of the Jews in the same way as would today's reader of an introductory history of 'the Holocaust'. To begin with, unlike the author of that hypothetical introductory text, most of these post-war actors did not emphasize the murder of the Jews amongst Nazi crimes; indeed, for reasons that will be explained throughout this book, the opposite was the case. Conversely, in their own diverse ways, intentionally and inadvertently, and both by omission and commission, these prosecutors contributed to the creation of some of the most influential paradigms of Nazi criminality. This book attempts to invoke the world of the period immediately after the Second World War when trials were an intrinsic part of making sense of a monstrous and immensely complex past.

Exactly what it meant to 'make sense' of the Hitler era was not a constant. Even in the courtroom the means and purposes of examining the past varied in accordance with the different political agendas of the period. The most obvious coercion of the past for the purposes of the present occurred in the political culture of the post-war Soviet bloc. The reduction in one trial of Sachsenhausen concentration camp guards to 'tools of monopoly capitalism' is indicative, as is the constant reference to the crimes of a generic 'fascism'—as a crisis stage of capitalism—rather than the historically and geographically specific 'Nazism'. Meanwhile, the official Soviet line refused to recognize that Jews and other ethnic groups had suffered as groups, preferring to describe the dead in terms of national citizenship, and particularly preferring anti-fascist resisters as victims of choice. This exaggeration of martyrdom at the expense of a more accurate representation of the thrust of Nazi murderousness was also replicated by the Soviet client regime in eastern Germany.

Yet such skewed representations of the past were arguably only of a different degree, not a different order, to processes set in motion further westward. The postwar 'Vichy syndrome', with its overblown emphasis on the French resistance and de-emphasis on collaboration, particularly in the fate of the Jews, is worthy of comparative consideration. As this book will show, the 'liberal democracies' were also authors of subtle re-writings of the Nazi extermination projects. This brings us to the next axis of the study.

On the legal side, the matter of which trials are to be examined, it is important to state at the outset that this monograph does not claim to include a comprehensive history of the postwar prosecutions. Little will be read of the trials conducted under Soviet influence, because the aforementioned, overbearing influence of Marxism-Leninism on the creation of the historical record is already well known. There is no mention of the trials of Axis defendants in the Far East. Nor is much written of the 'denazification' process, which was as much an attempt to prevent former Nazis occupying positions of influence in post-war Germany as a means of punishing them. The focus is upon the European trial programmes of Britain and the USA, which are examined in parallel in the interests of comparative study of two closely linked occupation regimes.

Again, though, these programmes will not be considered *in toto*. The criterion for consideration is the relevance of each trial in the 're-educational' sense; a relevance that was, generally speaking, related to the prominence of the criminal.

Owing to the rapid westward exodus of the German forces before the Soviet advance in the latter stages of the war, the British and Americans had come into possession of a disproportionately large number of leading Nazis. And as two of the chief Allies, going on to occupy two of the four zones into which the defeated Germany was divided, both bore a considerable moral and historical duty to shed light on the darkest deeds of their unwilling hosts. They had now acquired responsibility for inscribing the past not just on behalf of their own compatriots, but for most of the population of western Germany; thus this study is also a contribution to the early history of what has become known in German historiography as that region's process of 'coming to terms with the past'.

The American and British trial programmes were undoubtedly those that chiefly preoccupied the western Germans, though the trials enacted by the other western occupying power, France, actually involved more criminals than either. In discharging their duties, the USA and Britain pursued trial schemes that were very different in scope, but nevertheless were the only genuinely international programmes of any then running in western Europe. The two countries fielded respectively the largest and second-largest army of investigators in this sphere, and deployed them more widely than any other: in Germany, Austria, and Italy. Moreover, it was a unique feature of their policies that Britain and the USA each concerned itself to a large degree between 1945 and 1949 with trials of those in whom it had no direct national interest.

It remains to ask how the efficacy of the trials in their educational and historical capacity is to be judged. As victors, the edification of the USA and Britain through the trials will be considered for comparative purposes alongside the study of western Germany, the perpetrating and defeated nation. On the creation of a record for posterity, the object of consideration will be the influence of the trials on the western European and American historiography of the Holocaust.

Examination of the historiographical legacy of the post-war trials will often be a matter of considerable detail, with close reference to the evidence and argumentation of select works in the ever-growing field of Holocaust scholarship. However, in assessing the course of popular representations and perceptions, we shall not enter into an examination of minutiae. Rather, we shall consider the apprehension of two distinctive features of Nazi criminality: its 'depth' and its 'breadth' respectively.

The Nazi camp system is used to represent the 'depths' Nazism reached and the role of the Wehrmacht to illustrate the 'breadth' of German depravity. Despite the murder of the mentally and physically 'handicapped' in Germany and eastern Europe, and that of between 200,000 and 500,000 of Europe's Roma

and Sinti, and of nearly 2 million non-Jewish Poles, and over 3 million Soviet prisoners-of-war, as well as an untold number of Soviet and other civilians, and despite the fate of millions of Jews outside the gas chambers, the extermination camps remain as the emblematic manifestation of discriminatory mass killing—genocide—in history. And, as the largest organization directly involved in Nazi mass murder that was not itself a product of Nazism, but was rather a pre-eminent German institution, the actions of the Wehrmacht may be seen to represent the participation of Germany as a whole in the crimes of Hitler and Himmler. The legal treatment of the crimes of the camp system and of German soldiery may be seen as an index of the success or otherwise of the trials in their ‘re-educational’ capacity.

Overall, this book is a study of a dynamic relationship between sections of society that each play a role in the formation of ‘collective memory’ or consciousness of the past. The three-way division of the book reflects different strands of that relationship. The first section charts and analyses the implementation of punishment policies. In other words, it considers the reactions of the Allied political and administrative establishments, and the ways in which these shaped confrontation with the past through the medium of trial. The second section develops the chain of consciousness as the past was re-presented through the prism of the courtroom to the publics of the post-war world. Accordingly, that section examines the function of the legal profession, within and in juxtaposition to that of the media, politicians, social elites and other opinion-formers in each country. The final section examines the connections between courtroom and posterity, between the practices of the lawyers and those of the professional inscribers of the past: historians.

It might seem peculiar today, with the ‘Shoah business’ in rude health, to focus upon representations of the Holocaust provided more than half a century ago. However, the crucible of the post-war years still has a twofold relevance. First, with the exception of a small number of dedicated archival historians who are continuing to develop their understanding of the murder of the Jews, broader perceptions of that crime, including those of some contemporary Holocaust scholars, remain over-informed by what might be termed a ‘Nuremberg historiography’. Secondly, for decades the murder of the Jews impinged hardly at all upon the consciousness of the post-war world. A part of the explanation for that is the peculiar way the story was used in the punishment and re-education programmes of the Allies.

Since this book is a revised version of my doctoral thesis, first mention must go to the British Academy as it then was for funding four years of postgraduate study, including an extended visit to the USA. Additional American research was funded by the Southampton University School of Research and Graduate Studies and by the Royal Historical Society. Receipt of the Richard Newitt Prize from Southampton University facilitated a brief period in The Hague. My



former employers, the Holocaust Educational Trust, were generous enough to allow me a short paid period away from work to make the final alterations to this manuscript.

I would also like to express my gratitude to the following institutions and their staff: the Bodleian Library, Oxford; Churchill College Archives, Cambridge; the House of Lords Records Office; the Imperial War Museum; Lambeth Palace Library; the Liddell Hart Centre for Military Archives, King's College, London; the National Library of Wales; the Public Records Office, Kew; the Shropshire County Records Office, Shrewsbury; the University of Birmingham Archive; the University of Sussex Archive; the Modern Records Centre, the University of Warwick; the Wiener Library, London; the John F. Kennedy Library, Boston, Mass.; the Library of Congress; the National Archives and Records Administration, College Park, Md.; the Syracuse University Archive; the United States Holocaust Memorial Museum Archives, Washington, DC; and the Thomas J. Dodd Centre at the University of Connecticut. Particular thanks are owed to Arthur Eyffinger from the library of the International Court of Justice at The Hague; to Ulrike Talay of the archive of the Institut für Zeitgeschichte, Munich; to Jenny Ruthven of the Special Collections Department of the Hartley Library at the University of Southampton; and to Chris Woolgar and the other archivists in the Hartley Library for all their hard work and forbearance.

Morris Anspacher, Peter Calvocoressi, Theodor Fenstermacher, and Benjamin Ferencz have benefited the book by their personal recollections of the Nuremberg trials. The last two were kind enough to allow me to trouble them at a conference in November 1996 on the subsequent Nuremberg trials. Jonathan Bush was a sounding board for some of my thoughts and, with the generous acquiescence of his family, provided gratefully received hospitality and accommodation on a draining research visit to Washington. Bill Hoglund was equally charitable at the University of Connecticut at Storrs.

Mark Levene and Michael Biddiss read early drafts of some of my work, and provided constructive criticism and much-needed encouragement. Jeremy Noakes and Alan Bance were assiduous as my doctoral examiners, and their observations were most helpful in the process of revising the Ph.D. for publication. Andrew Charlesworth, meanwhile, has added another dimension to my grasp of the Shoah on two memorable field trips to Poland and Lithuania. Nick Kingwell, David Brown, Larry Day, John Oldfield, John McGavin, David Laven, Cedric Parry, the members of the Cavaliers Cricket Club, Joanne Reilly, and Deborah Spruce have befriended and supported me in various ways, and I owe them all much. John Little, a friend who passed away in 1999, would have been very happy to see this project come to fruition. I treasure his memory. Meanwhile, my parents, and my brother, Andrew, have contributed vastly by their support. In this connection, special mention goes to Alice Haythornthwaite, who for a long time tolerated all the stresses accompanying a relationship with a Ph.D. student.

Thanks also go to Ruth Parr, the history commissioning editor at Oxford University Press, for her enthusiasm for the project and her tolerance of my many unsolicited alterations, and to Genevieve Lester for her pertinent observations on those changes. David Cesarani also gave useful advice in the latter stages of the project. My chief debt, however, is to two friends under whom I have had the privilege of studying history. Colin Richmond must take the responsibility for much of my intellectual development, beginning with his third-year special subject course on the Holocaust at the University of Keele. He maintained a close interest in this project and frequently stimulated me with his profound and diverse insights. He was kind enough to read over the final drafts of the manuscript. Tony Kushner, director of the Parkes Centre for the Study of Jewish–Non-Jewish Relations, was my doctoral supervisor. Despite his own onerous workload, he always found time to advise and to comfort. He and his wife Mag have regularly accommodated me at their home, and bolstered me in the difficult times with good humour and counsel. This book, and the Ph.D. that preceded it, would never have been completed without him.

D. B.

## *Acknowledgements*

The author would like to thank the following for permission to reproduce unpublished material: the Trustees of the Mass-Observation Archive, University of Sussex Library; the Trustees of the Liddell Hart Centre for Military Archives, King's College, London.

Illustrations (except those indicated on page 892) © Soun Vannithone.

# *Contents*

## *Acronyms and Abbreviations*

xviii

INTRODUCTION	1
1. Aims and Methodology	1
2. The Trial Tableau	3
3. The Early Formation of Punishment Policy	6
4. The Holocaust on Trial: An Overview	10

## **Part I: The Legal Prism**

1. SHAPING THE TRIALS: THE POLITICS OF TRIAL POLICY, 1945–1949	17
1.1 The Theory behind the IMT Prosecution	17
1.2 The IMT Defendants: Individuals and Organizations	21
1.3 The Prospect of a Second International Trial	24
1.4 The Political Context of the Occupation of Germany	25
1.5 ‘The Trial that Never Was’: The Aborted Second Trial of Major War Criminals	28
1.6 Unequal Progressions: The Courses of British and American Trial Policy from 1946	32
1.7 The Development of the OCCWC	37
1.8 The OCCWC and the Foreign Office (i): The Industrialists	38
1.9 The OCCWC and the Foreign Office (ii): The Military	41
1.10 British Domestic Opposition to the Trials	47
1.11 The Politics of the Subsequent Nuremberg Proceedings	49
1.12 Conclusions	52
2. RACE-SPECIFIC CRIMES IN PUNISHMENT AND RE-EDUCATION POLICY: THE ‘JEWISH FACTOR’	57
2.1 The Search for Evidence	58
2.2 Deploying the Evidence: ‘Hard Documents’ and ‘Representative Examples’	60
2.3 Applying ‘War Crimes’ and ‘Crimes against Humanity’	63
2.4 The ‘Conspiracy’ to Initiate War: The Tyranny of a Construct	69

2.5	The 'Jewish Factor' in the Royal Warrant Trials	75
2.6	Occupation Policy, Victim Specificity and Symbols of Suffering	80
2.7	Conclusions	88

## **Part II: Post-War Representations and Perceptions**

3.	THE LIMITS OF THE LEGAL IMAGINATION: PLUMBING THE DEPTHS OF NAZI CRIMINALITY	93
3.1	The Dachau Trial	95
3.2	The 'Belsen' Trial	97
3.3	The IMT Trial and the Camp System	101
3.4	The Significance of Belzec, Sobibor and Treblinka	109
3.5	The Absence of Aktion Reinhard (i): An Expropriation Exercise?	110
3.6	The Absence of Aktion Reinhard (ii): By-Passing the Camps	116
3.7	Conclusions	124
4.	THE FAILURE OF THE TRIAL MEDIUM: CHARTING THE BREADTH OF NAZI CRIMINALITY	129
4.1	Genocide in the Consciousness of the Postwar World: An Overview	133
4.2	An Education in German Guilt	137
4.3	West German Responses to the IMT Trial	145
4.4	Towards the 'Final Solution of the War Criminals Question'	149
4.5	The Bystanders Judge Nuremberg	153
4.6	British and American 'Revisionism'	156
4.7	Negating Allied Punishment Policy: Premature Releases and Political Expediency	162
4.8	The Revised Rhetoric of the Wehrmacht's War	172
4.9	Conclusions	178

## **Part III: The Trials and Posterity**

5.	A NUREMBERG HISTORIOGRAPHY OF THE HOLOCAUST?	185
5.1	Legal Omissions (i): The SS and Police	186
5.2	Legal Omissions (ii): The 'Ostland' Criminals	196
5.3	The Nuremberg Legacy (i): Motivation from the Nazi Elite to the Executioners	200
5.4	The Nuremberg Legacy (ii): 'Extermination through Work'	208
5.5	Conclusions	218

<i>Contents</i>	xvii
CONCLUSIONS	221
<i>Appendix A: Charter of the International Military Tribunal, article 6</i>	229
<i>Appendix B: The defendants and organizations before the IMT</i>	229
<i>Appendix C: The subsequent Nuremberg proceedings</i>	231
<i>Bibliography</i>	233
<i>Index</i>	263

## *Acronyms and Abbreviations*

BAOR	British Army of Occupation of the Rhine
BRD	Bundesrepublik Deutschland (Federal Republic of Germany)
BUA	Birmingham University Archive
BWCE	British War Crimes Executive
CCG	Control Commission for Germany
CCG(BE)	Control Commission for Germany (British Element)
CCL10	Control Council Law Number 10
CDU	Christian Democratic Union, BRD
C.-in-C.	Commander-in-Chief
COGA	Control Office for Germany and Austria
FO	Foreign Office
<i>FH</i>	<i>Frankfurter Hefte</i>
<i>FR</i>	<i>Frankfurter Rundschau</i>
Gestapo	Geheime Staatspolizei (German State Secret Police)
HiCOG	(US) High Commission in Germany
HSSPF	Höhere Schutzstaffeln- und Polizeiführer (Higher SS and Police Leader)
IfZ	Institut für Zeitgeschichte, Munich
IG Farben	Interessengemeinschaft Farben Aktiengesellschaft (The 'Community of Interests' of the Farben joint stock company)
IKL	Inspektion der Konzentrationslager (Inspectorate of Concentration Camps)
IMT	International Military Tribunal
<i>IMT</i>	Published proceedings of the International Military Tribunal
JAG	Judge Advocate General
JCS	Joint Chiefs of Staff
LCO	Lord Chancellor's Office
LHCMA	Liddell Hart Centre for Military Archives
M-OA	Mass-Observation Archive
NARA	National Archives and Records Administration, College Park, MA
NMT	Nuremberg Military Tribunal, Subsequent Nuremberg Proceedings
<i>NYT</i>	<i>New York Times</i>
OCCPAC	Office of the Chief-of-Counsel for the Prosecution of Axis Criminality
OCCWC	Office of the Chief-of-Counsel for War Crimes, Subsequent Nuremberg Proceedings
OKW	Oberkommando der Wehrmacht (High Command of the German Armed Forces)
OMGUS	Office of Military Government, United States zone of Germany
OSS	Office of Strategic Services
PRO	Public Record Office, Kew, UK

RG	Record Group (of NARA)
RSHA	Reichssicherheitshauptamt (Reich Security Head Office)
RuSHA	Rasse- und Siedlungshauptamt (SS Race and Settlement Head Office)
SA	Sturmabteilungen (Nazi 'Stormtroopers')
SD	Sicherheitsdienst (Security Service of the SS)
SHAEF	Supreme Headquarters, Allied Expeditionary Force
SPD	German Socialist Party, BRD
SS	Schutzstaffeln
SUA	Southampton University Archive
<i>TWC</i>	<i>Trials of War Criminals</i> : published extracts of the proceedings of the (subsequent) Nuremberg Military Tribunals
UNWCC	United Nations War Crimes Commission
USHMM	United States Holocaust Memorial Museum
<i>VJZ</i>	<i>Vierteljahreshefte für Zeitgeschichte</i>
Waffen-SS	Armed SS, the military wing of the organisation
WCG(NWE)	War Crimes Group (North West Europe)
WJC	World Jewish Congress
WO	War Office
WRB	War Refugee Board
WVHA	Wirtschafts-Verwaltungshauptamt (Business Administration Head Office of the SS)
ZAL	Zwangsarbeitslager für Juden (Forced Labour Camp for Jews)



# Introduction

## I. AIMS AND METHODOLOGY

Michael Marrus, one of the foremost historiographers of the Holocaust, recently wrote that 'the Trial of the Major War Criminals at Nuremberg in 1945–46 . . . presented the first comprehensive definition and documentation to a non-Jewish audience of the persecution and massacre of European Jewry during World War II'. 'After Nuremberg', Marrus concluded, 'the murder of European Jewry could be authoritatively pointed to as an established fact of great historical importance.'<sup>1</sup> Though he concedes that what we now call 'the Holocaust' was not the centre of attention at the trial, that 'information about it could easily be drowned in the greater flood of crimes and accusations', that for many reasons the murder of the Jews was not a popular topic of conversation in the immediate post-war world, and that the trial itself 'added a few distortions' to the picture, 'Nuremberg' remains, for Marrus, 'a turning point'.<sup>2</sup>

In different ways Jürgen Wilke and Jeffrey Herf have added to these conclusions. The former has argued with reference to the press coverage of the trials in West German newspapers that the Nuremberg proceedings made a meaningful impression on the public's understanding of Nazi genocide and its confrontation with the past. The latter, in an otherwise convincing work, *Divided Memory: The Nazi Past in the Two Germanies*, published in 1997, also identified a 'Nuremberg interregnum' period of temporary West German consciousness of the crimes of Nazism.<sup>3</sup>

The 'trial of the major war criminals'—Hermann Göring *et al.*—did of course have a number of significances. As a multinational attempt to prosecute the leaders of a criminal regime for acts of state, thus extending the rule of international law beyond its existing practical jurisdiction, 'Nuremberg' was a watershed. And if the trials did not sound the death-knell of legal positivism, Nuremberg certainly fired a warning shot across its bows. The influences of the trials can be traced directly and indirectly to the formation of latter-day international criminal courts, the United Nations Charter of Human Rights and the Genocide Convention, and the 'Nuremberg code' of medical and scientific ethics. Diverse

<sup>1</sup> Michael R. Marrus, 'The Holocaust at Nuremberg', *Yad Vashem Studies*, 26 (1998), 5–41, at 5, 41.

<sup>2</sup> *Ibid.* 6.

<sup>3</sup> Jürgen Wilke *et al.*, *Holocaust und NS-Prozesse* (Cologne: Böhlau, 1995); Jürgen Wilke, 'Ein früher Beginn der "Vergangenheitsbewältigung": Der Nürnberger Prozess und wie darüber berichtet wurde', *Frankfurter Allgemeine Zeitung* (15 Nov. 1995); Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanies* (Cambridge, Mass.: Harvard University Press, 1997), 206–8; see also Adalbert Rückerl, *NS-Verbrechen vor Gericht: Versuch einer Vergangenheitsbewältigung* (Heidelberg: C. F. Müller, 1982), 111–12.

human rights campaigners have adopted the Nuremberg precedent in their campaigns against allegedly criminal state regimes or their representatives. Finally, the documentation gathered at Nuremberg undoubtedly expedited the compilation of histories of Nazism, and helped to conceptualize 'the Holocaust' for a relatively small number of intellectuals in the direct aftermath of the war. However, as this book seeks to show, long-term philosophical developments in the law in no way equate to a short- or even medium-term collective consciousness of, or confrontation with, genocide. A sharp, analogous distinction should also be made between the establishment of the broad principles of the murder of the Jews for posterity and more immediate, specific shifts in conceptions of that crime. In other words, what might be termed 'judicial memory'<sup>4</sup>—which the Nuremberg trials served passably well—did not equate with 'collective memory'.<sup>5</sup>

This book stands in large part counter to the positions adopted by Marrus, Wilke, and Herf. With reference to the case study of the murder of the European Jews—the definitive crime of Nazism—and the 'war of annihilation' between Germany and the USSR that precipitated the genocide, it will attempt to show that the war crimes trials did little to clarify conceptualizations of Nazi criminality in the public sphere anywhere. Sometimes they actually muddled the waters by drawing attention away from the victims of Nazi genocide and onto much more ambiguous symbols of suffering. Indeed, the trials had the peculiar effect of helping to elide the fate of the victims.

Not only were legal proceedings of dubious didactic value contemporaneously, however; their legacy to posterity is also qualified. The collection and cataloguing of documentation was a uniquely valuable service to students of Nazism, but the overall analyses of the murder of the Jews by the Allied courts were nowhere near as helpful. Indeed, beyond the basic outlines of the murder programme, which were actually evident during wartime for those concerned to look, the jurists got it wrong more often than they got it right. The prosecutorial investigations and judicial pronouncements on the Holocaust were indelibly marked by interpretative distortions that stemmed both from preconception and from the legal process itself, and these, it is argued, had repercussions for later historical writing.

<sup>4</sup> In a way that has not been attempted for the Allied trials of the Nazis, Martin Broszat has pointed to the relevance of trials of Nazis in Germany within the polymorphous (*vielfältigen*) process of 'mastering the past' (*Vergangenheitsbewältigung*). See his 'Siegerjustiz oder strafrechtliche Selbstreinigung: Aspekte der Vergangenheitsbewältigung der deutschen Justiz während der Besatzungszeit', *IJZ*, 29 (1981), 477–544, esp. 480–1. Regardless of their educative role, trials of former perpetrators have an important function for the society trying them. See Rückerl, *NS-Verbrechen vor Gericht*; Dick De Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of Their Post-War Prosecution in West Germany* (The Hague: Martinus Nijhoff, 1996).

<sup>5</sup> See Peter Novick's discussion of the origin of the idea of 'collective memory' in *The Holocaust in American Life* (New York: Houghton Mifflin, 1999), 5–7. In terms of the examinations that follow, Mary Fulbrook's term 'shared discourses' is probably more appropriate. See her *German National Identity after the Holocaust* (Cambridge: Polity Press, 1999), 143–7.

Thus it is not enough simply to do as Marrus does and reproduce the evidence that was presented at Nuremberg to illustrate what 'knowledge' the trials made available in 1945–6. The cognitive frameworks in which that evidence was placed by its recipients were vital in the post-war world, as they would be to the future historian. For every piece of the mosaic that was presented at Nuremberg and elsewhere, another was missing, another concealed, and another co-opted to support an untenable position. Moreover, particularly on a popular level, the style in which the evidence was presented—the concrete foundation on which the Allied re-educational 'lessons' were to be based—was every bit as important as the simple instance of that presentation. Given that legal reckoning was a part of a broader Allied scheme, it is essential also to address the historical contexts in which the 'facts' of Nazism were presented. Accordingly, the trials are examined here within Allied occupation policy and the political environments of the post-war period.

The study reveals a series of tensions in the formation of different forms of memory via the trial process. Some of these are inherent to the trial mechanism itself,<sup>6</sup> some specific to the period in question, and some to the representational problems posed by the Holocaust. Yet the relationship between the trials and what may broadly be termed 'memory' can only be theorized so far. In the final analysis, this is a historical study and demands reference to individual trials and strands of representation in their specificity. Understanding the relationship of different trials to each other and to prosecutors, defendants, and the law is no small matter, for the legal machinery wheeled into place in Europe was immensely complicated, and the general epithet 'war crimes trials' has perhaps obscured the great variety of those proceedings.

## 2. THE TRIAL. TABLEAU

There is only an incomplete record of the trials enacted after the Second World War. The number of proceedings runs to several thousands, the number of individual convictions to tens of thousands. Courts were established throughout the continent by nations that had been occupied by, allied to, and in conflict with Nazi Germany and Italy. The quality of the justice dispatched varied greatly, as did the profile of the defendants and the nature of the trials themselves.

A large number of trials were directed throughout Europe against those defined, often arbitrarily, as 'traitors' or 'collaborators'. In the political purges imposed upon the perpetrating nations themselves such proceedings found their equivalent in the 'denazification' and equivalent proceedings. These are to be distinguished, though not always clearly, from criminal trials enacted in the various countries to prosecute manifestly illegal acts committed both by domestic and foreign nationals in pursuit of Axis aims. Proceedings in the latter class have come to be known generically as 'war crimes trials', and it is these with which we

<sup>6</sup> Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction, 1997).

are concerned here. Within the complex of war crimes trials a distinction should also be made between the cases concerning, respectively, so-called 'major' and 'minor' war criminals. This awkward terminology denoted the stature of the criminal rather than the seriousness of the crime, and requires some explanation.

The best known of all war crimes trials is that, already touched upon, of 'the major war criminals' before the International Military Tribunal (IMT) at Nuremberg. 'The' Nuremberg trial, as it is popularly and erroneously known, was a creation of the agreement of the prosecuting and judging nations, the USA, the UK, France, and the USSR, and was the one instance of full inter-Allied co-operation in the punishment of Nazi criminals. It also featured the introduction of criminal charges unprecedented in international law, notably that of 'crimes against peace'. It has spawned a considerable historiography both broadly supportive and critical, and has cast the myriad other trials of the period into the shade. As the most significant manifestation of what came to be known critically as 'victor's justice', and as the proposed foundation for the imposition of a legal framework on the conduct of international affairs, for a time the IMT trial excited the passions of the concerned nations and the interest of many a jurist and would-be expert on the years preceding 1945.<sup>7</sup>

Though the springs of public interest had long since dried by the end of the IMT trial, it was succeeded by an even more substantial undertaking. The American military authorities in Germany, into whose zone of occupation Nuremberg fell, forged ahead at that place until well into 1949 with a series of proceedings against what were known as 'major war criminals of the second rank'. Owing to the location of the courtrooms and to their definite relationship with the trial of Göring *et al.*, these came to be known as the 'subsequent Nuremberg proceedings', or *Nachfolgeprozessen*. They were legitimated by an occupation statute known as Control Council Law no. 10 (CCL10). Twelve in all, the subsequent trials included 185 defendants prominent in a range of spheres of German life: the SS, the Nazi party, the German bureaucracy, the military, industry and finance, and the professions.

In providing both an organized documentary base and a corpus of oral testimony, the thirteen 'Nuremberg trials' in their different guises established

<sup>7</sup> Treatments of the formation and events of the IMT trial are legion. See e.g. Bradley Smith's *The Road to Nuremberg* (London: Andre Deutsch, 1982); id., *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977); Telford Taylor, *The Anatomy of the Nuremberg Trials* (London: Bloomsbury, 1993); Ann Tusa and John Tusa, *The Nuremberg Trial* (London: Atheneum, 1983); Arich J. Kochavi, *Prelude to Nuremberg* (Chapel Hill, NC: University of North Carolina Press, 1998); George Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff, 1990); Robert E. Conot, *Justice at Nuremberg* (New York: Harper and Row, 1983); Joe Heydecker and Johannes Leeb, *Der Nürnberger Prozess: Bilanz der Tausend Jahre* (Cologne: Kiepenheuer and Witsch, 1959); Whitney Harris, *Tyranny on Trial: The Evidence at Nuremberg* (Dallas, Tex: Southern Methodist University Press, 1954); Peter Calvocoressi, *Nuremberg: The Facts, the Law and the Consequences* (London: Chatto and Windus, 1948); Airey Neave, *Nuremberg: A Personal Record of the Trial of the Major War Criminals* (London: Hodder and Stoughton, 1978); Victor Bernstein, *Final Judgement: The Story of Nuremberg* (New York: Boni and Gaer, 1947).

themselves as a paramount historical source for the period with which they were concerned. They were derived conceptually from the idea of trying individuals and groupings involved in the formation and initiation of criminal policies that, because of the breadth of their application, had 'no particular geographical location'—this was the criterion according to which the criminals were termed 'major'. The concern with examining the channels of authority and the very nature of the Nazi regime set the Nuremberg series apart from the welter of 'war crimes' investigations (again, using the generic term) conducted elsewhere in Europe, and indeed was not really imitated until the prosecution of Adolf Eichmann in 1961, which David Ben-Gurion was to term the 'Nuremberg of the Jewish people'.<sup>8</sup>

If the subsequent Nuremberg proceedings contributed notably to the historical record rather than to contemporary awareness, they found a counterpart in the glut of prosecutions instituted independently by different national authorities around Europe for crimes committed against their subjects or on their territory. Germany was divided between the major Allies, who, as the sovereign powers, conducted their own zonal trial programmes, which are to be distinguished from the Nuremberg trials and served during the occupation period as an approximation to national proceedings for Germany. (Since France and the Soviet Union had been subject to German domination or influence, both of those powers also enacted trials of war criminals and collaborators in their own territory.) This distinction also goes for the American occupiers, who did not consider the subsequent Nuremberg proceedings to be zonal affairs *per se*, given the international basis of CCL10 and the significance of the cases, and who indeed instituted a separate series of trials of lower-ranking personnel before military tribunals. The suspects in the German zonal trials and the national tribunals of the other European countries could usually be associated with specific geographical locations, and were consequently of considerable interest to the prosecuting powers, but frequently of less immediate value to students of the full sweep of Nazi criminality. Neither did these trials generally feature the broad charges used at Nuremberg.

There were exceptions to these general rules. The French, for example, exploited the full breadth of CCL10 as the Americans did in the subsequent Nuremberg proceedings, in the prosecution before a multinational bench of the German industrialist Hermann Röchling for crimes against peace.<sup>9</sup> (Otherwise, the French zonal tribunals, based primarily at Rastatt, and also operating under CCL10 focused on more tangible, localized crimes, notably of the personnel of various concentration camps and prisons.)<sup>10</sup> More importantly, the fact that a

<sup>8</sup> Annette Wieviorka, 'La construction de la mémoire du génocide en France', *Le Monde Juif*, no. 149 (1993), 23–37, esp. 30.

<sup>9</sup> Yveline Pendaries, *Les procès de Rastatt (1946–1954): Le jugement des crimes de guerre en zone française d'occupation en Allemagne* (Berne: Lang, 1995), 49–55. The verdict was later overturned. The French tried more than 2,000 lesser criminals for crimes against humanity and war crimes.

<sup>10</sup> *Ibid.* 146–7.

defendant was tried by a national tribunal because his or her crime had a 'particular geographical location' did not mean that the crime or the criminal did not have international significance. Thus, for instance, a Polish national tribunal adjudicated in the case of Rudolf Höss, former commandant of Auschwitz-Birkenau, and a British zonal trial featured Field Marshal Erich von Manstein, one of the most vaunted of all the German military commanders.

The trials featuring in this volume are selected for their significance in the representation of Nazi anti-Jewish crimes from some of the aforementioned instances and schemes: the Göring case, the subsequent Nuremberg proceedings, and the American and British zonal series.<sup>11</sup> How each trial and series assumed the shape that it did is a matter of primary concern, for shape very much defined content, and there were real differences of opinion over the form and purpose of such proceedings.

### 3. THE EARLY FORMATION OF PUNISHMENT POLICY

Periodic official and semi-official declarations of retributive intent were made by representatives of each of the 'big three' powers, beginning in October 1941 with Roosevelt's and Churchill's pronouncement that 'the punishment of [Nazi] crimes should now be counted among the major aims of the war'.<sup>12</sup> The Soviets put a little steel into their words with a trial of collaborators at Krasnodar and one involving German prisoners at Kharkov in the second half of 1943.<sup>13</sup> However, well into the course of 1945, the near-victorious Allies had reached no agreement as to the overall treatment that should be meted out to Axis war criminals. There was no clear sign of international commitment to the principles outlined at the Moscow Conference of Foreign Ministers in November 1943, whence Britain, the USA, and the USSR had declared that

at the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or who have taken part in . . . atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the Free Governments which will be erected therein. [However] the above declaration is

<sup>11</sup> The IMT records are published as *Trial of the Major War Criminals before the International Military Tribunal*, 42 vols. (Nuremberg: IMT, 1947); hereafter 'IMT'. The proceedings of the subsequent Nuremberg Tribunals consulted for this book are housed in the University of Southampton Archives, and denominated 'NMT'. Additionally, substantial extracts from each of the trials has been published as: Nuremberg Military Tribunals, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 15 vols. (Washington, DC.: USGPO, 1953), hereafter 'TWC'. Material cited from American 'zonal' trials will be denoted by the microfilm number of the record in the National Archives and Records Administration, College Park, MD, hereafter 'NARA'. The comparable British sources have been studied either at the Public Record Office, Kew, hereafter 'PRO', or the Liddell Hart Centre for Military Archives, hereafter 'LHCMA'.

<sup>12</sup> Cited in Tusa and Tusa, *The Nuremberg Trial*, 21.

<sup>13</sup> Kochavi, *Prelude to Nuremberg*, 64–7.

without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by a joint declaration of the Governments of the Allies.<sup>14</sup>

There was an international consensus that something be done to punish someone in the German hierarchy, though opinions varied as to who exactly to hold responsible, and for what. Much Anglo-American vengefulness was predicated upon the fact that those peoples had been plunged once again into world war within a few decades of the previous conflict. Periodic revelations of 'war crimes' stirred the western publics, and the discovery of the remnants of a number of German concentration camps along with their decimated inmate populations in the spring of 1945, scandalized both nations. The 'Hunnish' and 'Prussian' qualities of imperialism, militarism, and aggression were shown in their true light, it was held, and they warranted punishment and demanded reform.<sup>15</sup> The Cold War had yet to descend upon Europe, and the foreign policy volte-face of the near future, with its moves towards 'reintegration' and leniency for Germany, would at that time have seemed light years away outside Whitehall and Capitol Hill.

The USSR had been longer and more acutely aware of what it was to be cast as an ideological enemy of Nazism. Besides experiencing the unparalleled barbarity of Operation Barbarossa, the German invasion of its territories, the Soviets overran the combined extermination and concentration facilities of Auschwitz-Birkenau and Majdanek months before the name of Belsen and Dachau meant anything to the British and American people. These establishments in Poland were different from and worse than the camps uncovered in the west, featuring the machinery of industrialized mass murder: huge gas chambers and crematoria served with supplies of human material from the nations of Europe by an ever-ready railway system.

Many of the 'junior' partners in the Allied coalition, countries which had also experienced life under Nazism, undertook their own trial programmes in accordance with the Moscow declaration. Indeed, representatives of most of the member countries of the United Nations War Crimes Commission (UNWCC), the first multinational body established to consider the issue of punishment, had been actively using that organization as a vehicle for the investigative works of their own national commissions since its establishment in 1943.<sup>16</sup>

<sup>14</sup> Ibid. 23–4.

<sup>15</sup> On the views of Churchill and de Gaulle on 'Prussianism', see Tony Judt, 'The Past is Another Country: Myth and Memory in Postwar Europe', in Istvan Deak, Jan T. Gross, and Tony Judt (eds.), *The Politics of Retribution in Europe: World War II and Its Aftermath* (Princeton, NJ: Princeton University Press, 2000), 293–323, esp. 296, 318. On the general 're-educational' intentions of the trial, see Frank Buscher, *The US War Crimes Trial Program in Germany, 1946–1955* (Westport, Conn.: Greenwood Press, 1989); Robert Sigel, *Im Interesse der Gerechtigkeit: Die Dachauer Kriegsverbrecherprozesse 1945–48* (Frankfurt am Main: Campus Verlag, 1992), 61.

<sup>16</sup> See United Nations War Crimes Commission (ed.), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948); Kochavi, *Prelude to Nuremberg*.

By November 1944 the British government, which was by no means a whole-hearted supporter of the UNWCC, also decided to prosecute under its own auspices certain German crimes committed against Allied nationals.<sup>17</sup> The legislation under which the British zonal trials were conducted was known as the 'Royal Warrant'. The cases were prosecuted by the Judge Advocate General's department of the army (JAG), which was answerable to the War Office, though the general policy of the British trial programme was the responsibility of the Foreign Office. The first trial conducted under the Royal Warrant began on 17 September 1945. It was dubbed the 'Belsen' trial, after the name of the camp where all the defendants had served.

Importantly, the promulgation of the Royal Warrant was preceded by a series of inter- and intra-ministerial debates about the legality of trials, with particular emphasis on the questions of jurisdiction over crimes committed in Axis or Axis-occupied territory, and against nationals of Axis states. The document emerged in its final form closely constrained by these concerns, and was in no way compatible with the sort of trial that occurred at Nuremberg of those individuals whose crimes had 'no particular geographical location'.<sup>18</sup>

The American army made a similar investment in the prosecution of 'conventional war crimes'<sup>19</sup> with a programme of investigation and trial spanning the period June 1944 to July 1948. This programme, and much of the initiative for punishment in US circles generally, was spurred by news of the massacre of American troops by a Waffen-SS division at Malmédy in December 1944. Despite an initial lack of manpower, its scope expanded with the growing awareness of the extent of Nazi criminality in Europe.<sup>20</sup>

These proceedings came to be known as the 'Dachau series', as many of the trials were conducted on the site of the former concentration camp. They encompassed cases against former concentration camp guards, murderers of downed American pilots (in the so-called *Fliegerprozesse*) and a third miscellaneous grouping including the Malmédy murderers and the personnel of the 'euthanasia' institution, Hadamar. Like the British trials, the Dachau trials were conducted under the authority of the Judge Advocate and Deputy Judge Advocate, but unlike the British case, policy-making power resided with the American forces in the European theatre, and then with the occupation regime, rather than in Washington.<sup>21</sup>

The institution of the IMT, as distinct from these zonal developments, derived from inter-departmental debate in the US government. The concept of

<sup>17</sup> Priscilla Dale Jones, 'British Policy towards German Crimes against German Jews, 1939-1945', *Leo Baeck Institute Year Book*, 36 (1991), 339-66.

<sup>18</sup> For analysis of the way the Royal Warrant limited the scope of trials, see below, Chapter 2, and also Frederick Honig, 'Kriegsverbrecher vor englischen Militärgerichten', *Schweizerische Zeitschrift für Strafrecht*, 62 (1947), 20-33.

<sup>19</sup> Institut für Zeitgeschichte (hereafter 'IfZ'), IFG 16, preface.

<sup>20</sup> IfZ, IFG 16, pp. 1-4.

<sup>21</sup> Ibid. See below, Chapter 1.12, on the importance of this distinction.



what emerged as the trial of the major war criminals had to be sold to the other powers. It was not inevitable that the select senior Germans, and the organizations deemed complicit in their wrongdoing, would reach a courtroom, and it was certainly no foregone conclusion that they would face the type of charges which they eventually met.

In the initial negotiations about the nature of the peace the British expressed a preference for summary execution of a large group of arbitrarily defined Nazi leaders, over and above those lesser perpetrators who would be given the benefit of trial. The guilt of the former was simply too obvious for a trial which, it was held, was problematic legally in terms of legal precedent. The courtroom might also provide a platform for revanchist Nazi propaganda.<sup>22</sup> An even more extreme position was taken by an American lobby centred around the Department of the Treasury and its secretary, Henry Morgenthau Jun. No manner of legal proceeding was envisaged in his plan for Germany.

The Treasury Department was more sensitive to the reality of the war in Europe, as it had close contacts with the War Refugee Board. The latter body had been established in 1944 in a belated American recognition of the seriousness of the plight of the Jews, and was thus a vital conduit for information about the Holocaust and pressure on behalf of its victims. Morgenthau's anti-German vitriol was manifest in his demands for the emasculation of that country by the outright execution of its leaders and by systematic de-industrialization and pastoralization, in order that it never again have the capacity to wage war.<sup>23</sup>

The Soviets favoured a trial of some description of a group of leading Nazis, perhaps for propaganda purposes similar to those served by their previous 'purge' trials. In any case, this idea was the closest approximation to another American proposal forwarded as a counter to the 'Morgenthau plan'. The rival Department of War under Henry Stimson was desperate to coax President Roosevelt away from his enthusiasm for the Treasury's idea, fearing that not only was de-industrialization impractical and immoral, it might well sow the seeds of discontent for a third World War. Conversely, the course of extending 'due process' to prominent Nazis was morally unimpeachable and it would also expose the evils of that regime, thereby, it was hoped, preventing their repetition.<sup>24</sup>

Self-evidently, the trial option won the day. It achieved hegemony in the final quarter of 1944, aided by the propaganda value the Morgenthau plan yielded to Josef Goebbels in the latter's struggle to make the Germans fight to the last. By April 1945 some form of legal action against prominent war criminals was all but certain, particularly when the death of Roosevelt resulted in the succession to the presidency of Truman, an avid supporter of the trial idea.<sup>25</sup>

<sup>22</sup> Tusa and Tusa, *The Nuremberg Trial*, 25–8, 61–4; Smith, *The Road to Nuremberg*, 45–6.

<sup>23</sup> Tusa and Tusa, *The Nuremberg Trial*, 50–1; Smith, *The Road to Nuremberg*, 25–9.

<sup>24</sup> For extensive details of these interdepartmental rivalries, see Smith, *The Road to Nuremberg*, ch. 1; Tusa and Tusa, *The Nuremberg Trial*, 51–3.

<sup>25</sup> Smith, *The Road to Nuremberg*, 54–5.

The multinational flavour of the prosecution of the major war criminals was assured by first Soviet, and then French, acquiescence in the principle of far-reaching legal proceedings. The British were the last to come on board, never really discarding their fears about the propriety and wisdom of this type of trial. They ultimately only surrendered in the face of the more-or-less united front of their confederates,<sup>26</sup> and would happily retreat to the more limited form of legal procedure beyond the IMT trial.

The formal agreement to trial was signed by representatives of the four Allied powers in London in August 1945. It affirmed the intention to deploy the IMT 'for the trial of war criminals whose offences have no particular geographical location, whether they be accused individually or in their capacity as members of organizations or groups or in both categories'. Attached to the agreement was a document which came to be known as the Charter of the IMT, setting out the rules of procedure for the court, and enumerating the charges on which it would adjudicate.<sup>27</sup>

The necessary factor in the victory of the War Department in Washington and then in London was the formulation of a prosecution plan of sufficient scope to encompass, first, the breadth and depth of the penetration of Nazi criminality into Germany and, secondly, the corpus of acts which distinguished Nazi atrocities from anything previously accounted for in international law. In recognition of the extremity and peculiarity of Nazi criminality, the IMT was called upon by the charter to adjudicate on actions that did not correspond to traditional notions of breaches of the 'laws of war': for instance, persecutions dating from before the outbreak of war and against Axis nationals; crimes committed during wartime but outside war situations; and ultimately the very act of aggressive war itself. The multi-faceted, international importance of this prosecution effort thrusts the IMT trial to the centre of any analysis of the legal accounting for Nazism. The IMT trial is the key point of departure for this book, for within it, and the lesser proceedings that surrounded and followed it, lay the seeds of the misrepresentations that were to characterize portrayals of Nazi criminality in the post-war era and in some cases up to the present day.

#### 4. THE HOLOCAUST ON TRIAL: AN OVERVIEW

The first section of this book is its empirical core, establishing with reference to diplomatic and legal records the fault lines of the various trial processes, and thus providing a basis for the subsequent discussion of the images of genocide that emerged from the courtrooms and the occupation milieux. The first chapter is a study of the prosecution of prominent war criminals within the context of the broader trial policy of the British and Americans. It brings out the distinctly American flavour of the IMT concept, particularly the controversial strategy

<sup>26</sup> Tusa and Tusa, *The Nuremberg Trial*, 66–7.

<sup>27</sup> IMT, i, 8–10.

employed to ensnare the diverse individuals and organizations brought to trial and simultaneously to scrutinize the history of Nazism. The chapter proceeds to examine the interrelationship of trial strategy and broader political aims and influences, and the way in which these combined to shape the subsequent Nuremberg programme. Alongside this analysis, it considers the course of the British Royal Warrant trial series and how that defined itself in regard to further prosecutions of 'major' and other important war criminals.

The development of the Cold War is afforded a prominent place within this analysis, in discussion first of the abortive proposal for a second international trial of 'major war criminals' and then of the phasing-out of criminal proceedings altogether. As the 1940s drew to a close, the imperative of reconciliation with Germany in the face of the perceived Soviet threat required the termination of trials. In these and later pages we examine the way that policy realignments in turn impacted, in an entirely negative way, on the educative objectives of the trial initiative.

While Chapter 1 describes the general contours of the trials, Chapter 2 examines the specific question of the treatment of anti-Jewish crimes within that framework. It suggests continuities between the latter and the attitude of the liberal democracies to the Jewish plight in wartime. Thus, in crude terms, on both sides of the German surrender responses were characterized either by a failure to recognize the fate of the European Jews or a reluctance to act upon any such recognition. For our purposes, only limited allowance was made for the catastrophe in the formulation of legal charges, and no priority assigned to the prosecution of its perpetrators. Sometimes, in fact, anti-Jewish crimes were deliberately downplayed by the trial planners. They were certainly almost absent from the wider complementary re-educational material presented by the occupation authorities, material that concentrated largely on crimes committed within Germany.

Moving into the second section, Chapter 3 shows the effect of this 'relativization' of the Jewish case in the Allied courts. It focuses upon the representation of the Nazi camps in the earliest and most widely publicized war crimes trials. It looks in detail at the way that prosecution agendas influenced the presentation of evidence on this complex system of persecution, and how that history was consequently simplified and homogenized, with the murder of the Jews downplayed. As the camp was the pre-eminent symbol of Nazi atrocity, such misrepresentations played a key role in forming misconceptions of the extent and intent of the crimes of the war years.

Chapter 4 differs slightly in its aim. It seeks to show why the trials did not alter pre-existing conceptions of German criminality. It argues that trials were conceptually flawed as didactic tools, and that their shortcomings were magnified by the political discourses of the post-war years. Between 1945 and 1953, Allied policy shifted rapidly from enforcing the idea of collective German guilt to differentiation between Germans, then, somewhat more gradually, to appeasement of

German indignation at the earlier punishment of war criminals. In the main, this was the result of simple political pragmatism, but there were also interesting commonalities between the Germans and the Allies at both the political and public levels as to who warranted trial and who did not. That freedom of expression was given to these partisan interests, unhindered by recourse to the actuality of gross German criminality, was accommodated by an Allied educational initiative whose only consistency was that from day one it focused on 'Germanism' and ignored the concrete effects of Nazi policy.

This analysis focuses particularly on the trials, and debates around those trials, of regular German soldiers. With the passage of time after the end of the war, such debates accommodated and were accommodated by broader international discourses about Germany's position *vis-à-vis* the USSR, the 'west' versus the 'east', civilization versus barbarism and the Christian order versus totalitarianism. They contributed eventually to significant distortions in each country of the nature of the German invasion of the Soviet Union in 1941, and more generally to sweeping diminishments of the breadth of German guilt, as the supposed innocence of the German soldier was transposed to the whole of the German population.

The final section and chapter concern the record of Nazism and its specific crimes that the trials created for posterity. The point of departure is again the evidence in which the judges and prosecutors were prepared to trust and that which they were not. We see that the preconceptions of the Allied lawyers took no account of many criminal groupings whilst inflating the role of others. Thus, for instance, some of the lesser-known police organizations that murdered Jews and others in eastern Europe received lenient treatment despite some evidence at Nuremberg as to their activities. These absences, and some of the exaggerations that are their counterparts, have found remarkably accurate reflection in the historiography of Nazi genocide.

On an interpretative level, the subjective elements of prosecution and judgement contributed towards the depiction of the Holocaust as a by-product of a monolithic German-Nazi conspiracy for European domination through war. This concept fed directly into the thinking of the subsection of Holocaust historiography known as the 'intentionalist' school, and thus into many of the blind alleys into which Holocaust scholarship has wandered. Examining this connection is not simply a matter of making the conceptual link between the idea of a long-standing conspiracy for war with that of a purported plan, long held by Hitler, for the extermination of the Jews. It concerns the elision of inter-Nazi conflicts over the exact course of the treatment of subject peoples; it is also an issue of the reduction of the complex of agencies involved in decision-making and 'executive action' and the distortion of important episodes to fit the grand narrative, to tie up the loose ends. Finally, it touches upon the removal of the question of individual motivation to murder by subordinating it totally to meta-historical forces.

In short, with reference to both the judicial and historical examination of criminal groupings and actions, Chapter 5 suggests a linkage between the earliest investigation of Nazi genocidal policy and most of the major historiographical debates about that subject in the succeeding half-century. These are brought together in the largest, and concluding, case study, which concerns the complicated and oft-misunderstood subject of the Nazi exploitation of Jewish slave labour.