

NAZI CRIMES AND THE LAW

Conference at the University of Amsterdam Law School, August 16–18, 2003. Conveners: Henry Friedlander (City University of New York), Nathan Stoltzfus (Florida State University, Tallahassee), Richard F. Wetzell (GHI). Participants: Michael S. Bryant (University of Toledo), Jonathan Bush (Columbia University Law School), Dick de Mildt (University of Amsterdam), Geoffrey J. Giles (University of Florida), Patricia Heberer (U.S. Holocaust Memorial Museum), Eric A. Johnson (Central Michigan University), Hans Safrian (Institut für Zeitgeschichte, University of Vienna), Annette Weinke (independent historian, Berlin), Elizabeth D. White (U.S. Department of Justice).

Scholarly and public discourse have long viewed the trials of Nazi criminals as a litmus test to assess the relative success of Germany's efforts to deal with its Nazi past. The way the Federal Republic pursued prosecution of Nazi criminals came to be seen as indicative as to whether Germans had advanced to embrace democracy. This conference on law and state-sponsored crimes focused on Germany as a case study. The presentations examined various successes and failures of German and Austrian postwar trials, as well as of early United States trials of Nazi criminals, and considered the use of historical evidence and the role of historians as expert witnesses. What was the place of German law in relationship to Nazi crimes? How did it work to facilitate crimes? To what extent were Nazi crimes illegal according to German law? After the war, the German judicial system charged with prosecuting Nazi perpetrators was embedded in the society that, as a whole, had perpetrated Nazi crimes. Yet this story, relative to all other pertinent cases, is generally a success story. How does this German record compare with records of the use of international law in recording and redressing state-sponsored crimes? To what extent can the Nuremberg trials, carried out by powers that had totally defeated the enemy, serve as the cornerstone of future international legal attempts to redress state-sponsored crimes?

Henry Friedlander opened the conference with his presentation, entitled "Legal and Extralegal Persecution in the Nazi Era." Among other subjects, Friedlander examined the role of courts in relation to Nazi political crimes. Ninety percent of all German judicial officials had belonged to the Nazi Party, welcoming the proclaimed law and order state following the disaster of Weimar. The judicial system was one reason the Holocaust resembled machine-like mass murder rather than a Czarist pogrom, and helped establish a sense of security and order for the majority. The dictatorship preferred to convey to the masses a sense of *Rechtsicher-*

heit, of stability and legal predictability. Nazi mass movement politics required large parts of the population to feel secure. Sensitive to popular opinion, the dictatorship claimed to create a situation that reflected popular sentiment. This did not aim to make an ideological enthusiast of everyone, although it did go beyond mere concern with morale. The regime needed to keep the "Aryan" majority satisfied and endowed with a sense of safety. This explains why the regime struggled so much with the issue of Jews married to Aryans, in particular what to do about their children, and ended up compromising "racial purification" in their case.

The law helped mobilize the consensus for Hitler, and mobilized criminal acts as well. It was widely believed that what Hitler said had the force of law, and some judges even made reference to this. Of course the range of activities the regime could undertake openly with popular approval expanded under the conditions of war and demands of patriotism. When its concern with the appearance of public security and fairness conflicted with goals the regime knew would cause controversy, the regime turned to deception of the public. This included secrecy, extralegal activities, non-public actions, false confessions, and deaths attributed to natural causes or "attempts to escape."

Geoffrey Giles presented a paper on social norms and laws regarding homosexuality. The campaign against homosexuals was part of the Nazis' attempts at consensus building. The prioritizing of measures dealing with homosexuality, within a much more sweeping (and in fact never accomplished) penal reform, reflects a desire to impress the public that the regime was getting things done, especially in cleaning up the country after the perceived ghastly libertinism of the Weimar Republic. This short-term political expediency in 1933 grew in June 1934 during the Röhm Purge into an alleged national crisis to shore up support from conservatives. Hitler personally cared little about homosexuality. But as Himmler became more and more obsessed with the issue, lawyers laid the groundwork for an unprecedented purge of sexual outsiders. As the situation grew direr for homosexuals during the Second World War, legal experts continued to work toward ways to streamline the conviction and punishment, under the broadest possible definition of a homosexual act, of the hundreds of thousands of homosexuals who had so far eluded them. The Führer did nothing to interfere.

Yet the radicalized prosecution of homosexuals during the Nazi period illustrates that the spirit of the law as defined by Party leaders was more decisive than the letter. The theme of law and society was elaborated, showing that laws followed and expressed social customs. Nazi legal guidelines called for laws to be written in clear, easily understandable language that reflected the "national feeling for justice and morality." Germany during the decades preceding the "Third Reich" had the

largest movement for homosexual emancipation in Europe. In Germany, where acceptance of Freud was most advanced, both homosexuality and tolerance of it were central to the rapid transition to modernity and the general emancipation of instinct. This did not mean popular opinion supported homosexuality. When at the end of June 1935 the regime tightened the penal code, including laws against homosexuality, "the public could be relied upon to condemn sodomy." Most Germans, in any case, believed for much of the Third Reich that the prisons and concentration camps were filled with criminals who fully deserved to be there.

Eric Johnson presented a closer look at Nazi perpetrators he characterized as "Local Eichmanns." He discussed the identities of two local Gestapo officers and their fates in post-Nazi West Germany, comparing them with Hannah Arendt's characterization of Eichmann. Johnson concluded that two officers, Karl Löffler and Richard Schulenburg, from Cologne and Krefeld respectively, were particular types of people—elderly, calm, and outwardly friendly, yet loyal Nazis and ardent anti-Semites—that Nazi authorities selected for the most important project of deporting German Jews. These men had been central figures in the persecution, deportation, and death of thousands of Cologne and Krefeld Jews.

Johnson then inquired into the impact of the vital support Jews and church officials gave these Gestapo officers after the war. Löffler and Schulenburg, like every Gestapo agent from Cologne and Krefeld Johnson has researched, had "Persilscheine," letters from influential church leaders and Jewish survivors amounting to clean bills of political health that portrayed them as humane career police officers. In addition to asking what impact this had on their prosecution, Johnson also raised questions about why these persons wrote letters of support, and whether they should influence our own opinion of the Gestapo agents they praised.

Certainly these letters influenced the German judicial system. Although one might argue that these Gestapo officers' guilt was greater than Eichmann's even if the number of victims they were responsible for was smaller, denazification processes initially classified them as Category III "minor offenders." Thanks to supportive testimony and letters, however, Löffler and Schulenburg successfully appealed. Löffler joined the ranks of the "exonerated" with Category V status in November, 1949; Schulenburg's status was lifted to Category IV in July 1950. Both were thus eligible again for police pensions, with the caveat that their years in Gestapo service could not be counted. By the end of 1955, through further appeals, both men were allowed to count their years with the Gestapo in the calculation of their pension, but not the promotions they had received as Gestapo officers. In 1958 their promotions in the Gestapo were in-

cluded too, and both men lived comfortably to a ripe old age. Johnson concluded by noting that “their experiences were repeated across Germany.”

In the first afternoon presentation, Annette Weinke argued for a greater historicization of the effort to study postwar trials as a test of Germany’s success in coming to terms with its past, casting her interpretations in a broad social and political perspective and seeking to take East German history equally into account along with that of West Germany. To what extent did a formalized strategy of confronting the past based in criminal law end up shaping society’s idea of Nazi perpetrators? How did this promote or block a broader confrontation with the Nazi past? Weinke showed that the Federal Republic’s renewed prosecution of Nazi criminals in the late 1950s cannot be explained simply by a general rise in moral standards; rather she finds the logic of this in the context of German-German Cold War conflict.

Weinke illustrated the degree of mutual influence between the two German states in memory politics by examining two different phases of the prosecution against Nazis, in the late 1950s and in the 1960s. The “treatment of the past” and the historiographic perception of this process, she found, were largely influenced by the East-West conflict, as the two Germanys attempted to gain legitimacy and in turn cast aspersions on the other. She revealed how the GDR, in addition to domestic and other international influences, shaped the FRG’s investigations of the Nazi past. In the end, Weinke’s approach permits a view of the history of anti-Nazi prosecution in postwar Germany not only as an indicator, but also as a medium of the politics of transformation from Nazism to democracy.

Jonathan Bush spoke on the history and consequences of a Nuremberg trial, *United States v. Wilhelm List et al.* (1947–48). The trial was known informally as the Hostage Trial, with senior military officials charged with killing of dozens of civilian hostages in reprisal for what the Wehrmacht deemed to be partisan killings of its members or other Germans. Beginning with its invasion of the Balkans in the spring of 1941, the German army terrorized Yugoslavia and Greece with hostage killings numbering in the hundreds of thousands.

Of the ten generals tried, eight were convicted of various war crimes and crimes against humanity, mainly related to the murder of civilians. The trial was not politically motivated, although Bush interpreted the trial as a key factor in ending the Nuremberg trials program and exacerbating tensions at the outset of the Cold War, and related it to important developments in international law. Soviet bloc and international lawyers heavily criticized the decision on List. They condemned the court’s holding that some military destruction had been lawful not because it was necessary but because it had been perceived to be a military necessity by

one of Hitler's favorite generals. More appalling to civilians throughout the Balkans who had struggled to resist uninvited German aggression was the court's conclusion that in resisting as partisans, they had violated the law of war. The court had also found that there were acceptable levels of hostage murders, and some were deemed within the range of lawful actions.

Responses to the List case are found in the Geneva Conventions of August 12, 1949. Although most national military codes allowed reprisals, including the taking of hostages under limited conditions, new Geneva provisions prohibited pillage, wanton destruction, and all collective punishments and reprisals, whether against POWs or civilians. Bush concluded that this strong rejection of collective punishment marked the repudiation of traditional views that reprisals in war were a useful tool for ensuring compliance with war laws, as the court had held in the List decision.

Nathan Stoltzfus focused on a Wehrmacht massacre on the Greek island of Cephalonia, in General List's territory, of around six thousand Italian officers and soldiers after they had surrendered. In September 1943, following the fall of Mussolini, the Wehrmacht took over military positions of occupation previously held by the Italians. Germans presented Italian troops with an ultimatum without basis in international law: join the Wehrmacht, surrender unconditionally, or face forcible disarmament. A combative spirit arose within the Italian troops, especially after they perceived that the Germans were not fulfilling their guarantees. Italian General Gandin, despite being a firm Mussolini supporter, followed the general opinion of his troops and decided to resist a German attack.

The sheer brutality of the unlawful murder of POWs spurred discussion among conference participants about motivations for mass murder in World War II. There seemed to be general agreement that there were a variety of motives, if perhaps no rational reasons. Also, the Wehrmacht murderers were mountain troops from Bavaria and Austria: practiced killers, barbarized by warfare, perhaps frustrated and increasingly ruthless as Germany's goals were not met. It was common to view retaliation as a matter of German honor.

Dick de Mildt opined that perpetrators could not admit to their crimes because doing so would have rendered it impossible to live with themselves. A commanding officer in charge of troops on Cephalonia wrote in 1987 that accusations of *Wehrmacht* criminality were defamatory. Cephalonia had been just another great German military campaign, and in any case, the Italians had turned treasonous just as they had done in World War I, and the German "embitterment" was great. In the Federal Republic, the social, political, and judicial aftermath of this massacre

illustrated the limits of national justice, not just due to domestic influences like the myth of an untainted, professional Wehrmacht, but also due to the Western Cold War alliance.

Michael Bryant's discussion of early postwar trials of concentration camp officials was a wrenching exposé of the brutality of Nazi criminality. Low-ranking camp workers clearly received the most severe legal sanctions, compared to "operational perpetrators," who committed their crimes as part of an organized scheme far from the physical crime. Defendants from Dachau were farmers, factory workers, glasscutters, and bakers in minor positions that guaranteed them daily exposure to their victims and boundless opportunities to torture and murder them with their own hands. Based on their direct commitment of the criminal act, criminal law identified them as "direct perpetrators."

The absence of a proximate relationship between the facilitator's actions and the violence of his crime, on the other hand, attenuates the impression of culpability. International Military Tribunal judgments identified as "facilitators" men such as the former leaders of the Nazi regime on trial simultaneously at Nuremberg. Bryant elaborated on the impact of social images in postwar German prosecutions. The lawyer with a doctorate charged with mass shootings on the eastern front or the general indicted for shooting hostages often went unrecognized as Nazi perpetrators because they did not resemble the profile of the "common" murderer. Adenauer and many others tended to exonerate professionals who worked in the bureaucracy connected to the Final Solution.

In December 1945, in the wake of the trial of "major" Nazis at Nuremberg, the quadripartite Allied Control Council promulgated Law Number 10 authorizing military authorities in the four zones of occupied Germany to level charges of crimes against peace, war crimes, membership in an illegal organization, or crimes against humanity for wartime offenses committed in their respective jurisdictions. Patricia Heberer explored policies and procedures of the United States military commission in those few postwar months before Law Number 10. Through case studies, she examined how United States military authorities wielded international law both to judge traditional war crimes and to confront Nazi policies of mass murder, in America's first effort to punish Nazi criminality before the charge of "crimes against humanity" greased the wheels of post-war adjudication.

These military commission trials regularly led to swift, relatively stiff sentences. Viewing these sentences in the perspective of the entire postwar period, Heberer concluded that genuine justice for the victims of Nazism was a possibility only in this immediate postwar period. Throughout, in her estimation, perpetrators who could lie low, living on false papers or enjoying the protection of German professional commu-

nities, might escape prosecution altogether. And those criminals who had carefully organized and implemented Nazi crimes, yet whose links to those crimes required time-consuming investigation and tenacious prosecution, *could* get away with murder, as indicated especially by Heberer's case study of the Hadamar killing center.

Dick de Mildt spoke on postwar German trials, drawing on several cases to illustrate deficiencies in "the overall success story of West German postwar prosecution." In May 1943, the Supreme SS- and Police Court in Munich tried SS-*Untersturmführer* Max Täubner in connection with large-scale executions of Jewish civilians in the Ukraine in 1941. Täubner had ordered photographs taken during one of the executions that had included torture. The SS court indicted Täubner for violations of military duty, not for murder or manslaughter, but rather on the basis of his "offense to troop discipline." He had allowed himself to engage in cruelties that were deemed unworthy of a German man and SS officer. He failed his men by not protecting them from emotional degeneration. Furthermore, the court found Täubner guilty of endangering the security of the Reich with photographs that could have fallen into enemy hands and used as propaganda. Moreover, showing such pictures to "persons with a weak mental constitution could paralyze the will to fight of the German people." Making the tasteless and shameless pictures expressed an inferior character. Himmler confirmed the SS court's ten-year prison sentence for Täubner and his expulsion from the SS.

De Mildt contrasted the experience of Täubner in postwar German courts with that of an army officer Manfred Blume, who during the summer of 1942 randomly killed a number of Soviet prisoners of war by shooting, beating, and bayoneting. A military court sentenced him to two years in prison plus demotion for manslaughter. Hitler, however, quashed the sentence and terminated the proceedings, opining that one cannot reproach "vital natures" in the unique fateful struggle of the German people, who reject all humanitarianism. Ironically, Hitler's appreciation of Blume landed him in enormous trouble. Instead of the relatively privileged convict status of a somewhat overzealous military officer, Blume took charge of a battalion at Stalingrad, and was taken prisoner and sentenced in the USSR to twenty years forced labor.

After the war, there were several attempts to re-indict Täubner, living in Bavaria, for massacres. But as the trial verdicts of the military courts, those of the SS- and Police Courts were considered legally valid German verdicts. When a state's attorney in 1960 sought to indict Täubner for his crimes, the attempt was rebuffed by the District Court for renewing prosecution of someone for crimes that had already been duly tried by a German court. Thus, thanks to Himmler's signature under a trial judgment that loudly applauded the "Final Solution" as "the necessary exter-

mination of the worst enemy of our people," Täubner was protected by the West German constitution from being tried again.

Manfred Blume, pardoned by Hitler, suffered a contrasting fate that was equally just under postwar German law. The USSR turned him over as a war criminal to the West German authorities in 1956. Ten years later, now a war-disabled pensioner, he was again tried for unlawful wartime killings. Despite his harsh fate and in contrast to Täubner, Blume received no protection from the double jeopardy clause, since due to Hitler's reprieve he was considered never to have been punished for his crimes. On January 25, 1966, the Hamburg court sentenced Manfred Blume to fifteen years for murder and attempted murder.

Hans Safrian's examination of postwar trials in Austria concentrated in its analysis on those accused of "improper enrichment"—illegally expropriating property during the Nazi period. He focused on the immediate postwar trials before the People's Courts, which judged perpetrators as traitors to Austria as well as war criminals. Lust for Jewish property "was one of the most distinguishing characteristics of the anti-Semitic mass movement in Austria in 1938." These acts of theft were illegal, although authorities had difficulty stopping the thieves. After the war, they also had difficulty prosecuting them. During the first postwar years, the People's Court of Vienna opened investigations of 5,914 persons thought to have expropriated property illegally. Only a small number of people faced trial, of which a mere fraction were found guilty. Most of these were convicted due to membership in the Nazi party before 1938, which under postwar Austrian law constituted treason. Safrian stated that this followed a pattern that he illustrated by a specific verdict. The court concluded that a defendant had stolen property from Jewish victims. Nevertheless, according to the court, he did it "in a personally upright manner." Although the court did not accept a survivor's statement as evidence for the prosecution, the judges accepted the defendant's assertions that he had stolen only on orders to do so. In the end, like so many others who had "improperly enriched" themselves, he was sentenced (in his case to eighteen months in prison) for having been a member of the Nazi party.

One reason that individuals suspected of improper enrichment were instead tried and sentenced for party membership was that party membership and rank could easily be determined by searching the surviving Nazi personnel files. Historians are familiar with trials of Nazi perpetrators primarily through their use of documents accumulated by the courts in the course of these trials. Elizabeth White concluded the conference by comparing the use of documents with the use of expert witness testimony as the basis of evidence for convictions. White discussed the use of historical evidence in U.S. courts since the late 1970s to denaturalize, deport,

or extradite Nazi criminals, showing how the treatment of alleged Nazi criminals in the United States relies more on expert testimony than in Germany. German prosecutors must prove that a defendant committed the elements of a specific crime, and conviction hinges on proving what the accused has actually done. Prosecutors in the United States, on the other hand, must show the role that a defendant played in the Holocaust and also disprove the defendant's claims, which commonly distance himself from the activities of his unit. Thus the government's Office of Special Investigations (OSI) has to show the historical context of the alleged activities in order for a judge to weigh accurately the credibility of the prosecution's evidence against the credibility of the defendant's claims.

As a result of these requirements, United States prosecutions of Nazi crimes feature far more of the history of the Holocaust than do similar prosecutions in Germany. In this task, expert testimony from historians has often proved to be a better tool than archival documents. The challenge of collecting documentary evidence of the activities of the accused from fifty or sixty years ago is daunting if it is to persuade the judge to give more weight to the government's interpretation of the evidence than to the defendant's. Expert testimony from historians, on the other hand, has contributed "in significant part" to the successes of United States government prosecutions. White demonstrated that the greatest contribution by historians to OSI's prosecutions probably lies in implicating non-Germans. Given the small number the SS and the police could deploy in the occupied Soviet territories, as well as the linguistic limitations of those men, their success in identifying, isolating, and murdering hundreds of thousands of Jews within a short time span depended upon their ability to recruit indigenous forces who were willing to assist the Germans in the Holocaust and in some instances to carry them out with very little supervision.

Nathan Stoltzfus