CONTESTED VISIONS OF JUSTICE: THE ALLIED WAR CRIMES TRIALS IN GLOBAL CONTEXT, 1943-1958

Conference at Boston College Ireland’s Conference Centre in Dublin, September 25-27, 2015. Co-sponsored by the German Historical Institute Washington, Boston College, the European Research Council, the “Asia and Europe in a Global Context” Research Cluster at Heidelberg University, and International Research and Documentation Centre for War Crimes Trials (ICWC) at the University of Marburg. Conveners: Franziska Seraphim (Boston College), Kerstin von Lingen (University of Heidelberg), Wolfgang Form (ICWC Marburg), and Barak Kushner (University of Cambridge). Participants: Elizabeth Borgwardt (Washington University, St. Louis), Robert Cribb (Australian National University), Franziska Exeler (Free University Berlin), Hayashi Hirofumi (Kanto Gakuin University), Andreas Hilger (University of Hamburg), Cheah Wui Ling (National University of Singapore), Narrelle Morris (Curtin University), Hitoshi Nagai (Hiroshima City University), Devin Pendas (Boston College), Tanja Penter (University of Heidelberg), William Schabas (Middlesex University), Annette Weinke (University of Jena), Sandra Wilson (Murdoch University), Matthias Zachmann (University of Edinburgh).

Over the course of three days, historians, political scientists and legal scholars examined the transnational connections between the political, administrative, legal, and social mechanisms of Allied transitional justice and their role in reshaping the postwar world after 1945. The conference began with a panel on “International Collaboration in Administering War Crime Trials,” chaired by Franziska Seraphim, which focused on the political will to pool legal expertise in order to conduct trials of Axis war criminals. This led to international collaboration in the area of war crimes investigations and prosecutions. The session subsequently highlighted the outcome of the program’s administration in the different theaters of war. The panel started with Narelle Morris, who examined the Australian national representation at the United Nations War Crime Commission (UNWCC) and showed how the intentions of the UNWCC were hampered by cooperation problems between individual member nations and the UNWCC, often to the exasperation of national representatives who were trying their hardest to make the UNWCC work. Robert Cribb addressed the implications of politics for the war crimes trial program within Mountbatten’s South East Asia Command (SEAC). He showed that whereas the trial process in South East Asia began with
a determination on the part of the former wartime Allies to prosecute comprehensively, the scale of the task and the political realities in the region soon overwhelmed the magnitude of that ambition. This stemmed in no small part from the fact that the prosecuting powers — the old European colonial powers in the region — were only temporary holders of sovereign power, challenged by local claims for independence. Hayashi Hirofumi provided an in-depth overview of the organizational structures under the US War and Navy Departments, respectively, to clarify both the command and liaison structures of war crimes trials of Japanese in the Pacific region. Taking the prosecution of wartime crimes in Western Europe as a case-study, Devin Pendas argued that the prosecution of axis criminality after World War II was initially part of a broader push for international legalism, but quickly became a set of disconnected regional and national projects. The main reasons for this were Cold War national security concerns as well as the resistance of post-occupation states, especially in Eastern Europe, to an emerging “international” legal system. Tanja Penter outlined how the prosecution of German war criminals and Soviet collaborators in the USSR was used to support both domestic and foreign political interests. She pointed out that the Soviet war crimes trials strengthened the Stalinist regime’s efforts to appear as a state that followed international standards of law and justice, thus consolidating the government’s legitimation towards the Soviet population, and its intended role in the international post-war order.

After a lively debate on the importance of the reconstitution and legitimation of sovereignty, international legalism, military power structures, and domestic competition for Allied transitional justice, the first day concluded with a key-note lecture delivered by William Schabas and titled “London 1941-1944: Conceiving the Permanent International Criminal Court.”

The second panel, chaired by Barak Kushner, examined “Competing Notions of Criminality in Comparison.” The panel’s first paper, by Wolfgang Form, explored different notions of state crimes and explained how Allied views on Axis state crimes found their way into the indictments of the International Military Tribunal (IMT) in Nuremberg and the International Military Tribunal for the Far East (IMTFE) in Tokyo. In his response, Matthias Zachmann examined the responses to the judgments given by the IMT and the IMTFE in Germany and Japan and argued that an orientalist image of Japanese society might explain the difference in the indictments of these
Franziska Exeler showed how in the case of Soviet justice “the global” and “the national” intersected, and how the development of international criminal law was pushed forward by a state whose own domestic legal system remained illiberal. She brought into the discussion photographs of local trials and analyzed their (propaganda) value. In her response, Tanja Penter raised the question of intra-Soviet interactions, namely to what extent the local trials of war criminals and collaborators in the Soviet Union were independent of or influenced each other.

During the discussion that followed, Cheah Wui Ling commented on the differing definitions of war crimes used by the Allied nations, the importance of nationality in prosecuting war criminals, and the question of differing audiences on local, national, and international levels. Devin Pendas commented on methodological issues, arguing that Allied war crimes trials should be examined from the perspective of jurisprudence and politics at different levels: comparative, transnational, and international. Following up on Form’s presentation, he raised the thorny issue of how to prosecute state crimes, that is, when the state, the source of legality, articulates norms that are criminal.

The third panel, “Cold Wars and Civil Wars as Contexts for Defining Justice,” chaired by Kerstin von Lingen, explored the ways in which Cold War political competition influenced the conduct of war crimes trials in Germany and China as well as the legal and political postures of the United States and Soviet Union as emerging superpowers. Annette Weinke showed how the trials of Nazi war criminals were used by both West and East Germany for the specific political ends of claiming sovereignty by delegitimizing the other regime at the height of the Cold War. This culminated in the late 1950s when the GDR used its self-declared “guardianship” of Nuremberg to foster anti-fascist alliances among communist countries, while the FRG instituted the Central Investigation Committee of Nazi criminality in Ludwigsburg. Barak Kushner highlighted key moments in the evolution of Chinese judicial proceedings against Japanese war criminals in Nationalist and Communist China and explained how both regimes attempted to shape their respective historical narratives. He addressed how the program of the Tokyo Trial influenced the ways in which China conceived of justice and consequently its own trials, and why China’s role in international tribunals has recently come to the forefront after a long period of dormancy. Elizabeth Borgwardt examined the generally favorable assessment of the Nuremberg
IMT in stark contrast to the highly critical, if not outright dismissive reception of the Tokyo IMTFE as different expressions of attempted projections of U.S. authority and legitimacy in the immediate post-war world. Andreas Hilger clarified the Soviet Union’s political and ideological reasons for prosecuting German civilians and German prisoners of war differently under changing political conditions, as part and parcel of the general use of judicial means to support Soviet domestic and foreign policy.

During the discussion the participants reflected on FRG and GDR opinions of the Soviet trials, the issue of demonstrative vs. show trials and the false duality created between politics and justice in the relationship between the IMT and IMTFE. Participants argued that when one moves from procedural law to substantive law, justice is always political; the question is therefore about how much consensus exists about any given case. The Allies demonstrated a higher level of consensus on trials against Nazi leaders than those against Japanese Class A war criminals. The procedural concerns expressed at the IMTFE were only a pretext to cover the fundamental disagreements that existed between the different national legal teams on the nature and the character of criminality on the Japanese side.

The fourth and final panel, chaired by Wolfgang Form, was dedicated to “Post-Trial Negotiations for Clemency and Release.” This roundtable discussion opened with Sandra Wilson’s comprehensive overview of clemency for war criminals in the post-trial phase of the program. Wilson argued that this was the most dynamic and unpredictable period as well as the most political part of the whole war crimes trial process. Different opinions on key points such as detention locations or granting clemency fostered resistance by the German and Japanese governments and also led to disagreements among the prosecuting powers. According to Wilson, changing views on war crimes and war criminals and the perception of different interests were nowhere more evident than in the post-sentencing phase of the trials. Yet, this history has attracted much less attention in the scholarly literature than the prosecutions themselves. Hitoshi Nagai linked the Japanese war criminals’ release in the Philippines with a set of mostly economic considerations. Focusing on the executive clemency for Japanese prisoners implemented by President Elpidio Quirino in 1953, Nagai reconstructed the context in which the release of war criminals furthered Philippine interests, not least of which was the negotiation of reparations payments by Japan. National security concerns, the
importance of Japan as a trading partner, the forthcoming Philippine presidential elections, and Quirino’s own political philosophy were important factors that impacted both the reparations and the war criminals issues. Kerstin von Lingen discussed the politics of postwar release by placing the clemency campaign of German field marshal Albert Kesselring’s trial in the context of the German rearmament debate. This example showed that the quest for clemency was often linked to political campaigns; a wave of supporters in Germany, the UK, and the U.S. in the early 1950s saw Kesselring’s case as paradigmatic when calling for an end to the Allied war crimes trials program in light of political benefits for the new German state with regard to sovereignty and rearmament. Franziska Seraphim made a case for the importance of the Allied Powers’ penal practices, that is, their treatment of accused and convicted war criminals through incarceration in occupied Japan and Germany. As military occupations gave way to Cold War alliances, the administration of punishment gave Japanese and Germans a way of mitigating Allied punitive policies while attending to the need for social integration, rehabilitation, and political self-legitimation. The punishment of Japanese and German war criminals showed many parallels and similarities, from American penal policies to German and Japanese strategies of resistance.

The conference concluded with a discussion on the comparative potential of the Allied war crimes trial program. Participants emphasized the importance of a quantitative in addition to a qualitative approach to post-WWII justice, especially since even basic statistics on the numbers of and reasons for convictions in Europe (in contrast to Asia) have not been comprehensively collected, making cross-regional comparisons difficult. While a good number of individual case studies especially on the European side are available, sorting out the range of different actors and agencies in order to detect both connections and disconnects in the global conduct of war crimes trials requires academic collaboration. The Allied war crimes program represents a rich historical moment precisely because it encompasses both the last stage of the war and the beginning of the postwar period. The participants agreed that post-WWII justice should be seen as a multi-dimensional phenomenon within an overarching global context, constrained by strong local dimensions.

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