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## **Germany, International Justice and the 20<sup>th</sup> Century**

The turning of the millennium has predictably spurred fresh interest in reinterpreting the 20<sup>th</sup> century as a whole. Recent years have witnessed a bountiful crop of academic surveys, mass market picture books and television programs devoted to recalling the deeds and misdeeds of the last one hundred years. It then comes as no surprise that Germany often figures prominently in these new accounts. If nothing else, its responsibility for World War I, World War II and the Holocaust assures its villainous presence in most every retrospective on offer. That Germany alone experienced all of the modern forms of government in one compressed century – from constitutional monarchy, democratic socialism, fascism, Western liberalism to Soviet-style communism -- has also made it a favorite object lesson about the so-called Age of Extremes. Moreover, the enduring international influence of Weimar culture, feminism and the women's movement, social democracy, post-1945 economic recovery, West German liberalism, environmental politics and most recently pacifism have also occasioned serious reconsideration of the contemporary relevance of the 20<sup>th</sup> century German past. Little wonder that several commentators have gone so far as to christen the “short twentieth century” between 1914 and 1989 as really the “German century,” to the extent that German history is commonly held as emblematic of Europe's 20<sup>th</sup> century more generally.<sup>1</sup>

Acknowledging Germany's central role in 20<sup>th</sup> century life has hardly made things easy for historians, however. In large measure the challenge has been to devise clear and compelling storylines to explain the country's dramatically changing political fortunes, its transformation

from a warfare to welfare state, as well as its complex historical legacy in remaking German identities, European politics and even global history. A good amount of the tension stems from the difficulty of conjoining the first half of the century with the second. For it is one thing to say that Germany rests at the center of a ravaged century, having unleashed imperial wars of aggression, untold suffering and history's worst crimes against humanity. But it is quite another to say that all of this was merely the bloody pre-history to a fundamentally different and comparatively benign story of post-Nazi development. What then is the relationship between the violence and will to power fueling Germany's first half of the century with the experience of peace and (relative) plenty after? Is it simply an international relations morality tale of (again, relative) good conquering evil? Particularly unsettling for many is the prospect that one would be hard-pressed not to write 20<sup>th</sup> century German history with a happy ending. Even if few would subscribe to a Whiggish interpretation of German history, scholars are beginning to focus less on how Germany found its way into Nazism and the Second World War and more on how Germans got themselves out of them.<sup>2</sup> To what extent each fledgling republic learned to become peaceful powers at the heart of a divided Europe is a growing research field for historians of late. Not that the apparently felicitous resolution of the once-nettlesome German Question is always easy to countenance: Niall Ferguson's rather alarmist view of a Reunified Germany that despite having lost two world wars has still managed to return as Europe's dominant force (whereas Britain, having in turn been on the winning side of both wars, has been unable to arrest political decline and waning international influence) is one recent instance pointing up the anxieties associated with suddenly releasing the German past from its long-familiar Cold War confines.<sup>3</sup>

All the same, some might counter that putting Germany at the center of the larger 20<sup>th</sup> century is misleading and unjustified. On the one hand, the United States and Soviet Union were clearly more influential overall both in terms of geopolitical reach and ideological appeal. On the other, war, revolution and mass death – what Lenin rightly predicted would earmark the century – were hardly the privileged monopoly of Germans, or even Europeans for that matter.

Viewed from a broader global perspective, Germany may not even be all that pivotal to what has recently been called the “moral history of the twentieth century.”<sup>4</sup> Moving beyond the ever-dominant Eurocentric framework for understanding the last century’s global violence, brutal population transfers, genocides and “radical evil” (one in which Hitler’s Germany and Stalin’s Soviet Union continue to frame international historiography on these subjects) is no doubt a necessary step toward composing alternative, more global accounts of the “Age of Catastrophe.”<sup>5</sup> Still, there is no getting around the fact that World War I, World II and the Holocaust were hatched in Berlin. The importance of this can hardly be overestimated, not least because Germany became the focal point of 20<sup>th</sup> century notions of international crime and punishment. Indeed, the perceived novelty and sheer scale of German misconduct in both world wars galvanized the war victors after each ceasefire to expand and rewrite international criminal law accordingly. The result is that Germany has been at the heart of transatlantic debates of retributive justice ever since the First World War. This was obviously the case at Versailles and Nuremberg, but even to a significant degree with the Stasi trials following the collapse of the GDR. This paper, then, addresses how ideas of Germany as modernity’s consummate “rogue state” have deeply colored 20<sup>th</sup> century views of international justice, as well as what is at stake in the recent collapse and even ironic reversal of this long-standing political perception.

For the war victors and their representatives who arrived in Paris at the conclusion of the Great War, the peace convention augured a truly momentous opportunity. Whatever their differences, they all wanted to make good on the war’s gruesome death toll by drafting a peace plan that would assure that the fallen had not died in vain. For Wilson and the other statesmen, the treaty negotiations afforded a unique chance to devise a bold blueprint for a brave new world order, one that would “make the world safe for democracy.” The aim was to bring to an end once and for all the anarchy of international politics by means of a peace covenant in which the secrecy, cabinet-room intrigue and warmongering of the Old World would be replaced by the

openness, cooperation and international spirit of the new. Not that international intervention in the name of civilization and high-minded humanitarian ideals was particularly new to the 20<sup>th</sup> century. At the Congress of Vienna in 1815, for instance, constitutional principles based on international codes of ethics, commitments to religious toleration and expanded civil liberties were promulgated within Europe's "family of nations."<sup>6</sup> The 1856 Paris and 1878 Berlin treaties also provided for the rights and security of those peoples placed under the rule of a foreign sovereign.<sup>7</sup> Not least, the Hague conferences of 1899 and 1907 were milestones in the broader European effort to "humanize" military conduct through the establishment of so-called laws of war. Underlying all of these efforts was the firm and widespread belief that international law could mitigate and deter international violence. The First World War thus represented a crisis in the 19<sup>th</sup> century system of international justice, and one that needed to be updated and fortified for a dangerous twentieth century world.

But if the Paris Peace Conference was in part distinguished by the dream to build this international order on "enlightened" notions of crimes and punishments, there was little doubt that Germany was the nation on trial. This was accentuated by the fact that initial efforts to try non-German war criminals quickly collapsed in the face of postwar politics. Austrian-Hungarian head of state Emperor Karl, for example, was deemed too far removed from events to be prosecuted, on the grounds that Austrian-Hungarian responsibility lay with the dead Franz-Josef; misdeeds committed by Austrian-Hungarian soldiers in turn were ignored altogether, largely as a result of both the absence of the aggrieved party from the peace conference (the new Soviet Union) and the widely-shared apprehension that arraigning these ex-soldiers from the new successor states would be onerous and destabilizing,<sup>8</sup> and the grossest breach of military ethics -- the Turkish genocide of the Armenians -- was not even seriously discussed by the peacemakers, since a state's treatment of its own subjects was not actionable as a war crime according to the Hague conventions. The one instance in which the Allies pressed for war crimes trials outside Germany was the British campaign to try one hundred Turks for mistreating British prisoners of

war under the auspices of the newly-established League of Nations. Circumstances made this impossible, however. Not only was Turkey in the midst of a civil war; Greek soldiers who had committed flagrant atrocities in their occupation of Smyrna in 1919 were not to be tried in kind, thus raising objections of Allied double standards.<sup>9</sup> These failures to mete out retributive justice elsewhere only intensified attention on Germany as a proving ground of Wilson's new vision of international justice. In this sense, Otto Kirchheimer's observation that "successor justice" is always both "retrospective and prospective" is particularly apt here, in that the Allied effort to lay bare the "roots of iniquity in the previous regime's conduct" was inseparable from the desire to make Germany's punishment "the cornerstone of the new order."<sup>10</sup>

Outrage toward Germany of course ran very strong from the very beginning of the war. Only a few weeks into the fighting Raymond Poincaré, president of French Republic, spoke for many Allied leaders and peoples in accusing the Germans of being guilty of a "brutal and premeditated aggression which is an insolent defiance of the law of nations."<sup>11</sup> However much the German delegation pinned its hopes for a just postwar settlement on Wilson's Fourteen Points, Poincaré's views clearly won out at Versailles. At this point there is no need to rehearse the closed-door machinations among Clemenceau, Lloyd George and Wilson concerning Germany's fate; nor need we dwell on the ways in which the conspicuous absence of Soviet and German delegates indirectly shaped deliberations. Certainly it has been argued many times that the infamous Article 231 was really introduced to justify massive reparation demands. Nonetheless, the victors still had to make the case -- the debate on what to do with Germany thus pivoted on what Germany had done.

Crucial in this regard was the whole question of "German atrocities." Obviously this was quite complicated, not least because all the belligerents habitually exaggerated enemy misbehavior for moral propaganda and heightened military engagement. That all sides desperately sought to present their war effort as fundamentally defensive made the question of atrocities all the more sensitive. For the war victors, discussion largely centered on Germany's

unlawful conduct of war. Calls to try Germany in court were expressed as early as 1915, as the British formally made war crimes trials part of its stated war aims. While such sentiments were downplayed during the war for the sake of protecting Allied soldiers in the field, the punishment of war criminals was the first item on the agenda at the Paris Peace Conference.<sup>12</sup> Among the litany of German “terrorist” infractions were the violation of Belgian neutrality; introduction of poison gas; unrestricted submarine warfare; mass rapes; the killing of civilians and children during the occupation of Belgium and France; the deportation of tens of thousands of Belgian and French conscripted laborers to German factories; the launching of zeppelins over London, which killed over two hundred British citizens; as well as the sacking of Louvain and the shelling of Rheims Cathedral. As Britain’s first historian of the peace conference wrote in 1920: “The attitude taken up [by the Allies] is of great consequence, for it explains the severity of some terms of the Treaty. Germany, being responsible for the war and for the ‘savage and inhumane manner in which it was conducted,’ had committed ‘the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized, has ever consciously committed.’”<sup>13</sup> French and British delegates called for the Kaiser’s extradition as a war criminal. The Allies’ domestic populations were even more bloodthirsty, as they clamored to try (and hang) Kaiser Wilhelm II for his violation of “international morality and the sanctity of treaties.” In fact, Lloyd George swept to victory in the 1918 election with his followers chanting “Hang the Kaiser!”<sup>14</sup> While harboring little sympathy for the Kaiser or for the German people more generally,<sup>15</sup> Wilson countered that putting the Kaiser in the dock was excessively vindictive and would contravene the principle of national self-determination.<sup>16</sup> Besides, Wilson was of the opinion that trying the Kaiser might tip Germany toward communist revolution. “Had you rather have the Kaiser or the Bolsheviks?” was his curt reply to his British and French colleagues. Eventually a compromise was struck: the Americans conceded the introduction of Article 227 calling for the creation of a special international tribunal to try the Kaiser and to demand his extradition, though nothing was ever done in the way of enforcement. In this sense, Wilson and the American delegates

succeeded in making sure that international justice did not trample the sovereign rights of the vanquished and its leaders.

But what about other accused German “war criminals?” The definition and understanding of “German atrocities” was instrumental in setting the tone at Versailles. Despite the full index of German violations, the lion’s share of diplomatic attention was trained on German acts toward Belgian civilians during the assault on their western neighbors in the fall of 1914. Even if still somewhat disputed, there is incontrovertible evidence that German soldiers committed a host of atrocities against Belgians in the first few months of the war. Chief among them was the claim that some 6500 French and Belgian civilians were unjustifiably killed by German soldiers in clear violation of the 1907 Hague Convention. Allied shock and anger toward Germany was not just a reaction to the number of civilians killed, but also to the manner in which German soldiers brutally mistreated them. Numerous eyewitnesses testified to the savaging of women and children as well as the mutilation of Belgian priests. For many, the accounts of Germans cutting off the hands of Belgian partisan priests recalled well-known stories of Belgian atrocities in the Congo, which were widely disseminated in European newspapers in the decade or so before the outbreak of World War One. Part of the outrage thus derived from the perception that Germans had treated other Europeans as colonial subjects, driving home the point even more so about German uncivilized wartime behavior.<sup>17</sup> The reports about brutal civilian killings not only lent gruesome rumors and wartime propaganda the aura of truth, but more significantly, they strengthened the widespread Allied suspicion that the German massacring of civilians was a key element of their prosecution of lawless “terrorist warfare.”<sup>18</sup>

Not surprisingly, the Germans passionately defended themselves against such charges. First and foremost, they countered that Belgian civilians had forfeited their protective rights under the Hague laws of war on the grounds that they were in fact armed and aggressive fighters. Submarine warfare, so argued the German delegation, was the country’s desperate strategy to break the unjust Allied blockade; in the 1919 German White Book, Count Brockhoff-Rautzau

even asserted that German civilians should be compensated for having “suffered immeasurable injury by the hunger blockade, a measure contrary to the laws of nations.”<sup>19</sup> Moreover, they argued that the Allies were hardly innocent themselves in this regard, as brutal atrocities committed by French and Belgian soldiers against their German counterparts were meticulously recorded by German military authorities. Nor were these Allied infractions unique to the Great War, since it was well known that British soldiers had often been equally harsh toward guerilla warriors during the Boer War, as were American soldiers toward Fillipino irregular fighters during the Spanish-American War.<sup>20</sup> Nonetheless, there was no denying that German soldiers had been particularly brutal with Belgian civilians. Recent scholarship has shown that the 1914 confrontation with armed civilians invoked memories of the infamous franc-tireurs from the Franco-Prussian War of 1870-71, when French civilians rose in arms to desperately defend their fallen patrie in a series of what today would be called guerilla assaults against the advancing Prussians. The popular uprising of French citizens in the face of clear military defeat was not so much feared for any potential military threat, but rather for its strong identification with the dangerous (that is, anti-Prussian) forces of republicanism, “people’s war” and revolution itself.<sup>21</sup> German soldiers thus felt justified in 1871 and 1914 in defending themselves against this “Reign of Terror” supposedly threatening them. Indeed, the spectre of the Belgian Volkskrieg against German soldiers served as a powerful element of German military imagination both during and after the war. Tales of atrocities supposedly committed by Belgian civilians against German soldiers were woven into new narratives of German victimhood and defeat, as the “franc-tireur was thus added by way of the invasion to the spy, saboteur and Cossack as one of the signifiers of the enemy for Germany.”<sup>22</sup> So powerful were these memories that when Hitler’s troops occupied Belgium during World War II, soldiers were explicitly instructed to raze any and all Belgian monuments commemorating civilian victims of German atrocities.<sup>23</sup>

So even if the Kaiser was left undisturbed in exile in Holland by virtue of the “sovereignty immunity” of heads of state, Allied lawyers busied themselves with preparing their



cases against other suspected German war criminals. The newly-created “Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties” recommended that necessary action should be taken against certain German nationals. Articles 228 and 229 stipulated that accused Germans be tried for “criminal acts” in “violation of the laws and customs of war.” But unlike Article 227, which called for a special tribunal to try the Kaiser, these articles were to be enforced. Efforts to establish an international “high tribunal” quickly ran aground in the face of American resistance, however. Again, the Americans insisted that such a court was both unprecedented and was an affront to national sovereignty, the effect of which would only further undermine the already shaky foundations of the Weimar Republic. This of course is precisely what happened, as the Articles 227-229 (to say nothing of Article 230, which demanded that the German government furnish “all documents and information” deemed “necessary to ensure the full knowledge of the incriminating acts”) calling for the Allied prosecution of the Kaiser and accused German soldiers met with extraordinary public outcry and condemnation;<sup>24</sup> in fact, the Kapp Putsch was in part fueled by the fear of extradition.<sup>25</sup> The compromise solution was that Germans were to try their own nationals. There was a good deal of wrangling among the Allies about the number and composition of suspects to be tried; the first combined list included some 3000 names, reflecting a “kind of rough mathematical ratio of wartime suffering” by each country involved.<sup>26</sup> Such an amount was quickly dismissed as unwieldy and unwise, given its likely reception in Germany. By the end of 1919 the Allies handed German delegates dossiers on 854 suspected “war criminals” with instructions to press for prosecution; the list included such notables as Ludendorff, Hindenburg and Bethmann-Hollweg. After stiff German protest and delicate diplomatic negotiations, the Allies submitted a sample “abridged list” of 45 Germans to be arraigned before the German Supreme Court in Leipzig in 1921. The proceedings were packed with spectators, including journalists from some eighty newspapers worldwide. Yet the results were quite predictable under the circumstances. Of the 45 submitted cases, merely 12 were tried by the German court, and of these only six were convicted. Several of them even

managed to escape with the help of prison guards who “were publicly congratulated for assisting them.”<sup>27</sup> Needless to say, the Allies were outraged. So incensed were the French and Belgians that they tried and convicted hundreds of accused Germans in absentia in their own national courts, and even attempted to use the war crimes issue to force compliance on reparations.<sup>28</sup>

If nothing else, these deliberations help put the Treaty of Versailles in a slightly different light. It is common knowledge that the publication of the treaty incited a torrent of indignation across the German political spectrum, and that the Diktat was universally interpreted as crude victor’s justice imposed on a prostrate nation, thereafter becoming a festering wound in the country’s body politic. An extraordinary amount of political and academic energy on the part of German politicians, historians, publicists and even the Foreign Office was devoted to refuting the war guilt clause in order to restore German innocence and national honor, as the unjust nature of the Versailles Treaty served as the focal point of political resentment and revanchist fantasies during the interwar period.<sup>29</sup> Less well-known, however, is that a good amount of this revisionist campaign aimed to exonerate the German soldier from charges of war crimes.<sup>30</sup> A similar innocence campaign was conducted by the Auswärtiges Amt and especially the Reichswehrministerium to counter Allied war crimes accusations.<sup>31</sup> So whereas there is little question that the war and the treaty forged a distinctively German “culture of defeat” based in large measure on a new poisonous language of victimhood, aggrieved nationalism and redemptive honor, it is well to remember that Articles 227-230 – and not simply 231 – generated a good amount of the sound and fury at the time.<sup>32</sup>

But it is not as if Germany saw itself as simply the victim of a miscarried international justice at Versailles. Indeed, it is all but forgotten that the Weimar Republic emerged as the champion of one key dimension of Wilsonian justice in the interwar years, namely minority rights in Europe. Such an attitude in many ways resulted from the signing of the ill-starred Polish Minority Treaty in June 1919 between newly-established Poland and the Allies, followed by the conclusion of thirteen similar agreements with the new states of Eastern Europe. Their

centerpiece was the explicit pledge to protect the civil, religious and political liberties of their minorities by devising what at the time was called a “new bill of rights” for them. The shocking revelations of Polish pogroms against Jewish minorities following independence stiffened Allied resolve to make the guarantee of minority civil rights the very precondition for international recognition of these new Eastern European states. However, these new states denounced the treaties as an unjust affront to their newly-won state sovereignty and as patently hypocritical, insofar as such minority guarantees did not apply to the Allied lands. No need at this stage to revisit the old story of the raised expectations and dashed hopes concerning ethnic minorities in interwar Europe; the relevant point is that Germany became the “spiritual center” of minority politics between the wars. That Germany had been a defeated country, subject to harsh treaty obligations, initially barred from the League of Nations and placed under Allied occupation lent it new credibility in posing as the defender of the unprotected and aggrieved. As early as January 1919, the German Society for the Rights of Peoples (Gesellschaft für Völkerrecht) boldly recommended that all League members grant minorities proportionate parliamentary representation, while allowing them to use their native languages in school, worship and civil affairs.<sup>33</sup> There were nationalist motivations at work too. In this case, the specific issue that galvanized Weimar politicians -- in particular Chancellor Stresemann -- was Poland’s alleged “extermination policies” against German nationals – that is, the expropriation and expulsion of Germans from “the Corridor.”<sup>34</sup> In response, Stresemann and his fellow politicians repeatedly petitioned the League not only about more strenuous enforcement of German minority rights in Eastern Europe, but insisted as well that a universal system of minority protection should be introduced to end all of the glaring anomalies and double standards. In 1925 Stresemann even organized the first “European Minorities Congress” in Geneva, where German and Jewish factions spearheaded the campaign for “cultural autonomy” for all Europe’s minorities. Even if the universalization of minority rights was ultimately deemed “inconsistent” with treaty provisions, Stresemann had effectively exploited the issue to help unite the wounded Reich,

cultivate western sympathies and create some room for diplomatic maneuver. Over the years commentators have tended to dismiss Germany's seemingly high-minded humanitarian policies in general and Stresemann's minority diplomacy in particular as nothing but subtle revisionism and even underhanded irredentism, not unlike Imperial Germany's machinations in World War I to champion liberation movements in the British and French colonies as a means of undermining the Allied war effort.<sup>35</sup> But in the end these efforts failed, as the Weimar Republic's inability to incorporate the so-called Volksdeutsche into a Greater Germany through the League of Nations became a favorite whipping post in the right-wing media, eventually emboldening Hitler to withdraw Germany from the League of Nations in 1933 and to go about solving the minority problem by radically different means. Not long thereafter Wilson's liberal internationalism was brutally trampled beneath German tanks, while Nazi jurists upheld that the "nation comes before humanity."<sup>36</sup> But just because we know the end of the story ought not obscure the fact that during the interwar years Germany assumed the unlikely role as the occasional upholder – and not just the victim -- of Wilsonian international justice.

By the time that Hitler had taken power in 1933, the whole tenor of the Versailles Diktat had drastically changed. The once-vociferous accusations about German singular responsibility and war crimes were slowly abandoned and even retracted by the international community; a growing number of politicians and publicists outside Germany now claimed that the German atrocities argument was largely the invention of Allied propaganda.<sup>37</sup> Already by the Locarno Pact of 1925, which among other things authorized Germany's admission to the League of Nations, the war crimes issue had lost much of its intensity. The new consensus of the late 1920s and early 1930s held that the Versailles Treaty – thanks in no small part to the strange marriage of German public relations and American revisionism – was an overly harsh "Carthaginian peace" (to cite JM Keynes's famous phrase) that provided no hope either for Germany's repayment or peaceful integration into postwar European politics. The ill-fated Allied policy of appeasement meant that Hitler was able to exploit the Wilsonian language of self-determination to press for his

own “radical revisionism” in the Sudetenland and elsewhere on behalf of German ethnic minorities. A few months after Hitler took power, the prosecutor’s office at Leipzig formally ended all war crimes proceedings.<sup>38</sup> Yet it was the failure to establish -- and enforce -- any workable system of international justice at Versailles that counted most. Hitler’s oft-cited brazen comment in 1939 that “Who after all today speaks about the destruction of the Armenians?” pointed up the unpunishability of massive war atrocities in liberal international law and the court of public opinion. The disastrous miscarriage of justice in Leipzig further exposed the limitations of Allied jurisdiction, and undermined any real sense of justice served. None other than Albert Speer, following his conviction of war crimes in 1945, ruminated that “it would have encouraged a sense of responsibility on the part of leading political figures if after the First World War the Allies had actually held the trials they had threatened for the Germans involved in the forced-labor program [in which Belgians were deported to work in German factories in 1916] of that era.”<sup>39</sup> However we evaluate Speer’s view and with it the failure of Versailles, the treaty did create a new lexicon for the laws of war and international justice. And in this new normative legal world, Germany became the measure of things -- be it crimes or punishments, victims or avengers.

For their part, the Nuremberg Trials were both a continuation and departure from attempts to carry out retributive justice after the First World War. In 1945, needless to say, the situation was quite different. This time the German Reich was fully broken and the country lay in ruins; there was no question as to its role in provoking the conflict, and hence no debate about national responsibility; the Nazi government had committed a series of gruesome atrocities and gross violations of the “laws of war” (mass murder of unarmed civilians, ethnic genocide, etc) that called for full and far-reaching punishment. The trials against 22 selected representatives of the Nazi regime by the Allies between November 1945 and August 1946 in Nuremberg thus took on heightened symbolic proportions far beyond the actual juridical proceedings. That the trials were to be carried out in Nuremberg itself, the city where the Third Reich’s infamous 1935 anti-

semitic laws were first promulgated, dramatized this symbolism even more so. And just as in 1919 the desire to punish “crimes against humanity” (minority abuses and prisoner of war mistreatment) never moved beyond addressing specific German misdeeds, international justice in 1945 again focused on Germany and Germans. Not that the International Military Tribunal in Nuremberg was the only war crimes trial after World War II. Similar courts were set up by the Allies in Japan, as well as by various military and national courts in France, Italy, Austria, Holland, Belgium, Poland, Hungary, Czechoslovakia and China.<sup>40</sup> Even so, it was clear that the Nuremberg Trials set the precedent, as the drama and scope of these war crime proceedings assured its central place in international law and the popular imagination ever since. That many of the other war crimes trials, most obviously those that took place in Tokyo, were comparatively limited in scope (Emperor Hirohito and his cronies were exempted from standing trial for fear that the country would descend into “communism and chaos”) further highlighted the prototypical quality and relative success of the German trials.<sup>41</sup> So again, the question about what to do with Germany was central to postwar reconstruction and European stability; its misdeeds were to be used as a cornerstone for erecting yet another new world order based on an expanded sense of international humanitarian law following the horrors of total war and genocide.

Of course many of Nuremberg’s basic principles were articulated well before the war was won. Declarations of retributive intent were made by Allied leaders as early as October 1941, at which time Roosevelt and Churchill (in part at the bidding of the Polish and Czech government-in-exile in London<sup>42</sup>) announced that “the punishment of [Nazi] crimes should now be counted as among the major aims of the war.”<sup>43</sup> The sanctity and protection of basic “human rights” was now elevated as part of the Allied crusade against the Nazi menace. In his 1941 State of the Union address, for example, Roosevelt defined freedom as “the supremacy of human rights everywhere” and that this in turn would form “a definite basis for a kind of world attainable in our time and generation.”<sup>44</sup> A year later, 26 countries signed the Declaration of the United Nations with the common pledge to “preserve human rights and justice in their own lands as well

as in other lands.”<sup>45</sup> Plainly this was an attempt to overcome the limitations of the failed Versailles Treaty. The Americans in particular believed that their refusal to join the League of Nations and later to take necessary actions against German aggression in the 1930s in no small way contributed to the humanitarian disaster of World War II.<sup>46</sup> But however much Roosevelt held the League of Nations in low regard, refusing for example to include any reference to an international organization in the Atlantic Charter, he did give credence to Wilson’s concept of collective security. In fact, it was the combination of human rights, international normative justice and collective security – in which global developments would be monitored by the Four Policemen of the US, Britain, the USSR and China -- that underlay Roosevelt’s vision of postwar order, and continued to shape perceptions long after his death. After all, the 1942 declaration clearly anticipated the founding of the United Nations, as well as the passing of the Anti-Genocide Convention and Universal Declaration of Human Rights in 1948. Indeed, the whole UN effort to set up “a progressive development of international law and its codification” in turn was built on what were generally called the “Nuremberg principles.”<sup>47</sup>

But this is not to say that the discovery of the full extent of Nazi “war crimes” and “crimes against humanity” in 1945 did not shake such high-minded wartime idealism. Already toward the end of the war, Roosevelt and Churchill made clear their common desire to execute Nazi leaders outright for their heinous misdeeds, believing that putting them on trial would only repeat the juridical farce of what Henry Morgenthau called the Leipzig “fiasco.” Opinion polls conducted in the US, Britain and France right after the war registered an overwhelming majority in favor of summary execution.<sup>48</sup> But on this point, the Americans (above all, Secretary of War Henry Stimson) and certain key figures within the British Foreign Office convinced their allies about the virtues of avoiding vengeful retribution, and that trying Nazi leaders was the most fair way to dispense lasting justice.<sup>49</sup> Instead of simply executing the foe’s leaders as was conventionally done with captured enemies in the past, the presiding judges at Nuremberg strove to provide a full and fair judicial proceeding as an expression of the very liberal principles for which the war was

waged. The trials were then to serve as an antidote to the full abrogation of law and due process under the Third Reich, as well as the mockery of justice on display in Stalin's show trials of the 1930s.<sup>50</sup> As American presiding judge Robert Jackson put it: "That four great nations, flushed with victory and stung with injury, would stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."<sup>51</sup> For Jackson and the others, just war crimes trials were a fitting end to a long and barbaric war, one whose crushing of human rights would end with their retroactive restoration.

Like at Versailles, the Allies were faced with the problem of "German atrocities" and "war crimes." But this time they did things differently. First, the Nuremberg trials maintained that international law applied equally to all individuals waging war, including heads of state. As opposed to the Paris Peace Treaty, the long-inviolable "sovereign immunity" of captured leaders was categorically denied. This time, too, the Allies wished to avoid the debacle of the 1921 Leipzig Trials by putting German leaders and other accused German "war criminals" on trial themselves.<sup>52</sup> As Justice Jackson remarked in his opening address to the tribunal, the Leipzig trials sadly illustrated the "futility" of leaving adjudication to the vanquished.<sup>53</sup> Secondly, the Nuremberg trials declared aggression (that is, "crimes against peace") as itself a violation of international law, and in so doing repudiated the sanctity of state sovereignty and "reasons of state." In fact, Germany's signature on the 1928 General Treaty for the Renunciation of War banning war "as an instrument of national policy" served as the ground of indictment of the Nazi leaders for "crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances."<sup>54</sup> Thirdly and perhaps most famously, the Nuremberg Trials rejected the traditional notion that individuals could escape responsibility by arguing that they were merely executors of an immune state and its policies. Nuremberg put strict limits on the scope of many traditional defenses against war crimes, be they obeying orders, acts of state and/or military necessity. Rather, the trials



introduced the novel concept of “crimes against humanity” to condemn those implicated in the planning and execution of mass death and genocide. It was an effort to make good on the famous Martens clause in the 1907 Hague Convention on land warfare, which called for the universal upholding of “the principles of the law of nations, as established by and prevailing among civilized nations, by the laws of humanity, and the demands of public conscience.”<sup>55</sup> The defense and challenge of “the laws of humanity,” so maintained the Nuremberg judges, began and ended with individual responsibility. In Jackson’s memorable words: “The idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons;” instead, “the very essence of the [1941 London] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state...if the state in authorizing actions moves outside its competence in international law.”<sup>56</sup> This was the reason that Jackson and the other judges rejected all notions of “collective guilt,” since they were interested in placing responsibility squarely on the shoulders of decision-making individuals.

But what about the German reaction to the trials? It is well known that the German judiciary was sceptical and quite hostile toward applying the term “crimes against humanity” to Nazi offenses on the traditional legal grounds of nulla poena sine lege (no punishment without prior law). This was all the more important at the time, given that the postwar rehabilitation of the Rechtsstaat (rule of law) was considered by many as the most fundamental measure of denazification in breaking free from the Third Reich’s wanton disregard for law and constitutional justice. While West German judges grudgingly complied in prosecuting Nazi crimes against humanity according to the London Charter-inspired provisions of Allied Control Council Law No. 10, they eventually reverted to older German laws once the Allied constraints were lifted in the mid-1950s.<sup>57</sup> The desired cathartic effect of the trials on everyday citizens was also difficult to discern, and already by the late 1940s Germans on both sides of the Iron Curtain had grown tired of – and sometimes hostile toward – the prospect of endless future war crimes

trials. Not that this sentiment was limited to divided Germany. Opinion polls conducted in the US, Britain and France at the time recorded collective fatigue and even boredom with the trials after a while;<sup>58</sup> reactions across Eastern Europe were very similar.<sup>59</sup> More, the good intention of using the trials as a device to expose German militarism and Nazi criminals was being increasingly compromised by Cold War concerns, as the compulsion to integrate each new German state into its respective Cold War orbit meant banishing the ghosts of the past for the sake of new political partnerships and ideological imperatives. The remilitarization and rearmament of both Germanys made such trials increasingly awkward and unwelcome by the mid-1950s. The GDR's official dismissal of the whole Nazi period – including the Holocaust – as simply the ugly face of “fascist capitalism” and “western imperialism” buried these issues even further beneath the floorboards of a triumphant “workers’ and peasants’ state.”<sup>60</sup> The Third Reich's Jewish victims therefore found no place or patrons in the newly-minted collective memories of the war; in each new German state, the “murderers in our midst” had been removed from view, while select victims (the communist resisters in East Germany, the July 20 conspirators and White Rose martyrs in West Germany) were elevated into each respective post-Nazi pantheon. To be fair, this tendency was in some ways already apparent during the trials themselves, particularly in the sense that the presiding judges generally privileged documentary evidence over eyewitness accounts, and summoned no camp survivors. The upshot, as Donald Bloxham recently put it, was that the tribunal “neglected to ensure that the victims were given the stage. In consequence, few non-Germans and no Jewish names, faces or stories were engraved on the collective consciousness.”<sup>61</sup> From this perspective, the Nuremberg trials have been seen as actually blocking a full reckoning with Nazi crimes.

Still, one should not overlook the long-term positive effects of the trials. After all, the court proceedings were extensively publicized in newspapers and on radio across the occupational zones, often complete with remarkably detailed accounts of trial developments. Films devoted to the theme (such as the documentary Nürnberg und seine Lehren) were favorably

reviewed and well-frequented by East and West Germans alike through the late 1940s. Opinion polls conducted at the time reported considerable support for the trials, as a large majority of those asked found them fair and informative, even if they often questioned them on legal grounds.<sup>62</sup> This was even more so in the western zones, as the trials were closely associated with the broader campaign to “re-educate” Germans about the failings of the Nazi past and the virtues of an alternative liberal future. As such the trials served as a veritable schoolroom for the fallen nation, in that it was during the proceedings when most Germans first learned about the details and faces behind Nazi war atrocities.<sup>63</sup> No less significant is that the trials were also decisive in convincing many Germans that the Nazi reign of terror was completely dead, insofar as law, constitutionalism and the restored Rechtsstaat were the hallmarks of a post-Nazi social order. Naturally this was much more evident in West Germany’s constitutional development.<sup>64</sup> The 1962 Spiegel affair, while not an explicit outgrowth of the trials, nonetheless was a key instance in upholding the centrality of civil liberty, free speech and the constitutional principle that the state itself was not above the law. In this regard, the trials seemed to have produced the opposite effect of the 1945 Allied initiative forcibly to parade Germans past piles of slaughtered civilians and desecrated corpses so as to make them face up to Nazi crimes, which tended to provoke more revulsion and anger than remorse and contrition.<sup>65</sup> That the Nuremberg Trials were followed by a series of other war crimes trials in East and West Germany in the 1950s and 1960s– as well as abroad – indirectly confirms the perceived value of trying to confront the country’s brown past through the newly-established court systems. To be sure, these trials remained delicate matters. Adenauer’s material restitution with Israel (Wiedergutmachung), for example, is often seen as shrewd statecraft to bring the trials to a close in the name of collective healing and national unity.<sup>66</sup> Still, the Allies’ didactic aim of showing these defeated peoples the benefits of due process and punishing Nazi criminals in the name of political accountability was incorporated to some extent by each successive German state.

But even if the language of human rights found little resonance in German war crimes trials, it was commonly invoked for other purposes. Not surprisingly this took on feverish tones with the intensification of the Cold War, as the rhetoric of human rights and “crimes against humanity” was often exploited by each German republic to criticize the other. West German officials, for example, never tired of accusing the East German state of human rights violations against its citizens, and that the Soviet treatment of German POWs “deserves its own Nuremberg” (see Robert Moeller’s contribution to this volume).<sup>67</sup> The GDR responded in kind with counteraccusations about the criminal bombing of Dresden by “Anglo-American gangsters in the skies,” as well as repeatedly asserting that the West German state was scandalously governed by unpunished “war and Nazi criminals.”<sup>68</sup> But such language was also applied more widely. During the 1950s, for example, various West German intellectuals, church leaders and political activists often invoked the language of Nuremberg and even Wilsonianism (most notably, national self-determination) to support decolonization and the national liberation movements in the British and French empires. The 1945 creation of the West German International League for Human Rights (Internationale Liga für Menschenrechte) and the eventual establishment of a West German chapter of Amnesty International were important in this regard, echoes of which could be found as well among East German church groups.<sup>69</sup> These trends intensified in the 1960s, as West German youth in particular increasingly turned this Nuremberg language of crimes against humanity against the Americans, particularly in regard to the civil rights movement in the US South and the Vietnam War. Such rhetoric also flourished in the peace movements of the 1970s and 1980s, and enjoyed perhaps its most dramatic expression in the Green Party’s staging of a “war crimes” trial in Nuremberg at the height of the US-USSR arms race during the early 1980s, with the aim of drawing attention to worrisome American nuclear build-up.<sup>70</sup> Now, whether or not the legacy of Nuremberg simply reinforced helped a “dormant legal consciousness” among (West) Germans is naturally open to debate.<sup>71</sup> What postwar developments make clear, however,

is that West Germans – and on occasion East Germans as well – were not shy in employing the language of war crimes trials to criticize its original authors and crusaders.

But this too was a problem built into the very foundation of the London Charter and the Nuremberg Trials. Over the years it has been commonplace to portray the trials as a superior version of international justice to its much-maligned forerunner at Versailles, particularly in light of the pre-eminent role assigned to individual responsibility and human rights in 1945. In part this had to do with Nuremberg's insistence on enlarging the rights and protections of civilians, not least because prior war conventions only covered soldiers, sailors and the medical personnel looking after them. Unprotected civilians were now given center stage, since they had become the very objects of terror and war policy in the Second World War.<sup>72</sup> Nevertheless, it is well to remember that the new focus on human rights was also a ruse to sidestep Versailles' thorny issue of minority rights. At first glance it seems easy to surmise why minority rights as such did not survive 1945. The Nazi experience – and in particular Hitler's perversion of Stresemann's minority diplomacy – rendered the defenders of minorities “forever suspect.”<sup>73</sup> Less well-known, though, is that the death of minority rights in 1945 was equally linked to the objections first raised by the new states of Eastern Europe to the proposed 1919 Minorities Treaties, namely that the demanded principles were not being applied in like fashion to the war victors themselves. The reason lay in the Great Powers' own internal political situation in 1945. Britain and France still had colonies in which many people did not enjoy equal legal standing before the law. Neither did the United States wish to champion the cause, as it too possessed a large segment of its population who was subjected to a crippling assortment of discriminatory Jim Crow laws and segregationist social policies. In the USSR, millions were still laboring away without rights and due process in the Soviet Gulags. The new celebration of individual human rights thus came at a price. As Mark Mazower observed: “Behind the smokescreen of the rights of the individual, in other words, the corpse of the League's minorities policy could be safely buried.”<sup>74</sup> The collapse of minority rights had disastrous consequences, as the Allies gave qualified consent to the forced

expulsion (according to the Potsdam Accord, it was to be conducted in a “humane and orderly manner”) of some 10-12 million ethnic Germans westward by Poles and Czechs at the end of war.<sup>75</sup> But it was not as if these vaunted human rights were not given any real legal safeguard either. Just as the impassioned efforts by the African-American intellectual WEB Dubois and the Japanese delegates to introduce an article in the Treaty of Versailles proclaiming the racial equality of all global citizens was rejected as inappropriate, so too the Great Powers in 1945 formalized no notion of equality or enforcement of human rights in the UN covenant. In fact, an estimated 14 million civilians have died in war-related deaths since Nuremberg,<sup>76</sup> and it was not until the Serbian “ethnic cleansing” campaign against their Bosnian neighbors the early 1990s that enforcement of these principles was finally authorized. But in the intervening forty years, as Geoffrey Robertson points out, the UN Charter on human rights was severely circumscribed, for its “duty was to promote human rights, not to guarantee them as a matter of law for all citizens. This vagueness was quite deliberate: no Great Power was prepared in 1945 to be bound by international law in respect of the treatment of its own subjects.”<sup>77</sup>

Over the decades West and East Germans alike challenged this logic, and often pressed for the full application of these hallowed principles. That Germany was no longer an Empire with colonies, and was not brokering international “spheres of influence” (indeed, it was one itself) cleared the way for its open and full-throated critique. Naturally, the discussion was much more frank in West Germany, as the GDR’s criticism of the West’s selective understanding of human rights abuses obviously found no corresponding objections to the Soviet Union’s own violations in the East. But it is wrong to assume that Germans only invoked this language in response to distant international developments. West Germans, for instance, often referred to the Atlantic Charter and notions of international justice in questioning Allied occupation policy, be it about severe food rationing or the dismantling of what remained of Germany’s industrial infrastructure.<sup>78</sup> Perhaps the most revealing case is the sound and fury surrounding the expulsion and refugee crisis in the wake of the 1945 ceasefire. Indeed, German lost territories in eastern

Europe furnished West German politicians across the political spectrum with a pretext to challenge what they saw as the hypocrisy of Allied morality, sometimes going so far as to say that the brutal expulsion of ethnic Germans was no less a crime against humanity than Nazi war crimes. Leaders of the expellee organizations were quick to exploit the new lexicon of rights, insisting that what they called Heimatrecht (the right to one's homeland) was itself a "God-given, basic human right." They also justified their revisionist territorial claims by invoking the older Wilsonian concept of "self-determination," which was being widely employed by underdeveloped countries at the time as part of their own fight for freedom and sovereignty. Given the expellees' political presence and electoral power, all three West German parties paid a good amount of lip service to their cause, publicly calling for the return of 1937 borders and in effect forestalling any real Ostpolitik until the early 1970s.<sup>79</sup> If nothing else, this shows that Stresemann's "minority politics" were not completely a dead letter after 1945. While it is true that (West) Germany never recouped its interwar role as "spiritual center" of minority policies after 1945, prominent political voices did turn the language of international justice propagated by the Allies against the Allies in advancing claims of possible redress and repatriation.<sup>80</sup> In this sense, human rights was used by both West and East Germans at times to underscore the moral legitimacy of their national polity as the defender of aggrieved peoples elsewhere – including members of their own imagined ethnic communities abroad – and post-Nazi humanitarian ideals.

But if Germany rested at the heart of discussions of international justice after both world wars, it was so again after the Cold War. This could be seen above all in the post-1989 efforts to come to terms with the East German past, specifically the notorious Stasi legacy. East Germany of course was hardly alone in this effort to cleanse its past after the collapse of communism in Eastern Europe. Poland and Czechoslovakia, to name the two most famous, were engaged in similar ventures. So-called truth commissions were also being set up all over the world in the 1990s as a new political means of confronting unsavory pasts.<sup>81</sup> Yet the German version was unique in important ways. Much of this had to do with the sudden disappearance of the GDR

state tout court, with the result that the legal project to confront the East German past took place not only within a new institutional framework, but also in a “new country, with new boundaries and a significantly changed population.”<sup>82</sup> Unlike elsewhere, post-communist institutions did not need to be built from scratch there; on the contrary, West German institutions, personnel and constitutional rules were ready-made to pursue retributive justice and “decommunization.”<sup>83</sup> The presence of a wealthy West German state assured that adequate financial means would be devoted to the cause of political cleansing from the very beginning. The uniqueness of Germany’s situation was also a result of the fact that it was the country with the “greatest experience in addressing, and debating the proper way to address, the crimes of the recent past.”<sup>84</sup> For all of these reasons, Germany’s effort to come to terms with its past was therefore often described as the most rigorous in the former communist bloc, taking on “an almost religious devotion to thoroughness that was unmatched by any other country at the time.”<sup>85</sup>

Resorting to law to overcome the worst aspects of the GDR dictatorship already found expression a few months before Reunification. By the end of August 1990, the German Unification Treaty called for the dismissal of former GDR officials or administrators who had unduly collaborated with Stasi or had committed human rights violations on the grounds of their “unsuitability” for public service. In September 1991 the Bundestag created the Central Investigative Office for Governmental and Unification Crimes (ZERV), which was charged with overcoming the GDR’s past through criminal law. To help with the investigations, and in response to popular demand not to have the Stasi records destroyed, the Bundestag soon thereafter passed the Law on the Documents of the State Security Service of the Former GDR (Stasi Unterlagen-Gesetz), which placed the Stasi records under the control of a new, non-partisan document center headed by Joachim Gauck, a Protestant pastor from Rostock and former East German civil rights activist. The so-called Gauck Authority thus provided private citizens access to Stasi files as a step toward openness and democracy, while at the same time investigating claims of individual infringements based on archival records. In the first few years



the agencies were remarkably busy conducting purges, investigations and trials. By 1993 there were some 50,000 preliminary investigations, and nearly 200 convictions. The trials ranged from border guards, mid-level officials, military generals, spies and secret police officers.<sup>86</sup> As part of the task force to confront the Stasi past, the federal government set up another special investigative body two years later, called the Enquete Commission, whose remit was to investigate “the history and consequences of the socialist dictatorship in Germany,” and to help lay bare the totalitarian netherworld of SED administration, all of which was designed to break the cycle of illiberalism in East Germany. As commission director and former East German dissident pastor and civil rights activist Rainer Eppelmann put it, the agency was to aid in the wider attempt “to change our laws, issue new decrees, and possibly correct our behavior so that we will not again find ourselves in the position of the ignorant child who, for the third time, touches the hot oven door and burns its fingers anew.”<sup>87</sup> To this end the commission oversaw a whole host of initiatives (open forums on the Stasi, televised discussions, museum exhibits, academic conferences, etc) aimed to expose additional dark elements of the past and to help ease the transition to democracy.<sup>88</sup>

Yet this did not prove easy. The scale of material alone was daunting. The Stasi employed a full-time staff of some 90,000, while making use of some 170,000 so-called “unofficial collaborators.” In all there were some 180-200 kilometers of shelved files, which included dossiers on some 6 million citizens. (By contrast, the Gestapo employed no more than 3000 regular officers, and perhaps as much as 10,000 total informants.)<sup>89</sup> Further complicating things was the question of responsibility. For if the worst abuses occurred during the early Stalinist years when the GDR was most directly under the thumb of the Soviet Union, then who was actually responsibility for abuses? Similarly, the GDR in theory affirmed democratic values, in clear contrast to the Third Reich. As Erich Honecker defiantly remarked in the early days of his planned trial, “there were no concentration camps in the GDR, no gas chambers, no political executions, no Volksgerichtshof (referring to the Third Reich’s notorious People’s Court), no

Gestapo, no SS. The GDR did not launch a war or commit war crimes or crimes against humanity. The GDR was a consistently anti-fascist state, whose dedication to peace brought it international prestige.”<sup>90</sup> Not least, some of the indictments seemed ungrounded and vindictive, given that the state accused of wrongdoing had been formally recognized by the authorities now judging the criminal nature of its actions.<sup>91</sup>

But it was the connection to Nuremberg that was the most relevant to the prosecutors and public alike. In some ways the implosion of East Germany in 1989 was akin to 1945. In each case, the state had disintegrated, and representatives from the defunct regime were being put on trial for past misdeeds. Not that East Germans were inexperienced in meting out retributive justice. In the 1950 Waldheim Trials, for example, the newly-established East German government handed down some 4000 convictions for loosely defined Nazi crimes ranging from NSDAP membership to Wehrmacht service.<sup>92</sup> Even so, the dissolution of the GDR meant that its state institutions, court system and legal traditions played virtually no role in shaping the proceedings. And as in 1945, foreigners were placed in positions of judge and jury. While it is true that East Germans chaired key commissions, the West German state came to serve as “the functional equivalent to post-World War II occupational regimes.”<sup>93</sup> This is largely why the investigations had a hard time shaking the widespread feeling that they were really dressed-up “victor’s justice,” just another installment in the more general “Kohl-onization” of East German state and society.<sup>94</sup> Activist and writer Jürgen Fuchs spoke for many when he conceded in a 1992 interview that “if we do not solve this problem in a definite way, it will haunt us as Nazism did. We did not denazify ourselves, and this weighed heavily on us for years.”<sup>95</sup> Gauck himself drew the connection when he remarked: “We in East Germany did not want to take leave of a dictatorship for the second time with the implicit motto: ‘keep smiling,’ but believed that with knowledge, rumination and even sadness, we could succeed in becoming a democratic land.”<sup>96</sup>

The legacy of Nuremberg could be seen in other ways as well. Particularly relevant here is that the accused Germans were being tried for violations of human rights and Nuremberg-

inspired international law. Indeed, the GDR's signature on the 1975 Helsinki Final Act, which pledged the country to recognize and honor international human rights, served as the pretext in making the trials possible in the first place. Besides, the DDR constitution had expressly endorsed "recognized norms of international law," in violation of which no legal order could be given.<sup>97</sup> Once the Wall was breached, these Nuremberg principles acted as the focal point for rallying new civil rights groups to pursue justice after 1990.<sup>98</sup> In this sense, the Nuremberg legacy of globalized human rights very much shaped the justice proceedings in East Germany. And just as German peace covenants (1648, 1815, 1919 and 1945) were never strictly internal German affairs, incorporating as they did the "claims of powerful outsiders,"<sup>99</sup> the model of justice in the 1990s was not homegrown. But neither was it harshly imposed from outside, however much it may have seemed to many East Germans. German Reunification many have been an internationally negotiated process (i.e., the Two Plus Four agreements), but its post-1989 justice procedures have been an all-German affair. For Gauck and the others, this national drama thus went well beyond simply passing sentences and setting the record straight. At stake was nothing less than the desire to reconcile trust and the state, German democracy and international justice.

That said, many East Germans were very dissatisfied with the trials. For one thing, many felt that they should have been permitted to manage their own affairs. Dissident Jens Reich complained, "this is our dirty laundry and our mess, and it is up to us to clean it up."<sup>100</sup> Others charged that the trials were wrong-headed and doomed from the start, if for no other reason that circumstances under which the documentary evidence was collected were rarely addressed. Nowhere was this more apparent than in the high-profile trials of East German border guards, who were being tried as much as for they didn't do as what they did. Accusations that they were guilty of human rights violations and moral failings for obeying "shoot to kill" orders seemed to many to be grossly inappropriate and unfair.<sup>101</sup> Still others argued that the Gauck Commission failed miserably to carry out its main mission. One study concluded that a majority of

interviewed “Gauck victims” saw no real difference between the law and victor’s justice.<sup>102</sup>

Another 1995 poll indicated that 73% of former GDR citizens felt themselves unequal before the law.<sup>103</sup> To be sure, such examples were part and parcel of a broader shift in East German public opinion during the 1990s, in which the initial hopes and expectations raised by Reunification eventually gave way to growing disillusionment and retrenched East German identity. One oft-cited questionnaire, for instance, revealed that the percentage of polled East Germans who saw and identified themselves more as “Germans” than “citizens of the former GDR” dramatically dropped from 66% to 40% from 1990 to 1995.<sup>104</sup>

Still, it seems too simple and premature to judge these trials as hopeless failures. The courts, after all, did hear 60,000 cases and manage to pass down over 1000 indictments. No doubt much of the shortcomings derived from the very “limit to the Rechtsstaat’s capacity to repair the wrongs of a state that no longer existed.”<sup>105</sup> Inevitably, perhaps, the idealistic efforts to “master the East German past” were largely reduced to the eastward extension of the Rechtsstaat. As East German dissident Bärbel Bohley famously quipped, “We wanted justice, and we got the rule of law (Rechtsstaat).”<sup>106</sup> But this seems to me not all that bad, given that the chief objective of the trials was to expose the wrongdoings of the past and to put East German political life on a firm juridical footing. Doing so was clearly a vast improvement on previous affairs in the GDR.<sup>107</sup> Perhaps more than anything else, this signaled the full liberalization of Germany; for only liberal governments have pursued war crimes trials, and only they see trials as a proper way of dispensing justice. Liberal states, by definition, are legalist, and believe in universal rights. And in a post-Nuremberg world, they are no longer put off by “geographical morality” and state sovereignty.<sup>108</sup> In this sense, the whole legal reckoning with the East German past – for better or worse – was very much in keeping with this liberal tradition. And as John Borneman has pointed out, the attempt – however imperfect – to prosecute former authorities has yielded remarkable political dividends in post-communist Eastern Europe more generally; for those countries that have seriously undertaken retributive justice have avoided the cycles of violence and

counterviolence which have plagued those that did not.<sup>109</sup> This applied equally to the 20<sup>th</sup> century German experience, insofar as the failed efforts to mete out retributive justice after World War I only bred political violence and instability. Precisely the opposite occurred in 1945, as justice served – again, however imperfectly – helped forge the necessary connections between political accountability and legitimacy. Granted, the trials and the Enquete Commission’s “didactic public history” may have not have brought about the cathartic healing that its South African counterpart apparently did; in fact, the East German version consciously avoided any “emotionalization,” and did not include real public participation. From this perspective, as Jennifer Yoder concludes, it may have “lacked public healing, leaving eastern Germans largely on the side-lines as their past was reconciled on their behalf.”<sup>110</sup> Maybe it is true that the whole enterprise produced a good amount of light, but not much heat. But in contrast to the post-1949 period, “when democracy [in West and East Germany] had to be built on a shaky foundation of justice delayed – hence denied – and weakened memory,”<sup>111</sup> the post-Reunification trials and public reckoning have been quite novel and successful in this respect. Conducting affairs in this legalistic fashion has also assured that the emotional rhetoric of victimization (aggrieved nationalism, victor’s justice, etc) that so animated German state crimes trials from the past Leipzig trials found little public forum. Not that the discourse of bruised honor and Western arrogance have disappeared; but if nothing else, the trials have at least held out the promise of a new inter-German constitutional culture founded on a fusion of democracy, accountability and memory.

How does this fit into the more general post-Cold War tenor of international justice? For one thing, the disappearance of Moscow as a polestar of a viable alternative to Western liberalism predictably fueled singing triumphalism of Western liberal ideology gone global. In part this is due to the fact that the US remains the only superpower, whose imperial might is now commonly described as a new and brash Pax Americana. Such changes have prompted a whole academic cottage industry of late dedicated to rethinking the implications of this international “liberal revolution,” as Bruce Ackermann has recently called it.<sup>112</sup> Of relevance here is that some have

viewed these transformations as the surprise comeback of long-derided ideals from the First World War. As one historian put it: “Today, Wilsonianism is triumphant. Everywhere leaders pay obeisance to his vision. The principles he championed – democracy, collective security, self-determination – are extolled as the building blocks of a new world order (itself a Wilsonian construct). Wilson, having periodically been criticized as a dreamer or a failure, is once again hailed as a visionary whose ideals can light the way to a brighter future.”<sup>113</sup> Even if Wilson’s idea of self-determination may have been put on ice during the Cold War, most notably in Eastern Europe, it returned with a vengeance in 1989. Nowhere was this more visible than in the dismantling of the Berlin Wall and the liberation of the Second World, as the map of Eastern Europe fractured into ever smaller nation-states. Needless to say, the tragedy of Yugoslavia has shown that Wilson’s ideas were – and are – no surefire recipe for regional stability and world peace. Despite that, Wilson is credited with having finally defeated his ideological rival. As one New York Times reporter crowed in 1991: “From the Baltics to the Adriatic, from the Ukraine to the Balkans, oppressed millions have given new life to his imperative – and often troublesome principle [of self-determination]. Indeed, if results are the measure, Wilson has proved a more successful revolutionary than Lenin.”<sup>114</sup>

By the same token, one could argue that post-Cold War international politics have been fueled by the Nuremberg legacy. This is evident with the expanded role of the UN in contemporary international affairs along with the globalized human rights politics accompanying the end of the Cold War. The creation of new judicial-type international institutions (e.g., the 2002 International Criminal Court in The Hague) and various truth commissions across the globe from Argentina to South Africa underscore Nuremberg’s enduring global legacy.<sup>115</sup> The early 1990s horrors of ethnic cleansing by Bosnian Serbs rallied the United Nations to intervene in the name of human rights abuses, representing the first time that the UN Charter was invoked to justify military engagement for this purpose.<sup>116</sup> Some have welcomed such developments, arguing that human rights – and not Westphalian state sovereignty – have emerged as the basis of

a new European order.<sup>117</sup> Not everyone has been so bullish, though. Plenty of critics have expressed great misgivings about the ways in which human rights are used as a pretext for military intervention. For some sceptics, human rights are now becoming the new imperial ideology of the 21<sup>st</sup> century, replacing the older 19<sup>th</sup> century lexicon of “civilization” and “uplift” as rationales for political hegemony and military rule. German sociologist Ulrich Beck has gone so far as to say that Kosovo represents the dawning of a new era of “postnational war” based on “militaristic humanism,” in which war itself is “a continuation of human rights by other means.”<sup>118</sup> So just as self-determination (as Walter Lippmann noted over fifty years ago) sometimes has sometimes been exploited as a “license to intervention and aggression,” human rights is in danger of serving as an alibi to advance old-style power politics.<sup>119</sup>

The fallout of 9/11 has exerted great impact on international justice as well. If nothing else, the Bush administration’s open flouting of international accords and organizations in the name of American self-defense – be they the International Criminal Court, the United Nations, Guantanamo Bay and most recently Abu Ghraib – has seriously challenged the logic and legacy of Versailles and Nuremberg. Here Bush appears to be following Truman’s dictum justifying his decision to intervene in Korea in 1950 that “if history has taught us anything, it is that aggression anywhere in the world is a threat to peace everywhere in the world.”<sup>120</sup> On this score, Bush’s views thus far are more in keeping with the likes of Henry Cabot Lodge, the Massachusetts senator who emerged as Wilson’s most powerful opponent in the League of Nation debate in 1919. At one point Cabot Lodge remarked “We are a great moral asset of Christian civilization. How did we get there? By our own efforts. Nobody led us, nobody guided us, nobody controlled us... I would keep America as she has been – not isolated, not prevent her from joining other nations for... great purposes – but I wish her to be master of her own fate.”<sup>121</sup> As such recent US policy is rightly described as a radical defense of state sovereignty and unilateralism at the expense of international mediating bodies and even its own liberal constitutional heritage. The increasing assault on civil liberties and the ever-expanding remit of government surveillance

agencies both at home and abroad make this clear. The trampling of citizen rights and due process is of course nothing new, going as far back as the Alien and Sedition Act of 1798. More recently, such suspensions were quite common during World War II. One famous instance was FDR's creation of a military tribunal (Proclamation 2561) to try eight Nazi saboteurs, two of whom were naturalized US citizens, for having planted explosives on the shores of Long Island in 1942. In this case, the leader suffered a crisis of conscience and eventually tipped off the FBI, whereupon the conspirators were quickly arrested; all but two were executed. Yet the legacy of the "Keystone Kommandos" is more than merely a forgotten story of Nazi espionage in the US.<sup>122</sup> As one recent author has persuasively argued, it served as a key precedent for George W. Bush's ordering of special military tribunals to try non-US citizens suspected of engaging in or abetting terrorist attacks on the US.<sup>123</sup> As such it marked a new concentration of power in the executive at the expense of legislative authority, whereby this special tribunal in effect created "new criminal offenses and new punishments."<sup>124</sup> The larger point, however, is that at precisely the moment when the London Charter and the inviolability of basic human rights were being expounded as the moral rationale for Allied warmaking, these civil rights and protections were being dishonored at home. It then exposed the Allied discrepancy between word and deed, making plain the extent to which human rights were – and still seem – "strictly for export."<sup>125</sup>

What is the relevance of this for Germany's new role in 21<sup>st</sup> century politics? For one thing, Germany has assumed a very different role in international affairs in the wake of 9/11, much to American consternation. Above all, it has led the charge against the use of military intervention in Iraq by insisting on peaceful solutions (in this case, continued weapons inspections) and defending the authority of the UN to mediate the international conflict. As is well-known, this has caused a war of words from both Berlin and Washington, giving rise to the greatest rift in American-German relations since World War II. For their part, American conservatives have not been shy in denouncing Germany's anti-war stance as tantamount to betrayal and ingratitude toward its American partners for fifty years of support and security.<sup>126</sup>



Other conservatives have taken a longer view of this growing cultural chasm between the United States and Europe. American commentator Robert Kagan, for example, has described these new differences as a kind of “clash of civilizations” in its own right, one that pits “Kantian” Europe against “Hobbesian” America.<sup>127</sup> Certainly he is not wrong in pointing out diverging transatlantic attitudes toward the value of international organizations in delivering peace, justice and security. Particularly notable, however, is how Kagan’s formulation turns Wilson’s logic on its head. After all, it was Wilson the peacemaker who arrived in Europe with the dream of exorcising the demon of Hobbesian power politics from European affairs once and for all. The irony is that the players have apparently changed sides, as Europe – led by Germany – has emerged as the new defender of human rights, internationalism and collective security in the face of American unilateralism and vengeance politics. The irony is that Germany has become the guardian of the legacy of Versailles and Nuremberg against the excesses of its original author.

Needless to say, Germany’s new-found pacifism has enormous consequences for understanding the country’s new place in international politics. For even if Germany has been at the very center of discussions of international justice from 1919-1989, its status was mostly as its object. This understanding shaped Germany’s relationship with the US for most of the 20<sup>th</sup> century, and it is this special relationship that has been called into question in 1989 and especially after 2001. For many (West) German observers, such a tack is foolish and worrisome, in that the success story of post-1945 German liberalism was in many ways thanks to American support and security. This is not to say that suddenly Germany has turned its back on its American partners; it is rather that it is unafraid to criticize the US for abandoning its once-cherished international obligations and moral principles.<sup>128</sup> Some may dismiss this as merely Schroeder’s political opportunism and shrewd electioneering, a renewed and at times quite nasty form of German Schadenfreude about American (and Israeli) policy failures, or even perhaps the extension of Stresemann’s interwar politics to use the Allied language of justice to advance new national(ist) policies. Surely it is true that the German criticism of the US has been used as to exercise

national sovereignty and help give voice to a new European political future that is not necessarily coterminous with US policies. Yet it is also plausible to argue that Germany has in fact learned the lessons of Versailles and Nuremberg, and that its own national identity is in many shaped by a strong antiwar sentiment across the old Cold War divide. Perhaps it is high time to take seriously the comment made by General Lucius Clay, the military governor of Germany from 1945-1949, when he asserted in an interview in the mid-1980s that the Nuremberg trials “were a very good thing, and that without them you would have a different Germany today.”<sup>129</sup> As German Culture Minister Michael Naumann pointedly retorted to suggestions that Germany’s antiwar politics was really a betrayal of trust during a televised BBC roundtable in March 2002, “why are our allies so bothered with German pacifism? Isn’t that precisely what they wanted from us in 1945?”

Naturally, such developments pose some difficulties for historians in rewriting 20<sup>th</sup> century German history as a whole. In light of recent events, it seems worthwhile reconsidering the record of German antiwar sentiment, antimilitarism and peace politics, to say nothing of the history of Germans as “good Europeans.”<sup>130</sup> How and to what extent ideas and practices of the Rechtsstaat, “constitutional patriotism” and European solidarity played out over the century deserve more sustained attention. The same goes for how changed notions of justice in the wake of Versailles and Nuremberg were expressed, remade or ignored in the German courts themselves. At stake, however, is more than simply adding these accounts to what we already know about German militarism, aggressive nationalism and wartime atrocities. For the danger is there to just reread 20<sup>th</sup> century German history through the prism of West German liberalism, thus fencing off the “other” history of violence, authoritarianism and unfreedom as the pre-history of peace and “normalization.” The pressing task is rather to rethink their relationship more carefully, to investigate how experiences and memories of both war and peace shaped the lives of 20<sup>th</sup> century Germans.<sup>131</sup> This is particularly relevant to the post-Nazi period. For if it is true that the ethnic state make war, and war makes the ethnic state, the destruction of the Third Reich and

subsequent geopolitical division have forever scrambled these notions of German identity and selfhood. In other words, the long-maligned Nuremberg trials and its associated “re-education” programs may have succeeded far more than commonly acknowledged. While justice was far from perfectly served in 1945-1946, it did set in train the campaign to bring former leaders and criminals to book in each regime; this is why Jeffrey Herf maintains that the “Nuremberg interregnum” of 1945-1949 was the “golden age of postwar justice.”<sup>132</sup> This is all the more compelling, given that the trials did not nurture any Versailles-style “culture of defeat” based on mobilized passions of revenge and retribution toward the postwar orders. Perhaps its greatest tribute was the peaceful proceedings of the Stasi trials in the 1990s, showing up the new political nation’s constitutional will to remember and atone.

Notions of justice of course continue to inform contemporary German cultural politics. Evidence can be seen in the sharp cultural divide between Osis and Wesis, as East Germans still very much feel themselves losers of the Wende and its promised prosperity for all. The regional electoral successes of the PDS clearly play on the justice issue for many East German voters. No less striking has been the frank recollections of German suffering and hardship as a favorite site of post-Reunification memory-work and justice of late. While the refugees issue has served as a perennial source of grievance, memory and cultural identity for decades, it has taken on surprisingly open expression in the last few years. One 1995 Spiegel opinion poll recorded that 36% of those asked answered yes to the question of whether “the expulsion of the Germans from the east [was] just as great a crime against humanity as the Holocaust [was] against the Jews?” As recently as 1999, Chancellor Schroeder asserted that “every act of expulsion, however different its historical origins may be, is a crime against humanity.”<sup>133</sup> Similar rhetoric has also been noticeable in the wide publicity surrounding the 2002 publications of Günther Grass’s Im Krebsgang: Eine Novelle and especially Jörg Friedrich’s Der Brand, the latter of which has revived old claims of the Allied bombing campaign as crimes against humanity.<sup>134</sup> The open reinvocation of war crimes phraseology to describe the Allied bombing and expulsions is quite

disturbing for many, not least because it tends to blur the distinction between perpetrator and victim. Now, whether this “right to mourn” is a step toward or away from any genuine reckoning with the past is hard to gauge; perhaps even the idea of a full and cathartic Vergangenheitsbewältigung is itself a leftist holdover from an older Nuremberg logic that presumes a necessary linkage of knowledge and liberation. How all of this will shake out is of course anyone’s guess; but it is worth rethinking how Germany has shaped the language of war crimes and human rights over the century. And for the first time since before the First World War, Germany is no longer the object and proving ground of international justice. On the contrary, it has become one of its principal subjects and champions. To what extent this is the strange victory of “victims’ justice” – with Germany standing as its main protagonist – warrants consideration. Whatever the case, Germany is no longer the same place that it was, and older narratives of political sin and contrition may no longer apply as they once did. But one thing is certain: the history of 20<sup>th</sup> century international justice is inextricably tied to German crimes and punishments. How Germany moves beyond this legacy will surely be one of the hallmarks of its 21<sup>st</sup> century history, foreign policy and identity politics.

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<sup>1</sup> Eberhard Jaeckel, *Das deutsche Jahrhundert: Eine historische Bilanz* (Frankfurt, 1999).

<sup>2</sup> Most directly on this theme is Richard Bessel and Dirk Schumann’s edited *Life after Death: Approaches to a Cultural and Social History of Europe During the 1940s and 1950s* (New York, 2003).

See also Hannah Schissler’s edited *The Miracle Years: A Cultural History of West Germany, 1949-1968* (Princeton, 2001) and Robert Moeller’s edited *West Germany under Construction: Politics, Society and Culture in the Adenauer Era* (Ann Arbor, 1996).

<sup>3</sup> Niall Ferguson, *The Pity of War* (New York, 1998), 458-462.

<sup>4</sup> See for example Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (London, 1999), in which the First World War and Nazism are consigned to chapters 4 and 6, respectively. Even so, Nazi Germany remains the explicit departure point for the book: “But, in another way, I have been thinking about this book for most of my adult life. Since I first heard about the Nazi genocide, I have wondered how people could bring themselves to commit such acts. The question has kept recurring and has been present in most of what I have written in philosophy.” (xi-xii).

<sup>5</sup> Mark Mazower, “Violence and the State in the Twentieth Century,” *American Historical Review* 107 (2002): 1158-1178.

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- <sup>6</sup> Mark Mazower, "The Strange Triumph of Human Rights, 1933-1950," *Historical Journal*, forthcoming, 3.
- <sup>7</sup> Lucien Wolf, "Interventions on Grounds of Humanity," in his edited *Notes on the Diplomatic History of the Jewish Question* (London, 1919), 6-62.
- <sup>8</sup> Not that the Serbians did not try. See for example R.A. Reiss, *Report Upon the Atrocities Committed by the Austro-Hungarian Army During the First Invasion of Serbia* (London, 1916).
- <sup>9</sup> James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, 1982), 148-163.
- <sup>10</sup> Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, 1961), 336, quoted in McAdams, 43.
- <sup>11</sup> Quoted in Willis, 8.
- <sup>12</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, 2000), 60-75.
- <sup>13</sup> H.W.V. Temperley, *A History of the Peace Conference of Paris*, 5 vols, here vol. 2, *The Settlement with Germany* (London, 1920), 11, quoted in Annika Mombauer, *The Origins of the First World War: Controversies and Consensus* (London, 2002), 42.
- <sup>14</sup> Bass, 12.
- <sup>15</sup> Manfrede F. Boemeke, "Woodrow Wilson's Image of Germany, the War-Guilt Question, and the Treaty of Versailles," in *The Treaty of Versailles: A Reassessment after 75 Years*, eds. Manfred F. Boemeke, Gerald D. Feldman and Elisabeth Glaser (New York, 1998), 603-614.
- <sup>16</sup> Willis, 98-112.
- <sup>17</sup> John Horne and Alan Kramer, *German Atrocities: A History of Denial* (New Haven, 2001), 223.
- <sup>18</sup> For background, "Michael Geyer, "Insurrectionary Warfare: The German Debate about a Levée en Masse in October 1918," *Journal of Modern History* 73 (2001): 459-527.
- <sup>19</sup> *German White Book Concerning the Responsibility of the Authors of the War* (New York, 1924 [1919], 10.
- <sup>20</sup> Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (London, 1980), 237. Still, we should not forget Germany's own ferocious savagery against the Herero and Nama of German South-West Africa in 1904-07. Isabel V. Hull, "Military Culture and the Production of 'Final Solutions' in the Colonies," in Robert Gellately and Ben Kiernan, ed., *The Specter of Genocide: Mass Murder in Historical Perspective* (Cambridge, 2003), 141-162.
- <sup>21</sup> Horne and Kramer, 148.
- <sup>22</sup> Horne and Kramer, 137.
- <sup>23</sup> Horne and Kramer, 404.
- <sup>24</sup> Michael Dreyer and Oliver Lembcke, *Die deutsche Diskussion um die Kriegsschuldfrage 1918/1919* (Berlin, 1993), 101-221.
- <sup>25</sup> Horne and Kramer, 329.
- <sup>26</sup> Bass, 78.
- <sup>27</sup> Robertson, 227; Horne and Kramer, 329.
- <sup>28</sup> Willis, 126; Bass, 80-82.
- <sup>29</sup> Holger H. Herwig, "Clio Deceived: Patriotic Self-Censorship in Germany after the Great War," in Keith Wilson, ed., *Forging the Collective Memory: Government and International Historians Through Two World Wars* (Providence/Oxford, 1996), 87-127.
- <sup>30</sup> The coupling of the war crimes and war guilt issues was also a matter of timing: the submission of the list of alleged war criminals was delivered in February 1920, while the specific reparation sum was first announced in January 1921, which effectively linked the two in the popular imagination.
- <sup>31</sup> In fact, Göring first met Hitler at a nationalist rally against French demands for the extradition of German war criminals. Bass, 60.
- <sup>32</sup> Wolfgang Schivelbusch, *The Culture of Defeat: On National Trauma, Mourning and Recovery*, trans. Jefferson Chase (London, 2002), 189-288.
- <sup>33</sup> Carole Fink, "The Minorities Question and the Paris Peace Conference: The Polish Minority Treaty, June 28, 1919," in Boemeke et al, 249.
- <sup>34</sup> Carole Fink, "Defender of Minorities: Germany in the League of Nations, 1926-1933," *Central European History* 5:4 (December, 1972): 330-336. For background, Erwin Kelmes, *Der europäische Nationalitätenkongress, 1925-1938* (Cologne, 1958).

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- <sup>35</sup> Fritz Fischer, *Germany's Aims in the First World War* (New York, 1967 [1961]), 120-154.
- <sup>36</sup> L. Preuss, "National Socialist Conceptions of International Law," *American Political Science Review* 29:4 (August, 1935): 594-609, cited in Mazower, "Strange Triumph," 6.
- <sup>37</sup> Horne and Kramer, 366-371.
- <sup>38</sup> Willis, 146.
- <sup>39</sup> Albert Speer, *Spandau: The Secret Diaries*, trans. Richard and Clara Winston (New York, 1976), 13, cited in Willis, 173.
- <sup>40</sup> In fact, the vast majority of war crimes trials were conducted by national courts and tribunals, whether in zones of former enemy territory occupied by victorious forces, or in victors' own territory or near scene of allegations. Best, *Humanity*, 291.
- <sup>41</sup> Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin, 2002), 238.
- <sup>42</sup> Arie J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, 1998), 6-26. Stalin, for his part, preferred war crimes trials for propaganda reasons.
- <sup>43</sup> Ann and John Tusa, *The Nuremberg Trial* (London, 1983), 21, cited in Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford, 2001), 6.
- <sup>44</sup> Quoted in Mazower, "Strange Triumph," 9.
- <sup>45</sup> Quoted in Mazower, "Strange Triumph," 7.
- <sup>46</sup> Willis, 174.
- <sup>47</sup> Best, *Humanity*, 290.
- <sup>48</sup> Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945-1946: A Documentary History* (New York, 1997), 242.
- <sup>49</sup> The British influence is discussed in Kochavi, 92-137.
- <sup>50</sup> Robertson, 21.
- <sup>51</sup> Quoted in Robertson, 218.
- <sup>52</sup> Woetzel, 31-34.
- <sup>53</sup> Marrus, 12.
- <sup>54</sup> Best, *Humanity*, 309.
- <sup>55</sup> Quoted in Marrus, 185.
- <sup>56</sup> Quoted in Robertson, 234.
- <sup>57</sup> Devin O. Pendas, "'Law, not Vengeance': Human Rights, the Rule of Law and the Claims of Memory in German Holocaust Trials," in Mark Philip Bradley and Patrice Petro, ed., *Truth Claims: Representation and Human Rights* (New Brunswick, 2002), 23-41 and Adelbert Rückerl, *NS-Verbrechen vor Gericht: Versuch einer Vergangenheitsbewältigung* (Heidelberg, 1984).
- <sup>58</sup> Bloxham, 145.
- <sup>59</sup> *The Politics of Retribution in Europe: World War II and its Aftermath*, ed. Istvan Deak, Jan Gross and Tony Judt (Princeton, 2000), 12.
- <sup>60</sup> Herf, 162-200.
- <sup>61</sup> Bloxham, 152 and Tony Kushner, *The Holocaust in the Liberal Imagination: A Social and Cultural History* (Oxford, 1994), 226.
- <sup>62</sup> Wilbourn E. Benton and George Grimm, ed., *Nuremberg: German Views of the War Trials* (Dallas, 1955).
- <sup>63</sup> Gerd R. Ueberschär, ed., *Der Nationalsozialismus vor Gericht: Die alliierten Prozesse gegen Kriegsverbrecher und Soldaten, 1943-1952* (Frankfurt, 1999).
- <sup>64</sup> One scholar has gone so far as to say that: "The notion of a state based on law clearly finds its most significant manifestation in the German judiciary [of the Federal Republic], whose structure and jurisdiction offer the most extensive legal protection of any judicial system in the world." Donald P. Kommers, "The Judiciary," in *Politics and Government in Germany, 1944-1994: Basic Documents*, ed. Carl-Christoph Schweizer et al (Providence/ Oxford, 1995), 272.
- <sup>65</sup> Dagmar Barnouw, *Germany 1945: Views of War and Violence* (Bloomington, 1996) and Cornelia Brink, *Ikonen der Vernichtung: Öffentlicher Gebrauch von Photographien aus nationalsozialistischen Konzentrationslagern nach 1945* (Berlin, 1998).
- <sup>66</sup> Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge, 1997), 267-302. See also Ulrich Brochhagen, *Nach Nürnberg: Vergangenheitsbewältigung und Westintegration in der Ära Adenauer* (Berlin, 1999).

- <sup>67</sup> See too Frank Biess, "Between Amnesty and Anti-Communism: The West German Kamaradenschinder Trials, 1948-1960," in Omer Bartov, Atina Grossmann and Mary Nolan, ed., *Crimes of War: Guilt and Denial in the 20<sup>th</sup> Century* (New York, 2002), 138-157.
- <sup>68</sup> Gilad Margalit, "Der Luftangriff auf Dresden: Seine Bedeutung für die Erinnerungspolitik der DDR und für Herauskristallisierung einer historischen Kriegserinnerung im Westen," in Susanne Düwell and Matthias Schmidt, ed., *Narrative der Shoah: Repräsentationen der Vergangenheit in Historiographie, Kunst und Politik* (Padersborn, 2002), 189-208 and *Brown Book: War and Nazi Criminals in West Germany*, published by the National Council of the National Front (East Berlin, 1965).
- <sup>69</sup> Lora Wildenthal, "The Origins of the West German Human Rights Movement, 1945-1961," ms, [http://www.humanrights.uconn.edu/rese\\_papers.htm](http://www.humanrights.uconn.edu/rese_papers.htm)
- <sup>70</sup> Dan Diner, *Verkehrte Welten: Anitamerikanismus in Deutschland: Ein historischer Essay* (Frankfurt am Main, 1993), 141-147.
- <sup>71</sup> Judith Shkar, *Legalism: Law, Morals and Political Trials* (Cambridge, Mass., 1986), quoted in Erna Paris, *Long Shadows: Truth, Lies and History* (London, 2001), 409.
- <sup>72</sup> Best, *Humanity*, 221. Best (223-224) summed up the guiding logic concerning the new dangers facing unprotected civilians thus: "To sum up this short review of the circumstances increasing the risks of civilians being damaged in the 20<sup>th</sup> century's wars, we may then crudely say that the technical means of damaging them had been perfected, plausible economic reasons for damaging them had multiplied, and their own apparently willing participation in the decisions to make or to continue war seductively suggested that they deserved to be damaged."
- <sup>73</sup> Fink, "Defender of Minorities," 357.
- <sup>74</sup> Mazower, "Strange Triumph," 11. See too Kenneth Cmiel, "The Recent History of Human Rights," *American Historical Review*, February 2004, esp. 128-129.
- <sup>75</sup> Norman M. Naimark, *Fires of Hatred: Ethnic Cleansing in 20<sup>th</sup> Century Europe* (Cambridge, Mass., 2001), 108-138.
- <sup>76</sup> Paris, 435.
- <sup>77</sup> Robertson, 27.
- <sup>78</sup> Josef Foschepoth, "German Reactions to Defeat and Occupation," in Moeller, *West Germany under Construction*, 78.
- <sup>79</sup> Pertti Ahonen, "Domestic Constraints on West German Ostpolitik: The Role of the Expellee Organizations in the Adenauer Era," *Central European History* 31:1/2 (Spring, 1998): 31-64 and Robert Moeller, "Sinking Ships, the Lost Heimat and Broken Taboos: Günther Grass and the Politics of Memory in Contemporary Germany," in *Contemporary European History* 11:2 (May, 2002), 154.
- <sup>80</sup> Rainer Schulze, "The German Refugees and the Expellees from the East and the Creation of a Western German Identity after World War II," in Phillipp Ther and Ana Siljak, eds., *Redrawing Nations: Ethnic Cleansing in East-Central Europe, 1944-1948* (London, 2001), 307-325.
- <sup>81</sup> Until the early 1990s, only a few "new democracies" had managed to bring their former dictators or rights violators to book – Greece in 1974-1975, Argentina in 1985 and Bolivia in 1986-1993. Priscilla B. Hayner, "Fifteen Truth Commissions – 1974-1994: A Comparative Study," *Human Rights Quarterly* 16: 4 (1994) and Henry J. Steiner, ed., *Truth Commissions: A Comparative Assessment* (Cambridge, Mass., 1997).
- <sup>82</sup> Jennifer A. Yoder, "Truth without Reconciliation: An Appraisal of the Enquete Commission on the SED Dictatorship in Germany," *German Politics* 8:3 (December, 1999), 61.
- <sup>83</sup> Yoder, *From East*, 30.
- <sup>84</sup> Claus Offe, "Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Transitions," *The Journal of Political Philosophy* 1:1 (1993): 17-44, here 20.
- <sup>85</sup> McAdams, 1.
- <sup>86</sup> Yoder, "Truth," 67-69.
- <sup>87</sup> Deutscher Bundestag, 82. Sitzung, 12 March 1992, 6712, quoted in McAdams, 90.
- <sup>88</sup> McAdam, 3.
- <sup>89</sup> Robert Gellately, *The Gestapo and German Society* (Oxford, 1990).
- <sup>90</sup> Erich Honecker, *Politische Erklärung von den 27. Grossen Strafkammer des Berliner Landgerichtes am 3. Oktober 1992* (Hamburg, 1992), 14-15, quoted in Anne Sa'adah, *Germany's Second Chance: Trust, Social Justice and Democratization* (Cambridge Mass., 1998), 183.

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- <sup>91</sup> Charles Maier, *Dissolution: The Crisis of Communism and the End of East Germany* (Princeton, 1997), 324.
- <sup>92</sup> McAdam, 5.
- <sup>93</sup> Offe, 21.
- <sup>94</sup> Not that this perception was altogether false. One West German official, for example, made no bones about admitting that the post-Reunification project to overcome East Germany's "culture of distrust" was nothing more than the "re-education" of the East. Yoder, *From East*, 108.
- <sup>95</sup> Cited in McAdam, 6.
- <sup>96</sup> "Interview mit Joachim Gauck," *Deutschland-Archiv* 28:11 (November, 1995), 1128-1132, cited in Maier, *Dissolution*, 312.
- <sup>97</sup> StGB/DDR paragraph 258, as quoted in Sa'adah, 149.
- <sup>98</sup> Yoder, *From East*, 57.
- <sup>99</sup> Maier, "German War, German Peace," *German History since 1800*, ed. Mary Fulbrook (London, 1997), 553.
- <sup>100</sup> *Taz*, September 6 1990, cited in Silke Schumann, *Vernichten oder Offenlegen? Zur Entstehung des Stasi-Unterlagen-Gesetzes* (Berlin, 1995), 17.
- <sup>101</sup> McAdam, 49.
- <sup>102</sup> Gisela Karau and Jens Vetter, *Gauck-Opfer* (Berlin, 1995).
- <sup>103</sup> *FAZ*, 8 March 1995, 8, cited in Yoder, "Truth," 76.
- <sup>104</sup> *FAZ*, August 6, 1995, 3, cited in Yoder, *From East*, 13. See too "Stolz aufs eigene Leben," *Der Spiegel* 27 (1995), 40-64.
- <sup>105</sup> McAdam, 167.
- <sup>106</sup> Bärbel Bohley, *Die Zeit* 14/1992, 44.
- <sup>107</sup> Maier, *Dissolution*, 317.
- <sup>108</sup> Bass, 8-24.
- <sup>109</sup> John Borneman, *Settling Accounts: Violence, Justice and Accountability in Postsocialist Europe* (Princeton, 1997), 5.
- <sup>110</sup> Yoder, "Truth," 77.
- <sup>111</sup> Herf, 7.
- <sup>112</sup> Bruce Ackermann, *The Future of Liberal Revolution* (New Haven, 1992).
- <sup>113</sup> Ronald Steel, "Prologue: 1919-1945-1989," in Boemeke, Feldman and Glaser, 21.
- <sup>114</sup> Quoted in Alan Sharp, "The Genie that Would Not Go Back in the Bottle: National Self-Determination and the Legacy of the First World War and the Peace Settlement," in *Europe and Ethnicity: World War I and Contemporary Ethnic Conflict*, ed. Seamus Dunn and T.G. Fraser (London, 1996), 27.
- <sup>115</sup> Norbert Frei, "Before and After Nuremberg," *Journal of Contemporary History* 38: 2 (2003): 333-335.
- <sup>116</sup> Mary Ellen O'Connell, "The UN, NATO and International Law after Kosovo," *Human Rights Quarterly* 22 (2000): 57-89.
- <sup>117</sup> Jürgen Habermas, "Bestialität und Humanität," *Die Zeit*, 29 April 1999, 1.
- <sup>118</sup> Ulrich Beck, "Über den Postnationalen Krieg," *Blätter für deutsche und internationale Politik*, 8 (August, 1999): 245-286, cited in Adrian Hyde-Price, *Germany & European Order: Enlarging NATO and the EU* (Manchester, 2000), 157.
- <sup>119</sup> Steel, 31.
- <sup>120</sup> Cited in Steel, 29.
- <sup>121</sup> William Widenor, *Henry Cabot Lodge and the Search for an American Foreign Policy* (Berkeley, 1980), quoted in Alan Brinkley, "The Concept of an American Century," in R. Laurence Moore and Maurizio Vaudagna, ed., *The American Century in Europe* (Ithaca, 2003), 9.
- <sup>122</sup> Gary Cohen, "The Keystone Kommandos," *Atlantic Monthly* (February, 2002): 46-59. See for example Ladislav Farago, *The Game of the Foxes: The Untold Story of German Espionage in the United States and Great Britain during World War II* (New York, 1971) and David Kahn, *Hitler's Spies: German Military Intelligence in World War II* (New York, 1978).
- <sup>123</sup> Louis Fischer, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Lawrence, 2003).
- <sup>124</sup> Max Paul Friedman, "Military Tribunals on Trial," *H-NET Review*, H-German/ net.msu.edu (September, 2003).
- <sup>125</sup> Mazower, "Strange Triumph," 20.
- <sup>126</sup> "Intellektuelle beklagen deutschen Antiamerikanismus," *FAZ*, 10 August 2002, 1.



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<sup>127</sup> Robert Kagan, "Power and Weakness," *Policy Review* 113 (Jun/July 2002).

<sup>128</sup> Thomas Assheuer, "Schlagschatten der Freiheit," *Die Zeit*, 9 June 2004, 41.

<sup>129</sup> Quoted interview in Jean Edward Smith, *Lucius Clay: An American Life* (New York, 1990), 297.

<sup>130</sup> For example, Karl Holl, *Pazifismus in Deutschland* (Frankfurt, 1988); Jeffrey Verhey, *The Spirit of 1914* (Cambridge, 2000); Michael Geyer, "Cold War Angst: West German Opposition to Rearmament and Nuclear Weapons," in Schlisser, 376-408, and most recently, Ute Frevert, *Eurovisionen: Ansichten guter Europäer im 19 und 20. Jahrhundert* (Frankfurt, 2003).

<sup>131</sup> Maier, "German War and Peace," 539-555.

<sup>132</sup> Herf, 373.

<sup>133</sup> Moeller, "Sinking Ships, the Lost Heimat and Broken Taboos: Günther Grass and the Politics of Memory in Contemporary Germany," in *Contemporary European History* 11:2 (May, 2002), 171-172.

<sup>134</sup> Moeller, 173-181.