

KIM CHRISTIAN PRIEMEL

THE BETRAYAL

The Nuremberg Trials and German Divergence



OXFORD

THE BETRAYAL

At the end of World War II the Allies faced a threefold challenge: how to punish perpetrators of appalling crimes for which the categories of 'genocide' and 'crimes against humanity' had to be coined; how to explain that these had been committed by Germany, of all nations; and how to reform Germans. The Allied answer to this conundrum was the application of historical reasoning to legal procedure. In the thirteen Nuremberg trials held between 1945 and 1949, and in corresponding cases elsewhere, a concerted effort was made to punish key perpetrators while at the same time providing a complex analysis of the Nazi state and German history. Building on a long debate about Germany's divergence from a presumed Western path of development, Allied prosecutors sketched a historical trajectory which had led Germany to betray the Western model. Historical reasoning both accounted for the moral breakdown of a 'civilised' nation and rendered plausible arguments that this had indeed been a collective failure rather than one of a small criminal clique. The prosecutors therefore carefully laid out how institutions such as private enterprise, academic science, the military, or bureaucracy, which looked ostensibly similar to their opposite numbers in the Allied nations, had been corrupted in Germany even before Hitler's rise to power. While the argument, depending on individual protagonists, subject matters, and contexts, met with uneven success in court, it offered a final twist which was of obvious appeal in the Cold War to come: if Germany had lost its way, it could still be brought back into the Western fold. The first comprehensive study of the Nuremberg trials, *The Betrayal* thus also explores how history underpins transitional trials as we encounter them in today's courtrooms from Arusha to The Hague.

Kim Christian Priemel is professor of contemporary history at the Department of Archeology, Conservation, and History at the University of Oslo, Norway.

‘Do we really need yet another book about Nuremberg? Readers well-versed in the history of international law may well ask themselves this question—as does Kim Christian Priemel, who proceeds to give a convincing answer to it. [...] His study is knowledgeable and assured, at times even downright gripping. [...] He has certainly succeeded in elucidating the complex dynamics of the equally complex Nuremberg Trials by focusing upon the actors involved.’

Kai Ambos, *Criminal Law Forum*

‘What makes Priemel’s study stand out is the scope of research, the breadth of analysis, and a well-defined thesis... What scholars and college students would probably appreciate most about Priemel’s study is his ability to weave all the tribunals into a single, uninterrupted narrative... *The Betrayal* is a superbly researched and argued book on its way to becoming a standard work.’

Anton Weiss-Wendt, *Genocide Studies and Prevention*

‘Kim Christian Priemel’s revealing new analysis should inspire historians to carefully reassess the Nuremberg Trials, their consequences and limitations. His deep knowledge of the pertinent legal scholarship on Nuremberg and Germany’s putative Special Path inform throughout this unique history of a touchstone in international law. *The Betrayal* is not a book for the casual reader, but serious students will overlook it at their peril—it has set the standard for the next generation of scholars of the Nuremberg Trials.’

Brian K. Feltman, *Michigan War Studies Review*

‘This book about “Nuremberg” investigates the highly original question how criminal trials change our views of history, and this is what it makes it so important... The detailed description of political and legal planning, drawing on private correspondence of judges, analysts, and journalists, as well as the short biographies of less prominent figures interspersed in the narrative, make for fascinating reading. The explanation why Nuremberg evolved the way it did... is compelling... Priemel’s work will definitely become seminal reading. A brilliant achievement.’

Kerstin von Lingen, *H-Net* [translated]

‘With this excellent work, Priemel has written the most complete account of the American trials at Nuremberg we have... *The Betrayal* is an exceptional work of legal and intellectual history that highlights powerfully the role that ideas—most notably that of a German *Sonderweg*—played in Allied efforts to prosecute the crimes of the Third Reich. Just as these trials benefitted historical scholarship in diverse ways, as the author points out, so too should this book contribute to a wide array of fields, from German history to intellectual history to that of transitional justice and human rights.’

Charles B. Lansing, *German History*

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German Divergence*

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Preface

Nobody with such luggage | has nothing to declare.

Norman MacCaig

‘Why another book on Nuremberg, aren’t there loads already?’ is, in all likelihood, the question I have been asked most often while working on this project. The answer is simple: yes, there are, and many good ones too. There are also the incomplete or unwritten tomes like John Wheeler-Bennett’s abandoned study (whose draft chapters now rest in St Antony’s College Library at Oxford), or Telford Taylor’s second book on the trials, which is sorely missed. Yet I felt that much was left out by the heap of books and articles which I dived into several years ago. And the more I read the more convinced I became that a comprehensive history of Nuremberg which went beyond enumerating facts and offering entertaining anecdote, which combined an analysis of the first, so-called Major War Criminals Trial of *Goering, et al.*, with a study of the frequently overlooked Nuernberg Military Tribunals by the American authorities but also of their companion trials in the French and British zones of occupation, had yet to be written. And I was intrigued by a subject whose continuing significance came into sharp relief due to a number of developments which were all, in one way or another, related to Nuremberg: the Munich trial of John ‘Ivan’ Demjanjuk in 2009–11; the efforts to hold private corporations accountable for human rights violations by arguing for Nuremberg’s character as a precedent in the 2012–14 *Kiobel* lawsuit; or the first proceedings (against Congolese warlord Thomas Lubanga Dyilo) to be held by the International Criminal Court in The Hague in 2009, an endeavour for which a group of Nuremberg prosecution veterans had been lobbying for decades, despite the obstruction of successive US administrations.

Trials for war crimes, crimes against humanity, and genocide confront the historian not only with stark, often horrific facts; they also take her or him to the limits of sobriety, which befits academic analysis. In evaluating cases where justice may have come at the expense of legality and thus, paradoxically, in the company of injustice, disconcerting questions arise and answers may be uncomfortable. On the other hand, dealing with the law can help to remonstrate to oneself that historiography ultimately is judgemental and thus a messy affair. Yet historians often find it hard to state their point of view, whether for the remnants of Rankean notions of studious research or because normativity is frequently confused with partisanship and bias. Detachment from one’s subject is generally held to be a virtue and the precondition for any critical analysis. This book or, rather, its author does not agree. To say that all historians carry convictions in their luggage is trite, and if they don’t, it is usually for the worse of the historiography they produce.

My own angle on the subject at hand is fairly straightforward. Choosing judicial trials as a response to the appalling German crimes committed between 1933 and

1945, was by far the best option available. ‘Nuremberg’ aspired to move beyond vengeance, to avoid show trials of the Vyshinskii and Freisler type, and to procure massive amounts of documentary evidence on which generations of historians, lawyers, political scientists, teachers, journalists, and other writers could draw. These tenets were largely achieved. Among the 206 defendants in the fifteen trials covered in this book, not one innocent man or woman was convicted. This position, of course, is a historian’s, and innocence is used here as the antonym to (historical) responsibility, not to (legal) guilt. And despite the fact that these proceedings had many shortcomings—some of them judicial, others historiographical—I cannot help but find that the endeavour was, on balance, a remarkable accomplishment: unprecedented then and unparalleled to this day. Frequent criticism of judicial trials in general and the Nuremberg series in particular, chiding the proceedings and their protagonists for a lack of precision, nuance, efficacy, scope, and what have you, seems cheap considering the enormous pressure of time under which the protagonists laboured. What is more, it ignores the epistemological stakes involved in marrying law and history.

Yet the mixed reception of the Nuremberg trials—between glorification and wholesale rejection, with many shades of grey in between, and with shifting front-lines over time—surely is not only the audience’s fault but also resulted from the shortcomings depicted in this book, not least their considerable overstretching. The breathtakingly ambitious programme to do all at once: render justice, innovate law, jumpstart historical analysis of Nazi Germany, and (re)educate not only the defeated nations but a global constituency, accounts for both Nuremberg’s achievements and its disappointments. This book explores, for the first time, the forging of the entire project, its practical pitfalls, and the mixed results it produced. Still, there are many ways of telling the story of the Nuremberg trials, and this is merely one of them.

* * *

Rumour has it that we are all standing on the shoulders of giants. While I do share the sentiment I prefer to think of these shoulders as belonging to a multitude of dwarves, but either way there is much to acknowledge. Over the years, so many people have helped me along the way that I am bound to omit some names; these colleagues and friends I ask to be, once more, kind enough to overlook my limitations.

Thinking about the trials began on a long train journey to Berlin when I discovered that my misgivings as to Nuremberg-related research were shared by Alexa Stiller. We have been discussing war crimes, their prosecution, and their historiography ever since; two exciting workshops and two edited volumes have grown out of this cooperation without which the present book could not have been written. In fact, many of the ideas in this volume are Alexa’s as much as mine (though she will disagree with others, I suspect). I am no less grateful to the participants of the said conferences, one held at the US Holocaust Memorial Museum in 2008, the other at Viadrina University the following year, from whose knowledge and insights I learned so much. Many other colleagues offered advice and welcome criticism. I had the pleasure of presenting and discussing the project at the Centre Marc Bloch in Berlin, the Université Libre de Bruxelles, the Modern German History Seminar at

Cambridge, the Center for European Studies at Harvard, the Marburg International Research and Documentation Centre for War Crimes Trials, the Center for Advanced Studies of LMU Munich, and at a joint conference of ENS and the Université de Paris-Nanterre. Sections of Chapters 5 and 6 draw on material previously published in the *Historische Zeitschrift* and the *Journal of Modern History*.

The project could not have been undertaken without the immensely precious independence (and the very measurable financial support) awarded by a Fedor Lynen Fellowship of the Alexander von Humboldt Foundation which brought me to the green pastures of both Cambridges. It would not have been undertaken without the encouragement of Eveline Bouwers, Richard Evans, and Charles Maier who saw a book in what was then not much more than an idea. The Lynen stipend also allowed me to travel far and wide, hunting down public record collections and private papers on both sides of the Atlantic. Naming all archivists on whose expertise I relied would explode this preface; but Sabrina Sondhi of Columbia's Law Library and Annegret Neupert at the German Federal Archives in Koblenz deserve particular praise for their generous support. I am also grateful to the heirs of Hans Morgenthau and to the Estate of F. A. Hayek for granting permission to quote from the respective unpublished writings. Robert M. Morgenthau kindly allowed me to use the 'Farben Octopus' illustration from his father's famous *Germany Is Our Problem*. The late Detlev Vagts generously offered his legal expertise as well as private recollections of his father and fellow émigré scholars. The manuscript was finally completed at Humboldt University Berlin, cheered on by a number of colleagues whom I will be missing, and with the luxury of virtually unlimited academic liberty that came with a Diltney Fellowship so kindly granted by the Fritz Thyssen Foundation, allowing me to pursue two large research projects at the same time.

One of the authors on whose work I have drawn in this book, historian Rohan Butler, was not exactly taken in by the quality of German prose. Much of it, the All Souls fellow found, was 'pedantic and pretentious, given to inelegant excess, and apparently less concerned with sound sense than with verbal formulae'. Daniela Helbig, Kevin Jon Heller, Mala Loth, Simon Mee, Marcus Payk, Joshua Rahtz, and Hugo Service have done their best to render the book less Germanic, and I have benefitted a lot from their critical comments on the argument as well as from their stylistic improvements to the actual text. Peter Mercer was of great help in compiling the index. Two anonymous referees pointed me to weaknesses and helped to clarify imprecisions in my reasoning, for which I am very grateful. Whatever flaws the following pages still contain are, of course, entirely my own. At Oxford University Press, Christopher Wheeler accepted my bold suggestion that this really was the first comprehensive history of Nuremberg ever, and Cathryn Steele then oversaw the project's progress (and at times the lack thereof) with much patience and kindness. I am also grateful to Dan Harding for his careful and precise copy-editing, as well as to Clifford Willis for proofreading and to Vaishnavi Ananthasubramanyam for her competent management.

Dedicating academic prose to loved ones is necessarily inadequate. But as no collection of poetry from my pen is in sight I must do with what I have. This book, therefore, is for M., for everything, and fully aware that 'these are private words addressed to you in public'.

Berlin, November 2015

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List of Abbreviations

Acc.	accession
<i>AHR</i>	<i>American Historical Review</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
BEW	Board of Economic Warfare
BWCE	British War Crimes Executive
<i>BYIL</i>	<i>British Yearbook of International Law</i>
CFR	Council of Foreign Relations
CIA	Central Intelligence Agency
<i>CLR</i>	<i>Columbia Law Review</i>
F	folder
<i>FA</i>	<i>Foreign Affairs</i>
FBI	Federal Bureau of Investigation
FEA	Foreign Economic Administration
FRG	Federal Republic of Germany
<i>HLR</i>	<i>Harvard Law Review</i>
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organization
IMT	International Military Tribunal
<i>IMT</i>	<i>IMT Proceedings Transcript</i>
IMTFE	International Military Tribunal for the Far East
JAG	Judge Advocate General
<i>JICJ</i>	<i>Journal of International Criminal Justice</i>
<i>LRTWC</i>	<i>Law Reports of Trials of War Criminals</i>
MP	member of parliament
MPS	Mont Pèlerin Society
NATO	North Atlantic Treaty Organization
<i>NCA</i>	<i>Nazi Conspiracy and Aggression</i> documents collection
NMT	Nuernberg Military Tribunals
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei
OCCPAC	Office of the U.S. Chief of Counsel for the Prosecution of Axis Criminality
OCCWC	Office, Chief of Counsel for War Crimes
OKW	Oberkommando der Wehrmacht (Wehrmacht High Command)
OMGUS	US Office of Military Government
OSS	Office of Strategic Services
POW	prisoner of war
R&A	Research & Analysis Branch
RG	record group
RKF	Reichskommissar für die Festigung deutschen Volkstums (Reich Commissioner for the Strengthening of Germandom)
RSHA	Reichssicherheitshauptamt (Reich Security Main Office)
RuSHA	Rasse- und Siedlungshauptamt (Race and Settlement Main Office)

RVE	Reichsvereinigung Eisen
RVK	Reichsvereinigung Kohle
SA	Sturmabteilung
SD	Sicherheitsdienst des Reichsführers SS
SS	Schutzstaffel
<i>TWC</i>	<i>NMT Proceedings Transcripts</i>
<i>UCLR</i>	<i>University of Chicago Law Review</i>
UNWCC	United Nations War Crimes Commission
<i>USGPO</i>	<i>US Government Printing Office</i>
<i>VfZ</i>	<i>Vierteljahrshefte für Zeitgeschichte</i>
Vol.	volume
WVHA	Wirtschafts-Verwaltungshauptamt (Economic and Administrative Main Office)

1

Introduction

Drawing Lines

The story of this case is, in the last analysis, a story of betrayal.

Telford Taylor

Le projet était évangélisteur.

Edgar Faure

[F]or there is no quality in this world that is not what it is merely by contrast.
Nothing exists in itself.

Herman Melville¹

PROLOGUE: FRANCONIA, MARCH 1946

Eight months after the end of the war, a US Army jeep approached Hartenstein castle, a thirteenth-century fortress in Franconia, some fifty miles from Nuremberg. The passengers, several GIs and a well-groomed civilian, were greeted with surprise by the grandchildren of the castle's proprietor, Hans Anna Haunhorst, a career diplomat who had served in Japan and at the Holy See but had resigned from the Foreign Office on the eve of World War I. His unexpected visitor was Robert M. W. Kempner, himself a former civil servant in the Reich's Home Office who had been forced to leave Germany in 1935 due to his oppositional activities and Jewish background. After a decade in exile, he now returned as a naturalized US citizen and a member of the American prosecution team at the International Military Tribunal at Nuremberg. Kempner was on friendly terms with the Haunhorst family and would visit them repeatedly to discuss the state of German affairs with the former diplomat whom—at least in the eyes of Haunhorst's granddaughter Ilka—he resembled like a younger brother. That, however, would not remain the only link between the two men. When Haunhorst's son-in-law, Harro von Zeppelin, returned from a prisoner-of-war (POW) camp several months later, he was arrested and brought to Nuremberg in order to testify against Walter Darré, *Reichsbauernführer* and blood-and-soil ideologue whose adjutant he had been. Although he was too small a figure to warrant indictment himself, Ilka's father had bad luck. Preparations

¹ *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, 15 vols. (Washington: USGPO, 1949–53) [henceforth: *TWC*], here VI, 114; 'The project was missionary.' Edgar Faure, *Mémoires II* (Paris: Plon, 1984), 14; Herman Melville, *Moby Dick or The Whale* (London: Folio Society, 1974), 72.

for Darré's trial dragged on for many months until his case was finally incorporated into the so-called Ministries trial which targeted high-ranking government officials from various Berlin departments, notably the Foreign Office. The prosecution team was headed by none other than Kempner. The penultimate trial of twelve in total, the Ministries case was the last to finish, and Zeppelin occupied a cell in the witness wing of the war criminals prison until late 1948.²

The episode is inconspicuous, yet instructive. Although neither Hans Haunhorst nor Harro von Zeppelin enjoyed particular prominence, they belonged to the German elite which, in the eyes of the Allies, required purging, reformation, and re-education before any political and moral reconstruction could begin. While Zeppelin, the descendant of an illustrious dynasty of *ancienne noblesse*, was among those purged, Haunhorst, the scion of a bourgeois Rhenish family, would be called upon to cooperate with the Americans. He prided himself in collaborating with the new authorities while his son Hanswolf was among the founders of the Christian Social Union in Bavaria and served as party liaison to the regional US offices. In later years, Haunhorst's son would become the editor of a NATO publication and, in 1973, would report from the accession ceremony of both German states to the United Nations for the public broadcaster *Deutsche Welle*.³

In a nutshell, the family history illustrates how difficult it was to tell where Germans stood in 1945, both for themselves and the Allied victors. The Haunhorst-Zeppelin family found itself on either side: detained in Nuremberg's war crimes prison while at the same time conversing amicably with the deputy chief prosecutor, himself a German expatriate. Boundaries were not drawn easily. But they were essential for the occupation forces in figuring out with whom to collaborate, whom to invest with authority, and how to treat German elites generally. The problem, posited historian John Wheeler-Bennett, then working for the British Foreign Office, was 'to find those who can be trusted'.⁴ As a confidante of Darré, an SS member, and stained by his military service in the Eastern 'bloodlands' (to hijack Timothy Snyder's phrase), Harro von Zeppelin found himself beyond the red line. And while his family name linked him to the mediaeval grandeur of Teutonic Knights, it also evoked the famed German airships which had inflicted terror—though rather little damage—across Europe during World War I.⁵ Zeppelin's in-laws, meanwhile, were deemed politically trustworthy, and Haunhorst's post-war career symbolizes the democratization of West Germany and its swift, wholesale reintegration into the transatlantic world. Both sides of the coin, inclusion and exclusion, remained contested over roughly a decade which saw the transformation of the European and American democracies'

² Ilka von Zeppelin, *Dieses Gefühl, daß etwas nicht stimmte. Eine Kindheit zwischen 1940 und 1948* (Berlin: Wagenbach, 2006), 107f., 135f.; Vernehmung des Freiherrn Harro von Zeppelin, 10 January 1948, IfZ, ZS-1764.

³ Barbara Fait, Alf Mintzel, and Thomas Schlemmer (eds.), *Die CSU 1945–1948. Protokolle und Materialien zur Frühgeschichte der Christlich-Sozialen Union*, vol. 1 (Munich: Oldenbourg, 1993), 803f., 1875f.; Reportage vom Beitritt der BRD und der DDR zur UNO am 18. September 1973, <<http://dw.de/p/JOVz>> accessed 22 August 2014.

⁴ Unconditional Surrender and Occupation, June 1943, StACL, Wheeler-Bennett Papers, Series B, F.2.

⁵ Guillaume De Syon, *Zeppelin! Germany and the Airship, 1900–1939* (Baltimore: Johns Hopkins University Press, 2002), 55f., 71–109; Jerry White, *Zeppelin Nights. London in the First World War* (London: Bodley Head, 2014), 124–31.

arch-enemy into their dependable ally, and of a totalitarian regime into a member of the 'Free World' or simply the 'West'.⁶

A key arena in which the boundaries of the West, that 'imagined community' (Benedict Anderson), were deliberated, its identity defined, and claims to membership negotiated, was the Palace of Justice at Nuremberg (Fig. 1.1). The judicial proceedings held here between 1945 and 1949, despite their significantly greater scope commonly referred to as war crimes trials, did not only coincide with the transitional period of direct Allied rule after the downfall of the Third Reich, they played a vital role in the transition from National Socialism to integration into the two blocs of the impending Cold War. Conversely, if the political reconstruction of divided Germany cannot be understood properly without an appreciation of the Nuremberg proceedings, any analysis of these trials must be aware of the stakes held by the various parties involved, German and Allied. The bottom line, of which most protagonists inside and outside the courtroom were aware, was the question whether or not Germany belonged to the West. Whatever the answer, it guided Allied policies towards the defeated nation generally but also on the individual level of the Nuremberg defendants' fate. It is thus in a threefold sense that the trials before the various military tribunals—the four-power trial and the American proceedings at Nuremberg, the Rastatt case against industrialists under the auspices of the French, and the trial of Field Marshal Erich von Manstein staged by the British authorities in Hamburg—were transitional: chronologically as part of the conversion from despotism to democracy; functionally in their contribution to bringing about this transition; and methodologically by applying law that was in itself provisional (or, in the eyes of its critics, makeshift and flawed).

The argument this book submits is thus straightforward: in the concerted effort of retribution, reorientation, and reconstruction which was Nuremberg, the Allies set out to demonstrate the legitimacy of the judicial proceedings and present a political and ethical vision that was superior to the deceased Nazi regime and its discredited predecessors in Imperial Germany and Weimar. For both aims the concept of the West was well-suited, as it asserted the moral authority of the victorious Allies. It justified their venture to mete out justice to their vanquished enemies rather than merely exerting revenge, and it exemplified an ideal—or indeed a set of ideals—to which a future German nation should aspire. The very notion of a fair trial was based on the idea that Germany was *not* beyond reform, that Germans *could* learn from the Allies and improve on their historical record. It was in this sense that French prosecutor and future prime minister Edgar Faure held the whole project to be 'évangélisateur', i.e. missionary.

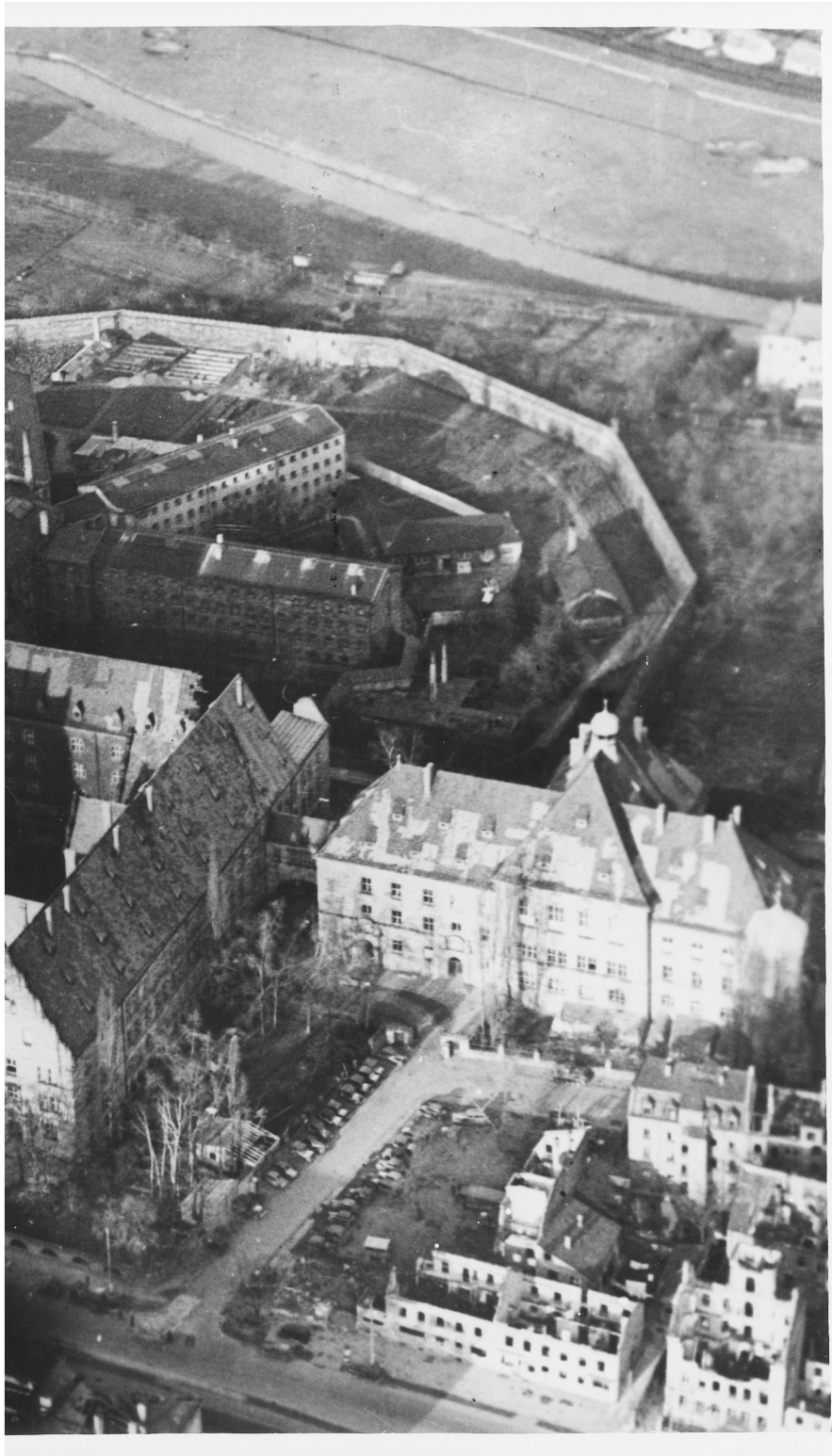
The concept of the West came with the additional benefit of elucidating why Germany, despite her shared European heritage, had not lived up to the standards of civilization as defined by the (Western) Allies,⁷ why the unthinkable had

⁶ For the purposes of this book, a lower case 'west' and 'western' denotes directionality whereas the upper case 'West' and 'Western' implies historical, cultural, and political concepts. Cf. Alastair Bonnett, *The Idea of the West. Culture, Politics and History* (Basingstoke: Palgrave Macmillan, 2004).

⁷ This is also the argument of Christiane Wilke, 'Reconsecrating the Temple of Justice. Invocations of Civilization and Humanity in the Nuremberg Justice Case', *Canadian Journal of Law and Society*, 24 (2009), 181–201.



Fig. 1.1. The Palace of Justice, Nuremberg, 1945 (the prison adjoining)
United States Holocaust Memorial Museum



happened. It was, in the words of American lawyer-cum-historian Telford Taylor, a key protagonist at Nuremberg, ‘a story of betrayal’ which would be told in the trials: the sad tale of physicians who had disregarded their professional ethics; of public servants who had been disloyal to democracy; of soldiers who had run afoul of their code of conduct; of businessmen who had abandoned fair competition and the free-market economy; and not least of all the treason against the rule of law committed by German lawyers. In short, the narrative which the Nuremberg prosecution crafted was that of sedition from Western standards and values. This story of how Germany had deviated from the Western way promised to explain the unexplainable, and this very explanation would be the first transitional step back on the right path.

In court, the heuristic potential of this approach was visibly compromised by the Soviet Union’s participation on the prosecuting and judging side (though also by the other Allies’ unwillingness to discuss their respective conduct of war). In the follow-up proceedings, the concept’s explanatory force depended on whether or not it could be shown that Germany had indeed differed essentially, and not just incidentally or superficially, from its Western counterparts. This argument, known to cultural studies as *othering*, was the linchpin of the Nuremberg trials’ design, and the proceedings developed into a protracted debate precisely on if and where lines of difference could be drawn. The prosecution declared ‘they are nothing like us’. But it also had to insist that ‘they’ could. At the same time, the defendants and their counsel claimed they already were and always had been. Whoever made the more plausible case came out victorious in the eyes of the audience on the judges’ benches, among the contemporary observers on both sides of the Atlantic, and eventually of posterity. This contest, which is captured in the rhetorical figure of *tu quoque* (‘you, too’), was at the very heart of the trials. If taken seriously not as exculpatory evidence—as such it has long been disqualified as irrelevant—but as the assertion of fundamental similarity and thus as the reproach of hypocrisy, it holds the key to understanding the dynamics of the Nuremberg trials and their outcome.⁸ With *tu quoque* demanding equality under the law, i.e. that ‘similar cases be treated similarly’ while essentially unequal situations be handled unequally, the argumentative strategies were plain: whereas the defence affirmed German similarity to the (Western) Allies, the prosecution had to make a case for their being fundamentally different.⁹

1.1. TRANSITIONAL TRIALS

Transitional justice is a term of recent invention. Coined in the 1980s in the waning days of Latin American junta rule, it did not signify just any transition but specifically democratic change and was tied up with the rekindled human rights

⁸ Judith N. Shklar, *Legalism. Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1986 [1964]), 168, understands *tu quoque* to be ‘a politically powerful argument’.

⁹ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1999 [1971]), 50f., 208f. Cf. Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt: Suhrkamp, 1993), 223–7, who points out that this component of the rule of law is, unlike material justice, not contingent.

discourse of the previous decade.¹⁰ As a field of academic research, transitional justice has been ‘on the upward trajectory’¹¹ ever since, following the collapse of state socialism in Central and Eastern Europe but also reacting to civil wars and genocidal crimes in Rwanda, the Balkans, and East Asia. Understood as ‘justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes’,¹² transitional justice covers a wide array of judicial and non-judicial mechanisms from lustration, purges, domestic truth commissions, and restitution policies to (inter)national tribunals and traditional communal law enforcement. While not mutually exclusive, these forms of transitional justice largely fall into three categories: retributive, restitutive, and restorative.¹³ Among these, it is the retributive branch, i.e. judicial trials, which has received the bulk of attention, owing to the creation of the ad hoc international tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the establishment of the permanent International Criminal Court (ICC) in The Hague.¹⁴ With a jurisdiction covering war crimes, crimes against humanity, genocide, and, in the ICC case, crimes against peace, these law courts are usually said to stand in the tradition of the transitional trials of the post-World War II era. Indeed, the ‘road from Nuremberg to The Hague’ has become a stock image of celebratory speeches as well as of academic treatises which trace the pedigree of today’s courts back to the Allied proceedings in Germany and Japan.¹⁵

The credit for conceptualizing transitional trials in all but name must go to Otto Kirchheimer, the German-American jurist and political scientist who contributed to the run-up of the Nuremberg trials back in the 1940s. Two decades later, Kirchheimer published his magnum opus, a comprehensive treatise on *Political Justice*, which salvaged politically charged proceedings from simplistic identification with Stalinist and Nazi show trials, a problem that continues to vex lawyers to

¹⁰ Cf. Paige Arthur, ‘How “Transitions” Reshaped Human Rights. A Conceptual History of Transitional Justice’, *Human Rights Quarterly*, 31 (2009), 329–67. For the Human Rights revival see Samuel Moyn, *The Last Utopia. Human Rights in History* (Cambridge, Mass.: Harvard University Press, 2010).

¹¹ Kieran McEvoy, ‘Beyond Legalism. Towards a Thicker Understanding of Transitional Justice’, *Journal of Law and Society*, 34 (2007), 411–40, 412.

¹² Ruti Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, 16 (2003), 69–94, 69.

¹³ This classification builds on Elazar Barkan, ‘Introduction. Historians and Historical Reconciliation’, *American Historical Review*, 114 (2009), 899–913, 902, but distinguishes further between material claims settlements which come under the term of restitution and various commemorative policies which aim at restoring the social fabric of trust. These overlap with each other as well as with judicial and administrative retribution.

¹⁴ For recent overviews see Nico Wouters (ed.), *Transitional Justice and Memory in Europe (1945–2013)* (Cambridge: Intersentia, 2014); Melissa Williams, Rosemary Nagy, and Jon Elster (eds.), *Transitional Justice* (New York: NYU Press, 2012); Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

¹⁵ Theodor Meron, *War Crimes Law Comes of Age* (Oxford: Oxford University Press, 1998), 198–203; Guénaél Mettraux, ‘Trial at Nuremberg’, in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law* (London: Routledge, 2011), 5–16. In contrast, Hervé Ascensio, ‘La justice pénale internationale de Nuremberg à La Haye’, in Simone Gaboriau et Hélène Pauliat (eds.), *La justice pénale internationale* (Paris: Pulim, 2002), 29–44, 30, stresses discontinuity and various aborted cycles of progress. Cf. Annette Weinke, *Die Nürnberger Prozesse* (Munich: Beck, 2005), 119–22.

this day.¹⁶ Kirchheimer not only suggested that there was a long tradition of such proceedings but singled out what he labelled successor trials, a status which he accorded to both national and international tribunals like those in Nuremberg and Tokyo.¹⁷ More significant was Kirchheimer's observation that successor, i.e. transitional, trials are at the same time retrospective and prospective. By indicting the crimes of the predecessor regime, the participant-observer Kirchheimer argued, the succeeding government claims moral superiority and emphasizes the difference between those in the defendants' dock and those on the judges' benches, thereby seizing the opportunity to turn the trial itself into 'a cornerstone of the new order'.¹⁸

However, this legitimizing function of transitional trials hinges on the application of the rule of law. Judith Shklar in her seminal study on *Legalism* and Leora Bilsky's perceptive analysis of the Kastner and Eichmann trials in Israel show that transitional trials can exploit their potential to demonstrate superior ethics and educate both the accused and the public only if the standards of due process and fair trial are observed, i.e. when the defendants are granted a true 'fighting chance'.¹⁹ Unsurprisingly, critics have been quick to point to the conflicting prerogatives of retrospective retribution and prospective didactics. The application of *ex post facto*, i.e. retroactive, law is hard to reconcile with legalist requirements and is not much helped by invoking natural law which is uncoded and sits ill with legalist thinking. Shklar and, following in her footsteps, Mark Osiel take the dilemma head-on and argue that the virtues of legalism only come to fruition if employed in the service of liberal ideas. The compromising of legalist principles is redeemed by the purpose of creating a liberal, democratic, and—paradoxically—legalist order.²⁰ This, however, comes perilously close to an ends-justify-the-means

¹⁶ For typologies see Ron Christenson, 'A Political Theory of Political Trials', *Journal of Criminal Law and Criminology*, 74 (1983), 547–77, 554–6, and Eric A. Posner, 'Political Trials in Domestic and International Law', *Duke Law Journal*, 55 (2005), 75–152, at 81–7. While Christenson distinguishes between partisan, i.e. deliberately fraudulent, and political trials which proceed within the law, Posner argues that all political trials employ the judicial process against their opponents, varying only in the legal standards which they apply. Both, however, subscribe to a political–legal dichotomy and ignore the reciprocal dimension of law and politics which is not exclusive to but particularly intense in international criminal law; cf. Gerry Simpson, *Law, War and Crime. War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007), 12–25.

¹⁷ Otto Kirchheimer, *Political Justice. The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), 323. Kirchheimer's classification is borne out by the key role the trials played in bringing about regime change but also reflects the Allies' wielding sovereign authority following unconditional surrender.

¹⁸ Kirchheimer, *Political Justice*, 336–8, at 336. While concurring with Paige Arthur that 'transitional justice' is not a 'timeless construct', I disagree with her admonition that its application to pre-1990 cases inevitably implies misrepresentation. Despite their different wording the concepts denominated by 'successor' and 'transitional' trials seem sufficiently similar to be used interchangeably; Arthur, 'Transitions', 324–8.

¹⁹ Leora Bilsky, 'Political Trials', in Neil J. Smelser and Paul Baltes (eds.), *International Encyclopedia of the Social and Behavioral Sciences*, vol. 17 (Amsterdam: Elsevier, 2001), 11712–17, 11713f. Note that Bilsky further differentiates between transitional trials which accompany regime change and transformative trials which may go on for decades, continuously renegotiating collective identity; Leora Bilsky, *Transformative Justice. Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004).

²⁰ Shklar, *Legalism*, 108, 145–7; Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick: Transaction, 1997).

rhetoric, and Shklar's adversaries have not been slow to seize on the weaknesses of this deliberately normative stance.²¹

Approaching the problem inductively rather than deductively, Cornelia Vismann, in her groundbreaking study of the media of law, provides a more rigorous analysis which applies directly to the Nuremberg complex. Vismann identifies two ideal types of jurisdiction, courts and tribunals, and their respective modes of operation or *dispositifs*: theatral in court, agonal before tribunals. While ordinary justice²² comes in the shape of the court, i.e. a disinterested investigation finally resolved by an impartial arbiter, the tribunal is a duel by juridical means and exceeds the limits of legalism. As such, the tribunal is particularly apt in transitional contexts precisely because it need not heed the limitations of a fixed legal order. Vismann provides a catalogue of distinct characteristics to be found in tribunals, all of them pertinent to Nuremberg: they are constituted ad hoc and implement retroactive law, thereby violating the *nullum crimen, nulla poena sine lege* doctrine; they are adversarial in nature, yet with the judge being party rather than neutral referee; facts are not simply found but are contested in the trial which is not a fight *for* but *over* truth. Accordingly, tribunals are genuinely pedagogical institutions meant to reach out to a public which is to be educated, and the defendants sit in the dock as both individuals and allegorical characters.²³

Chastised by their critics for precisely these reasons, though, tribunals, or rather, their members trained in the legalist tradition, aspire to resemble courts.²⁴ And while the procedural law is made up on the go it is this adherence to the rule of law which provides tribunals with legitimacy and authority. Ironically, the defence can thus only challenge the legal quality of the tribunal through procedural guarantees, i.e. by asserting the tribunal's very legalistic character (and that of the symbolic order represented in and by the trial).²⁵ In the transitional context, this affirmation of due process is particularly important as the law is the code in which a society conceives of itself:²⁶ both how it would like to be and what it accepts it is. Nuremberg was no different in this respect since the rule of law was a 'significant piece of the jigsaw' that came under the name of Western tradition.²⁷ Accordingly, the trials

²¹ See e.g. Posner, 'Political Trials', 14.

²² As epithets such as 'ordinary' are knotty, the differentiation is pragmatic. To conceive of transitional trials merely as 'overblown versions of ordinary legal problems' misconstrues their specific historical character; cf. Eric A. Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice', *HLR*, 117 (2004), 761–825, 765.

²³ Cornelia Vismann, *Medien der Rechtsprechung* (Frankfurt: Fischer, 2011), 146–83.

²⁴ Lawyers' preference for ordinary jurisdiction over literally extraordinary ad hoc proceedings is readily apparent in the ICTY's and ICTR's designation as tribunals whereas the permanent ICC registers as a court.

²⁵ Cf. Willibald Steinmetz, 'Towards a Comparative History of Legal Cultures, 1750–1950', in Willibald Steinmetz (ed.), *Private Law and Social Inequality in the Industrial Age. Comparing Legal Cultures in Britain, France, Germany, and the United States* (Oxford: Oxford University Press, 2000), 1–41, at 8–11, and Henning Grunwald, *Courtroom to Revolutionary Stage. Performance and Ideology in Weimar Political Trials* (Oxford: Oxford University Press, 2012), 177–9.

²⁶ Cf. James Boyd White, 'The Ethics of Argument. Plato's *Gorgias* and the Modern Lawyer', *University of Chicago Law Review*, 50 (1983), 849–95, 881–3.

²⁷ Shklar, *Legalism*, 21. For a powerful example of how the history of the West can be read through the prism of legal history see Harold J. Berman's classic *Law and Revolution. The Formation of the Western Legal Tradition*, 2 vols. (Cambridge, Mass.: Harvard University Press, 1983 and 2003).

were not only the means by which Germany's Westernness was negotiated; they were also evidence of Allied Westernness itself. In other words, the proof of the pudding was in the eating. Plus, flagging legal standards which had not been upheld by the Third Reich, but which were able to recall Kantian notions of the *Rechtsstaat*, promised to teach the German audience a lesson which would appeal to them.²⁸ Finally, Nuremberg was—until the 1990s—the last fanfare for an essentially nineteenth-century liberalism whose global outlook, itself deeply steeped in imperialism, was defined by the belief in peace through law and which, erroneously, conceived of the collective security and economic policy mechanisms established in the 1940s as the successful legalization of international affairs rather than the 'pragmatic necessity' that it was.²⁹

1.2. LAW AND HISTORY

Although the subject matter is clearly historical, historians have been slow to pick up on the debate. Beyond case studies, research on transitional justice has largely been the domain of lawyers, political scientists, and international relations scholars, while little conceptual input has come from the ranks of historiography. The recent surge in history-and-memory studies instigated by Pierre Nora's *lieux de mémoire* is the notorious exception to the rule, and despite these forays theoretical contributions remain few and far between.³⁰ This is somewhat surprising, since in the past the law-and-history nexus occupied the minds of the likes of Marc Bloch, Reinhart Koselleck, Carlo Ginzburg, and Paul Ricoeur. Their reflections all recognize significant analogies in categories such as fact-finding, proof, and veracity, in the hermeneutic process of interpretation, and in the rhetorical devices required in making a plausible case.³¹ Yet they do not overlook fundamental differences: the interpretative framework of judges is confined by statutory law, precedent, and the obligation to arrive at a judgement,³² and the immediacy felt by those in court is quite different from that of the protagonists in books. Not least of all, the judicial doctrine of *ne bis in idem*, that no one shall be tried twice for the same offence, sets juridical

²⁸ Shklar, *Legalism*, 168.

²⁹ Ibid., 128–30; Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), 3–5, 101–10, at 388. Cf. Mark Mazower, *Governing the World. The History of an Idea* (London: Allen Lane, 2012), 200f., 215.

³⁰ Pierre Nora, *Realms of Memory. The Construction of the French Past*, vol. 1 (New York: Columbia University Press, 1996), xv–xxiv. See also Charles Maier, 'Doing History, Doing Justice. The Narrative of the Historians and of the Truth Commissions', in Robert I. Rotberg and Dennis Thompson (eds.), *Truth v. Justice. The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000), 261–78; Berber Bevernage, *History, Memory, and State-Sponsored Violence. Time and Justice* (New York: Routledge, 2012).

³¹ Bruno Latour, *La fabrique du droit. Une ethnographie du Conseil d'État* (Paris: La Découverte, 2004), 236.

³² Carlo Ginzburg, 'Just One Witness', in Saul Friedlander (ed.), *Probing the Limits of Representation* (Cambridge, Mass.: Harvard University Press, 1992), 82–96, also contends that historians, in contrast to lawyers, may rely on the testimony of sole witnesses. While this is formally true, many historians tend to be wary of lending too much weight to sources not cross-verified by other evidence. Vice versa, international criminal law has discounted the *testis unus, testis nullus* principle.

analysis apart from historiographical discourse which may continue ad infinitum and result in findings more akin to a palimpsest, a serial novel, or indeed both, than to a verdict, however ambiguously phrased.³³

In one of his last major works, Ricœur has drawn attention to how historiographical accounts may be amenable only to some courtroom protagonists, as the analysis of structural forces favoured by a post-historicist discipline is more likely to appeal to a defence cause bent on exculpating the person in the dock than to a prosecution obliged to prove individual guilt. And Berber Bevernage argues that the concepts of time entertained respectively by jurisdiction and historiography differ profoundly. While retributive law assumes that the crime is not altogether past and can thus be 'reversed, annulled, or compensated by the correct sentence and punishment',³⁴ historical analysis holds that such a process is impossible; hence the frequent disappointment of historians with the apparently inadequate results of judicial reckoning. Yet, historians' insistence on the past-ness of the past, Bevernage adds, is itself deficient from the victims' perspective whose suffering defies chronological time whereas it appeals to perpetrators wishing to leave the past behind.³⁵

Meanwhile, social history's identification of judicial inquiry with the discredited *histoire événementielle* of great men has hardly helped to spark historiographical interest in jurisdiction and jurisprudence,³⁶ a differentiation that is frequently lost on historians. This lack of attention adds to law's seclusion as a discipline which writes its own history rather than outsourcing it to historians. And its apparently hermetic logic and language has kept historians from penetrating the disciplinary boundaries and from trespassing into a field where the law and its practitioners are sovereign. In effect, many historians prefer to treat legal matters exclusively on their own terms and tend to think of and about law in ways that have long gone out of fashion or which have been challenged by various turns, some of them mirroring those undertaken by historiography (e.g. the 'performative turn'), others peculiar to legal studies (e.g. the 'law and economics' school). In short, lawyers' legal history and historians' legal history coexist peacefully, but in a state of mutual ignorance.³⁷

³³ Reinhart Koselleck, 'Geschichte, Recht und Gerechtigkeit', in Dieter Simon (ed.), *Akten des 26. Deutschen Rechtshistorikertages* (Frankfurt: Campus, 1987), 129–49; Marc Bloch, *The Historian's Craft* (Manchester: Manchester University Press, 1992), 114–19, 160; Carlo Ginzburg, *The Judge and the Historian. Marginal Notes and a Late-twentieth-century Miscarriage of Justice* (London: Verso, 1999), 16–18, 35f., 117–19; Paul Ricœur, *Memory, History, Forgetting* (Chicago: University of Chicago Press, 2006), 314–33; Michael Stolleis, 'Der Historiker als Richter—der Richter als Historiker', in Norbert Frei, Dirk van Laak, and Michael Stolleis (eds.), *Geschichte vor Gericht. Historiker, Richter und die Suche nach Gerechtigkeit* (Munich: Beck, 2000), 173–82.

³⁴ Ricœur, *Memory*, 324–6; Bevernage, *History*, 2.

³⁵ Berber Bevernage, 'Writing the Past Out of the Present. History and the Politics of Time in Transitional Justice', *History Workshop Journal*, 69 (2010), 111–31, 116, 125f.; Ricœur, *Memory*, 166.

³⁶ Cf. Ginzburg, *Judge*, 14f.; Michael Wildt, 'Differierende Wahrheiten. Historiker und Staatsanwälte als Ermittler von NS-Verbrechen', in Frei, et al., *Geschichte*, 46–59, 57.

³⁷ Laura Kalman, 'Border Patrol. Reflections on the Turn to History in Legal Scholarship', *Fordham Law Review*, 66 (1997), 87–124, 89; Benjamin Carter Hett, *Death in the Tiergarten. Murder and Criminal Justice in the Kaiser's Berlin* (Cambridge, Mass.: Harvard University Press, 2004), 7, 243.

In contrast, sociologists and anthropologists have dealt extensively with the law over the past decades, developing a broad range of approaches that run the whole gamut from systems theory to anthropological observations and ethnographic studies.³⁸ It is via this detour that historical interest in the law seems to have been rekindled recently, with a particular interest in criminal trials generally and political trials in particular. Such approaches do not privilege the judgement over the proceedings nor the judges over the trials' other protagonists, the prosecution staff, defendants and their counsel, the audience, and the media, thereby allowing for an interpretation of the trial as performance.³⁹

One of the major jurisprudential developments of the past decades, the law-and-literature movement, has meanwhile gone largely unnoticed among historians. This is all the more surprising as it shares its roots in the linguistic turn with the historiographical debate following Hayden White's *Metahistory*. What the latter is to historians, James Boyd White's 1973 analysis of *The Legal Imagination* is among jurists, introducing the methodology of literary criticism to the study of law and igniting the law-and-literature debate. If, in Ricœur's quip, 'structuralism had given historiography a perfidious kiss of death', Clio seems to have shared it with Justitia.⁴⁰ Despite the convenient label of law-and-literature, however, there is no unified movement to speak of. Instead the field is divided into two large groups, one concerned with law *in* literature, the other with law *as* literature. And as Jane Baron has wryly observed, the 'two strands of law-and-literature are neither reading the same works nor asking the same questions'.⁴¹ Her own classification is more succinct, dividing the heterogeneous field into three sub-currents: a humanist approach which conceives of literature as a method of humanizing the law and its agents; a hermeneutic strand which focuses on the textuality of law and draws on literary theory to interpret legal writings; and 'narrative law-and-lits'—an offshoot of the hermeneutics approach 'without the interdisciplinary middleman of literary theory'⁴²—which focuses on storytelling in law as a means of persuasion, on the evidentiary use of stories, and on the epistemological consequences arising from the simultaneity of multiple claims to truth.⁴³

³⁸ Luhmann, *Recht*; Latour, *Fabrique*; Clifford Geertz, *Local Knowledge. Further Essays in Interpretive Anthropology*, 3rd ed. (New York: Basic Books, 2000), 167–232.

³⁹ See Grunwald, *Courtroom*, and Hett, *Death*; cf. the contributions to Georg Wamhof (ed.), *Das Gericht als Tribunal, oder: Wie der NS-Vergangenheit der Prozess gemacht wurde* (Göttingen: Wallstein, 2009).

⁴⁰ James Boyd White, *The Legal Imagination. Studies in the Nature of Legal Thought and Expression* (New York: Little, Brown, 1973). Quote from Ricœur, *Memory*, 140.

⁴¹ Jane B. Baron, 'Law, Literature, and the Problem of Interdisciplinarity', *Yale Law Journal*, 108 (1999), 1059–85, 1065; Gyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton: Princeton University Press, 2000), 20. Much of the debate about if and how law and literature relate to each other is an exercise in failed communication, see the exchange between Boyd White and Posner: Richard A. Posner, *Law and Literature* (Cambridge, Mass.: Harvard University Press, 2009); James Boyd White, 'Law and Literature. No Manifesto', in White, *Expectation*, 52–72; James Boyd White, 'What Can a Lawyer Learn from Literature?', *HLR*, 102 (1988–9), 2014–47; Richard A. Posner, 'Against Ethical Criticism', *Philosophy and Literature*, 21 (1997), 1–27.

⁴² Binder and Weisberg, *Literary Criticisms*, 207.

⁴³ Baron, 'Law', 1064–6, at 1066. Cf. Paul Gewirtz, 'Narrative and Rhetoric in the Law', in Peter Brooks and Paul Gewirtz (eds.), *Law's Stories. Narrative and Rhetoric in the Law* (New Haven: Yale

Only the latter category, narratology, is of interest for the purposes of this study as it is particularly apposite in analysing criminal trials. As Robert Burns has shown in his *Theory of the Trial* (which is a dissection of criminal proceedings rather than an actual theory), narratives help to organize vast, complex, and often contradictory information, and thus render the judicial case coherent and consistent. The trial unfolds as a dialectical sequence of narrative construction and deconstruction with prosecution and defence taking turns before the judgement concludes the dispute.⁴⁴ This can be done by adopting one of the presented stories either entirely or in parts, or by filtering the judge's own version of what has happened out of the parties' and witnesses' accounts, backed by an institutional authority over past and present that neither side can lay claim to. However, the judgement may remain interpretatively inconclusive, if dissenting opinions 'unsettle' the majority's reading of the case.⁴⁵ While Burns' observations are by and large limited to US law, his model is apt in the context of transitional trials and of the Nuremberg proceedings where the adversarial pattern of Anglo-Saxon law was adopted, though with some modifications.⁴⁶ In the absence of the investigative judge of continental European law, the tribunals relied mostly on the parties to provide the information required to settle their respective cases. Procedural devices such as trial briefs and rebuttals, direct, cross-, and re-examinations, and opening and closing statements, furnished the literary forms into which the competing narratives were moulded.⁴⁷ The tribunal's agonal *dispositif* became tangible in judicial procedure, and the courtroom itself turned into a 'discursive machine'.⁴⁸

Such readings of judicial trials have led Alan Dershowitz to remark caustically that 'life is not a dramatic narrative'. And indeed, his observation that the defence does not have to devise its own narrative because it is perfectly sufficient and possibly more efficient to disrupt the prosecution's, raises a salient issue in most criminal proceedings.⁴⁹ Yet in the framework of transitional trials this is a moot point.

University Press, 1996), 2–13, 8. Due to its links to rhetoric, the analysis of narrative structure is the only literary operation a vocal law-and-literature critic like Judge Posner deems sensible; cf. Posner, *Law and Literature*, 349f., 424–32.

⁴⁴ Robert P. Burns, 'The Distinctiveness of Trial Narrative', in Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros (eds.), *The Trial on Trial, Vol. 1. Truth and Due Process* (Oxford: Hart, 2004), 157–77, 158f., 176; Burns, *Theory*, 28, 92f.; Lisa Kern Griffin, 'Narrative, Truth, and Trial', *Georgetown Law Journal*, 101 (2013), 281–335, 293f.

⁴⁵ Robert A. Ferguson, 'The Judicial Opinion as a Literary Genre', *Yale Journal of Law & the Humanities*, 2 (1990), 201–19, 210. Cf. Simpson, *Law*, 79–104; Sanford Levinson, 'The Rhetoric of the Judicial Opinion', in Brooks and Gewirtz, *Law's Stories*, 187–205, 201; Posner, *Law and Literature*, 428–30; James Boyd White, 'What's an Opinion For', in Boyd White, *Expectation*, 35–42.

⁴⁶ Jerome Bruner, *Making Stories. Law, Literature, Life* (Cambridge, Mass.: Harvard University Press, 2003), 37–62, applies the means of narratology to all branches and varieties of law.

⁴⁷ Cf. Peter Brooks, 'The Law as Narrative and Rhetoric', in Brooks and Gewirtz, *Law's Stories*, 14–22, 19f.

⁴⁸ Stephan Braese, 'Juris-Diktionen. Eine Einführung', in Stephan Braese (ed.), *Rechenchaften. Juristischer und literarischer Diskurs in der Auseinandersetzung mit den NS-Massenverbrechen* (Göttingen: Wallstein, 2004), 7–24, 18. For the related identification of trials and theatre, courtroom and stage, see Vismann, *Medien*, 31–44. The present book does not escape this metaphor either when it speaks of trials which are staged, of protagonists acting their part, or of an audience bored by the lack of drama.

⁴⁹ Alan M. Dershowitz, 'Life is Not a Dramatic Narrative', in Brooks and Gewirtz, *Law's Stories*, 99–105, 99; cf. Robert Weisberg, 'Proclaiming Trials as Narratives', in *ibid.*, 61–83, 69.

While discrediting the prosecution's story may help to save the individual defendant from conviction, it threatens the larger cause if it does not blend into the general defence strategy. And although pursuing an opportunistic tactic in order to (quite literally) save one's neck may seem preferable to going down for the sake of a collective endeavour, this conflict is subdued in multiple-defendant prosecutions. Here, all accused stand to lose if they undermine each other's arguments and, in case of conviction, depend on support from their constituencies outside the courtroom. At Nuremberg, this realization led to remarkable discipline among the Nuernberg Military Tribunals (NMT) defendants, though not among those in the IMT's dock.

Conceptualizing the trial in narrative terms thus opens the door widely to historiographical analysis. Not only does the narrative structure of trials translate into historiographical language as emplotment, both judicial and historical narratives contribute to the production of the realities they purport to describe.⁵⁰ This is nowhere more tangible than in transitional trials which, as Ruti Teitel has elaborated, help 'to construct historical transition and to make it comprehensible to contemporary and retrospective observers. . . . Ultimately, it is in part through these legal phenomena that we grasp whether a transition has occurred.'⁵¹ Transitional proceedings are therefore both the subject and the site of production for contemporary history; their mode of negotiating the recent past is contemporary history in its rawest, most immediate, most painful, and thus most conflicted form. These trials provide an arena in which history is not written by victors alone but is the very subject of a contest over which version of events will be read into the judgement, with both sides hoping that the judicially prevailing view—in German law institutionalized in the discreet abbreviation *b.M.* for 'prevailing opinion'—will ultimately evolve into historiographical consensus.⁵²

It is this setting which makes the Nuremberg trials such an intriguing historical subject. The proceedings' design was a conscious effort on the part of the prosecution to correlate law, history, and international politics. The trial series was supposed to be a retributive act and a didactic exercise, a legal innovation and a contribution to the reconstruction of multilateralism. In this ambitious undertaking, history played a key role as an analytical and a moral resource, translating from academic investigation into courtroom narratives, though 'filtered' through legal and juridical categories which shaped its form and substance and determined its argumentative effectiveness.⁵³ History was expected to justify the Allies' trial programme by proving

⁵⁰ Ricœur, *Memory*, 238; Bevernage, 'Writing', 113; Georg Wamhof, 'Gerichtskultur und NS-Vergangenheit. Performativität—Narrativität—Medialität', in Wamhof, *Gericht*, 9–37, 18.

⁵¹ Ruti Teitel, 'Transitional Jurisprudence. The Role of Law in Political Transformation', *Yale Law Journal*, 106 (1997), 2009–80, 2078f.

⁵² Dietrich Busse, 'Verstehen und Auslegung von Rechtstexten—institutionelle Bedingungen', in Kent D. Lerch (ed.), *Die Sprache des Rechts, Bd. 1: Recht verstehen. Verständlichkeit, Missverständlichkeit und Unverständlichkeit von Recht* (Berlin: De Gruyter, 2004), 7–20.

⁵³ Lawrence Douglas, 'The Didactic Trial. Filtering History and Memory in the Courtroom', in David Bankier and Dan Michman (eds.), *Holocaust and Justice. Representation and Historiography of the Holocaust in Post-war Trials* (New York: Berghahn, 2010), 11–22, 14. Inversely, Inga Markovits, 'Selective Memory. How the Law Affects What We Remember and Forget about the Past. The Case of

Nazi criminality beyond doubt and to showcase the rule of law which a future German democracy should aspire to. In effect, it would substantiate the claim to superiority underlying both tenets. The language in which this claim was formulated was that of the West. Terminology, though, was inconsistent and speakers would often invoke ‘civilization’, ‘humanity’, ‘Christianity’, or, of more recent vintage, ‘the United Nations’. Yet few Allied prosecutors or observers would have argued that Germans were no Christians or that they were uncivilized in the sense that colonial subjects were held to be. Rather, they had not behaved as true Christians and they had violated the rules of civilization, a reproach which made sense only if these designations and rules had applied in the first place.⁵⁴ In contrast, the West served both as the marker to separate what was good and decent from what was errant and depraved and as a tool to frame modern German history in terms of a deviation from the right way. These categories were deeply steeped in nineteenth-century legal thinking of otherness⁵⁵ but also drew on concepts borrowed from interwar academic discourses, notably from historiography, sociology, economics, and jurisprudence, which were migrating between Europe and North America. Accordingly, this book—standing at the crossroads of legal history and intellectual history—also contributes to recent research on intellectual emigration, showing how ideas literally travel and translate into action.⁵⁶

If Nuremberg was a contest of ideas moulded in the idiom of law (and a case of applied humanities if ever there was one), the present book is its chronicle, written in the vernacular of the historian. While its focus is on the actual trials and thus on the latter half of the 1940s, it must look back at whence the arguments advanced in the courtroom came and where they went once the tribunals were dissolved. The Nuremberg debate neither stopped when the last sentences were handed out in

East Germany’, *Law & Society Review*, 35 (2001), 513–63, argues that law diffuses historical information from the courtroom into public memory.

⁵⁴ Cf. Liliana Obregón, ‘The Civilized and the Uncivilized’, in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of The History of International Law* (Oxford: Oxford University Press, 2012), 917–39, at 918. On the nexus between colonialism and international law see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

⁵⁵ For the persistence of such dichotomies see the contributions to Anne Orford (ed.), *International Law and Its Others* (Cambridge: Cambridge University Press, 2006).

⁵⁶ For the migration of ideas see, e.g., Daniel T. Rodgers, *Atlantic Crossings. Social Politics in a Progressive Age* (Cambridge, Mass.: Belknap Press, 1998); Richard Bodek and Simon Lewis (eds.), *The Fruits of Exile. Central European Intellectual Immigration to America in the Age of Fascism* (Columbia: University of South Carolina Press, 2010); Alfons Söllner, *Deutsche Politikwissenschaftler in der Emigration. Ihre Akkulturation und Wirkungsgeschichte* (Opladen: Westdeutscher Verlag, 1996). A caveat seems warranted: the present study highlights elite discourse rather than popular debates although both overlap because prosecutors are also people and, indeed, not invariably well educated. Still, the protagonists of this book were on average far more knowledgeable than their American, British, French, or German compatriots; they drew on academic research, and they conversed in professional, often overlapping networks. On British and American public opinion see Angela Schwarz, *Die Reise ins Dritte Reich. Britische Augenzeugen im nationalsozialistischen Deutschland (1933–39)* (Göttingen: Vandenhoeck, 1993); Astrid M. Eckert, *Feindbilder im Wandel. Ein Vergleich des Deutschland- und des Japanbildes in den USA 1945 und 1946* (Münster: Lit, 1999); Steven Casey, *Cautious Crusade. Franklin D. Roosevelt, American Public Opinion and the War against Nazi Germany* (Oxford: Oxford University Press, 2001); Michaela Hoenicke Moore, *Know Your Enemy. The American Debate on Nazism, 1933–1945* (Cambridge: Cambridge University Press, 2010).

1949 nor when the gates of Landsberg prison finally closed behind the last pardoned inmates nine years later. Instead, the historical narratives which had been introduced, developed, and popularized at Nuremberg were fused into the academic and public debates over National Socialism and Germany's place in the new world order in the following decades. Influential interpretations such as the German *Sonderweg*, totalitarianism, or 'the other Germany' proved to be long-lived and obstinate.⁵⁷ At the same time, the decision to reintegrate the Federal Republic into the transatlantic fold meant that the established stories required a new twist: the Westernization of Germans as a didactic play. Like the White Queen's memory in *Through the Looking Glass*, Nuremberg's narratives—few of which were actually invented for, but many of which were elaborated and catalysed by, the trials—worked in both directions. Still, narrative analyses of judicial trials and their echoes can only go so far. Their limitations are set by what is, for whatever reason, omitted and which cannot be constructed from other sources;⁵⁸ the things not said in courtrooms would fill whole libraries.

1.3. 'EVERYBODY WHO COMES BACK IS WRITING A BOOK'

The International Military Tribunal at Nuremberg has been called one of 'the best studied trials in history',⁵⁹ and there is indeed no dearth in books and articles on the Allied proceedings held at Nuremberg from 1945 to 1949. Lawyers, historians, and political scientists have all delved into the rich sources bequeathed by the tribunals, a significant part of them readily available in printed format. Journalists have produced eloquent accounts of the IMT, and several motion pictures have chosen Nuremberg as their scene and subject, including Stanley Kramer's Academy Award-winning *Judgment at Nuremberg* (1961) and Marcel Ophüls's documentary *The Memory of Justice* (1976).

While the subject clearly has not suffered from neglect, a closer look reveals a more ambiguous picture.⁶⁰ This is for two reasons: first, the massive number of publications authored by contemporaries of and participants in the trials.⁶¹ Indeed, rarely has a historical subject been so often and so extensively studied by its own

⁵⁷ Dated and dusty as they appear to us, *Sonderweg* interpretations were cutting-edge in the 1940s and still enjoy some popularity: Heinrich August Winkler, *Der lange Weg nach Westen*, 2 vols., 7th ed. (Munich: Beck, 2010).

⁵⁸ Two different dimensions of this are sketched by Robert Ferguson, 'Untold Stories in the Law', in Brooks and Gewirtz, *Law's Stories*, 84–98, and Marie-Bénédicte Dembour and Emily Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', *European Journal of International Law*, 15 (2004), 151–77.

⁵⁹ Devin Pendas, 'Seeking Justice, Finding Law. Nazi Trials in the Postwar Era, 1945–1989', *Journal of Modern History*, 81 (2009), 347–68, 359.

⁶⁰ For bibliographic essays readers may consult Pendas, 'Seeking Justice', and Kim Christian Priemel, 'Consigning Justice to History. Transitional Trials after the Second World War', *Historical Journal*, 56 (2013), 553–81.

⁶¹ Cf. the section's title which comes from Rosenbaum to Biddle, 8 March 1946, GUL, SCRC, Biddle Papers, Box 5, F.1.

protagonists. Not only have the major editions of the trial proceedings, evidence, and accompanying materials been compiled by members of the prosecution (with some assistance from the defence counsel and the tribunals' adjunct staff), there has also been a veritable deluge of diaries, memoirs, articles, and book-length studies penned by judges and defendants, prosecutors and defence attorneys, interpreters and prison personnel. Even a good portion of academic reviews has been supplied by the historical protagonists eager to comment on each other's reminiscences and reflections, both friend and foe.⁶² Unsurprisingly, these writings differ greatly in style, scope, ambition, and achievement. Their influence however is tangible, with some of them registering as secondary rather than primary sources (a shaky distinction in law journals anyway), e.g. Whitney Harris's *The Nuremberg Trial* and Telford Taylor's *Anatomy of the Nuremberg Trials*. While the fact that such works have their own agenda in whose light they need to be read is fairly obvious, the difficulty does not stop here. Taylor's monograph, for all its qualities as an admirable piece of writing and an astute analysis which is not uncritical of his and his fellow prosecutors' work at Nuremberg, is a case in question. Composed in the 1980s, Taylor made use not only of his own recollections and notes but also drew on diaries and memoirs from his former colleagues, undertook archival research, and digested a good deal of published material along the way. Sifting through the notes and manuscript pages which are kept at Columbia Law School's library the reader finds Taylor's drafts sprinkled with clippings from his sources and copies from history textbooks. What is memoir and what historiographical work becomes almost indistinguishable in the published tome.⁶³

This is not to say that works by journalists and historians are necessarily either better researched or more 'objective', quite the contrary. Popular accounts like the widely read books by R. W. Cooper, Robert Conot, or Ann and John Tusa offer insightful, vivid storytelling but fail to provide substantial context or analysis, besides having aged considerably over the past decades.⁶⁴ And Eugene Davidson's *Trial of the Germans*, the first comprehensive account of the IMT by a historian, besides consisting mostly of biographical sketches of the defendants rather than analysing the trial, is itself a contribution to the debate about the German national character. A product of the short-lived Foundation for Foreign Affairs (of which more in Chapter 9), the book argues for an explanation of National Socialism as the brief aberration from an otherwise Western tradition. As such it is an intriguing example of the post-Nuremberg swing in academic and public perception and turns out to be of greater interest as a document than as a historiographical study.⁶⁵

⁶² For a systematic bibliography of these writings see Priemel and Stiller, NMT, 843–51.

⁶³ CLS, TTP 8-2-1, 8-2-2, 8-2-3, 8-2-4, 20-1-1, 20-1-2, 20-1-3.

⁶⁴ Robert W. Cooper, *The Nuremberg Trial* (Harmondsworth: Penguin, 1947); Joe Heydecker and Johannes Leeb, *Der Nürnberger Prozess. Bilanz der tausend Jahre* (Cologne: Kiepenheuer & Witsch, 1958); Robert Conot, *Justice at Nuremberg* (New York: Basic Books, 1983); Ann Tusa and John Tusa, *The Nuremberg Trial* (London: Atheneum, 1983); Joseph Persico, *Nuremberg. Infamy on Trial* (New York: Penguin, 1994).

⁶⁵ Eugene Davidson, *The Trial of the Germans. An Account of the Twenty-two Defendants before the International Military Tribunals at Nuremberg* (New York: Macmillan, 1966).

Thus, Bradley Smith's pioneering works on the preparatory steps of the Nuremberg trials and about the deliberations of the IMT judges remain essential reading to the present day. Smith's painstaking reconstruction of the American–British debate up to the London Conference in the summer of 1945 not only placed the war crimes complex firmly into the larger debate on post-war occupation. It also introduced the unassuming figure of Colonel Murray C. Bernays as a key figure in conceptualizing a triangular trial design which correlated the charges of conspiracy to launch aggressive war and to commit war crimes and crimes against humanity with their actually being committed and with organizational criminality.⁶⁶ Smith's ignorance of significant protagonists, notably the other Allies and the multinational United Nations War Crimes Commission (UNWCC), has recently been remedied by Francine Hirsch, Arieh Kochavi, Richard Overly, Irina Schulmeister-André, Kirsten Sellars, and Antonin Tisseron.⁶⁷ Meanwhile, several studies have pointed to the intellectual input of émigré, often left-wing scholars to the Nuremberg project via the relay station of the Office of Strategic Services.⁶⁸

But it was only in the early 2000s that the problems arising from the familiar, yet different legal and historical epistemologies—which had occupied Nuremberg's contemporaries as well as observers of the Eichmann trial in 1961⁶⁹—resurfaced thanks to two path-breaking publications by Lawrence Douglas and Donald Bloxham. The latter's *Genocide on Trial* blames Bernays' trial concept for leading to an utter misrepresentation of Nazi criminality. Prioritizing aggressive war and conspiracy, Bloxham argues, not only marginalized war crimes and crimes against humanity but portrayed German extermination policies as ancillary to Nazi ideology rather than an end in itself. In this perspective, the US prosecution's decision to run a 'trial by document'⁷⁰ made things worse by failing to give the survivors a

⁶⁶ Bradley F. Smith, *Reaching Judgment at Nuremberg* (London: Andre Deutsch, 1977); Bradley Smith, *The Road to Nuremberg* (New York: Basic Books, 1981); Bradley Smith (ed.), *The American Road to Nuremberg. The Documentary Record, 1944–1945* (Stanford: Stanford University Press, 1982).

⁶⁷ Richard Overly, *Interrogations. Inside the Minds of the Nazi Elite* (London: Penguin, 2002), 6–55; Kirsten Sellars, *'Crimes against Peace' and International Law* (Cambridge: Cambridge University Press, 2013), 48–67; Arieh J. Kochavi, *Prelude to Nuremberg. Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 1998); Francine Hirsch, 'The Soviets at Nuremberg. International Law, Propaganda, and the Making of the Postwar Order', *AHR* 113 (2008), 701–30; Irina Schulmeister-André, *Internationale Strafgerichtsbarkeit unter sowjetischem Einfluss. Der Beitrag der UdSSR zum Nürnberger Hauptkriegsverbrecherprozess* (Berlin: Duncker & Humblot, 2016). See also George Ginsburgs, *Moscow's Road to Nuremberg. The Soviet Background to the Trial* (The Hague: Nijhoff, 1996), and the documentary tome by Natalia S. Lebedeva (ed.), *СССР и Нюрнбергский процесс. Неизвестные и малоизвестные страницы истории* (Moscow: Meždunarodnyj Fond Demokratija, 2009). Antonin Tisseron's pioneering *La France et le procès de Nuremberg. Inventer le droit international* (Paris: Les Prairies Ordinaires, 2014), was published while the present study was in its final stages but I have incorporated his findings where they supplement or correct my own.

⁶⁸ Barry M. Kätz, *Foreign Intelligence, Research and Analysis in the Office of Strategic Services 1942–1945* (Cambridge, Mass.: Harvard University Press, 1989); Petra Marquardt-Bigman, *Amerikanische Geheimdienstanalysen über Deutschland 1942–1949* (Munich: Oldenbourg, 1995); Michael Salter, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg. Controversies Regarding the Role of the Office of Strategic Services* (Abingdon: Routledge-Cavendish, 2007).

⁶⁹ Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (London: Penguin, 2006); Harry Mulisch, *Criminal Case 40/61, the Trial of Adolf Eichmann. An Eyewitness Account* (Philadelphia: University of Pennsylvania Press, 2005).

⁷⁰ John Mendelsohn, *Trial by Document. The Use of Seized Records in the United States Proceedings at Nurnberg* (New York: Garland, 1988), 173.

prominent voice in the courtroom and phrasing crimes primarily in the idiom of the murderers. And this understanding of the Holocaust, which privileged the perpetrators' perspective over the victims', also fuelled both intentionalist and structuralist interpretations of Nazi rule and genocide which would dominate historiography for decades.⁷¹

Although Bloxham's forceful argument has met with much approval,⁷² some points are worth reconsidering. While it is correct that little room was given to survivor testimony, this does not engage the question what would have been sayable or, rather, comprehensible in the first place, at least if one believes that '[t]o be received, a testimony must be... divested as much as possible of the absolute foreignness that horror engages'.⁷³ And Bloxham's critique is not without contradictions when he notes that law operates according to its own epistemological rules ('the legal prism') but censures the way this prism fractures Holocaust memory.⁷⁴ Moreover, Douglas, although concurring in that there were 'serious shortcomings in the historical understanding of the Holocaust that emerged from Nuremberg', argues that the Shoah was not glossed over in the courtroom but repeatedly evoked, adding up to a notable narrative and moral presence. More importantly, perhaps, Douglas's reference to the didactic character of all criminal proceedings effectively rebuts Hannah Arendt's jarring criticism of trials which try to educate rather than minding 'law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment'.⁷⁵

The influence of Bloxham's and Douglas's readings is discernible in a number of studies of the NMT and the Frankfurt Auschwitz trial of 1963–5 when it comes to evaluating law's performance in dealing with Nazi criminality. Here, the US proceedings at Nuremberg fare much better than their German proxies, vindicating Cornelia Vismann's distinction between tribunal and court. While the NMT proceedings against the German physicians, the SS Einsatzgruppen officers, and the German High Command are credited with general fairness, notable factual accuracy, and conscientious sentencing,⁷⁶ recent studies of the Auschwitz trial find fault with German law itself, thinking it to too formalistic and inflexible to account for the complexities of state criminality in general and genocide in

⁷¹ Donald Bloxham, *Genocide on Trial. War Criminals and the Formation of Holocaust, History and Memory* (Oxford: Oxford University Press, 2001).

⁷² But see, in contrast, Michael R. Marrus, *The Holocaust in History* (Toronto: Key Porter, 2000), 36.

⁷³ Ricœur, *Memory*, 176.

⁷⁴ This is astutely observed in Wamhof, *Gericht*, 17.

⁷⁵ Douglas, *Memory*, 2–6, 257. Quote: Arendt, *Eichmann*, 253.

⁷⁶ Ulf Schmidt, *Justice at Nuremberg. Leo Alexander and the Nazi Doctors' Trial* (Basingstoke: Palgrave Macmillan, 2004); Paul Weindling, *Medicine and the Nuremberg Trials. From Medical War Crimes to Informed Consent* (Basingstoke: Palgrave Macmillan, 2004); Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945–1958. Atrocity, Law, and History* (Cambridge: Cambridge University Press, 2009); Valerie G. Hébert, *Hitler's Generals on Trial. The Last War Crimes Tribunal at Nuremberg* (Lawrence: University of Kansas Press, 2010). See also Horst H. Freyhofer, *The Nuremberg Medical Trial. The Holocaust and the Origin of the Nuremberg Medical Code* (New York: Peter Lang, 2004). In contrast, Annette Weinke's assessment of the Ministries trial is much soberer and stresses the prosecution's failure: Eckart Conze, Nobert Frei, Peter Hayes, and Moshe Zimmermann, in collaboration with Annette Weinke and Andrea Wiegeshoff, *Das Amt und die Vergangenheit. Deutsche Diplomaten im Dritten Reich und in der Bundesrepublik* (Munich: Blessing, 2010), 400f.

particular.⁷⁷ Devin Pendas' conclusions, however, suggest that most judicial systems might fail the test, as the judicial rendering of extrajudicial reality can only come at the cost of reduced complexity—and the more extraordinary the crime, the greater the losses.⁷⁸

Two recent collections on the NMT proceedings vindicate both perspectives by pointing to the lasting impact the courtroom narratives had on generations of historians, while praising the trials' overall accomplishment in terms of analytical depth on the other hand.⁷⁹ The tone of disappointment frequently lingering in historiographical works on post-World War II trials has little room here,⁸⁰ nor, for that matter, in Kevin Jon Heller's new legal history of the NMT cases. The present study has benefitted immensely from Heller's work, as his broad, comprehensive study brings the jurisprudential debate about Nuremberg and the many contested issues up to date: on which legal grounds the Allies could base their jurisdiction (partly on universal jurisdiction, partly on *debellatio*, i.e. German sovereignty had passed to the Allies following total defeat); what the character of the NMT was (inter-allied due to Control Council Law No. 10, in contrast to the IMT's truly international Charter); whether or not the Kellogg–Briand Pact of 1928 provided a valid legal basis on which to charge aggressive warfare (hardly so); if crimes against humanity was a retroactive offence (it was insofar as the acts in question did not overlap with war crimes); if individuals were subjects of international law (they were); if the act of state and superior orders doctrines were legally relevant pleas in any way (they were not although the British and US military guidelines had abandoned superior orders only late in the war—ironically much later than in Germany); and that the trials, despite undeniable deficits, were 'impressively fair' in procedural terms.⁸¹ These issues, many of them tangled and not all of them resolved seventy years later, will mostly be bypassed or approached from a more narrowly historiographical perspective in this book, as in the case of *tu quoque*.

1.4. A NOTE ON SOURCES

In a mock-lament, Paul Ricœur once noted that '[i]n a period now taken to be outdated in historical research, work in the archives had the reputation of assuring

⁷⁷ Rebecca Wittmann, *Beyond Justice. The Auschwitz Trial* (Cambridge, Mass.: Harvard University Press, 2005); Devin Pendas, *The Frankfurt Auschwitz Trial, 1963–1965. Genocide, History, and the Limits of the Law* (Cambridge: Cambridge University Press, 2006).

⁷⁸ In this respect, Pendas' analysis illustrates Luhmann's general point; Luhmann, *Recht*, 43, 76f., 225f.

⁷⁹ Kim Christian Priemel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals. Transitional Justice, Trial Narratives, and Historiography* (New York: Berghahn, 2012); Kim Christian Priemel and Alexa Stiller (eds.), *NMT. Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtschöpfung* (Hamburg: Hamburger Edition, 2013).

⁸⁰ A peculiar case is Frank Gausmann, *Deutsche Großunternehmen vor Gericht. Vorgeschichte, Verlauf und Folgen der Nürnberger Industriellenprozesse 1945–1948/51* (Hamburg: Kovač, 2011). Although well-researched, Gausmann's analysis of the trials' planning phase suffers from his ill-concealed bias against the prosecutors' alleged leftist outlook; the actual proceedings figure but marginally.

⁸¹ Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011), 11, 109–37, 159–78, 263–71, 295–8, at 178.

the objectivity of historical knowledge, protected thereby from the historian's subjectivity'.⁸² As there is no return to an epistemological state of grace, objectivity is not an option. However, access to archives still reaps considerable benefits beyond what can be gleaned from published research. This also holds for the subject of this book. Over the last three decades a great number of records have been made available, some of which had been literally forgotten in archival basements, many others which were only recently opened, the majority of them private papers. These include letters and files by David Maxwell-Fyfe and Charles Dubost, the de facto leaders of the British and French prosecution teams at the IMT respectively, the papers of NMT prosecutor Belle Mayer Zeck and Judge Charles Wennerstrum, and the correspondence of German defence attorneys Hellmut Becker and Otto Kranzbühler, to name but a few. The staff of the various proceedings have bequeathed not only a breathtaking number of publications elaborating, explaining, and justifying their respective cases, they also amassed heaps of papers which have come down to us over the years; yet, with very few participants still alive, this process is likely to come to a closure in the near future.

Massive though they are, these materials are unevenly spread, both with an eye to the individual trials and to their participants: some cases are well covered while sources on others are scarce (the same is true for the official records kept at the various national archives). And while a great number of British, French, and US prosecutors as well as German attorneys have left bulky collections of personal papers, neither the judges' nor the defendants' perspectives are easily reconstructed. Also, the available papers profess a notable bias in favour of those who had already been prominent at the time of the trials or who rose to fame in their aftermath. Many of the rank-and-file prosecutors and the vast majority of researchers, interpreters, et al., have left little archival trace so that the composition of source material mirrors differences in status and fortune. By the same token verbosity is easily mistaken for relevance; yet the fact that someone was particularly prolific in drafting memoranda and sought to memorialize his exploits at Nuremberg by donating his private papers to his former college does not necessarily make him a towering figure; prosecutor Paul Gantt or judge Michael Musmanno here come to mind. Cross-referencing with other collections and in particular with the courtroom proceedings is crucial in sifting through the heaps of sources.⁸³

The most important sources therefore remain the verbatim transcripts of the actual proceedings. While in the case of the IMT these have been published in all four official languages of the tribunal (the famous Blue Series because of the cloth they were bound in), amounting to an impressive twenty-two volumes with another twenty volumes collecting the evidence presented in court,⁸⁴ the NMT

⁸² Ricœur, *Memory*, 169.

⁸³ For the methodological challenges in working with court-generated materials see Jürgen Finger, Sven Keller, and Andreas Wirsching (eds.), *Vom Recht zur Geschichte. Akten aus NS-Prozessen als Quellen der Zeitgeschichte* (Göttingen: Vandenhoeck & Ruprecht, 2009).

⁸⁴ *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 Nov. 1945–1. Oct. 1946*, 42 vols. (Nuremberg: no publ., 1947–9) [henceforth: *IMT*]; see also *Nazi Conspiracy and Aggression*, ed. Office of United States chief of counsel for Prosecution of Axis Criminality, 8 vols. and 2 suppl. (Washington: USGPO, 1946–8) [henceforth: *NCA*], and the London conference

proceedings have never been published in full. The so-called Green Series is but a digest of the original 135,000 pages of transcript, not counting the myriad legal briefs and more than 185,000 pages of trial evidence.⁸⁵ There is probably no single person who has ever read all of these, and the present author, despite having seen a fair amount, lays claim to exhaustion but not to completeness. While researching for this book in some forty archives and libraries across five countries, representativeness seemed slightly more feasible, though still a tall order.⁸⁶

The theoretical baggage outlined above lightened the load and accounts for the book's methodology. Special attention has been paid to preparative memoranda, opening and closing statements, trial briefs, and rebuttals, as these condense what Burns calls the trial's 'theory', i.e. the interpretative pattern and the narrative backbone of the prosecution and the defence arguments.⁸⁷ Likewise, judgements go beyond mere recapitulation and present the audience's response to the story it has been told; not the only audience, of course, as there were other spectators, including the tribunal's advisory staff, the interpreters and technical personnel, the journalists and other observers, the public inside and outside the courtroom, and, ultimately, the retrospective audience of historians. To get an impression of the trials' atmosphere, delving into the transcripts is therefore imperative, the losses incurred in the process of translation and transcription notwithstanding.⁸⁸ Again, the IMT makes for easier research as, in addition to the printed text, filmed recordings are available.⁸⁹ For the other trials in Nuremberg, Rastatt and Hamburg, there are but short sequences, usually from the arraignment and the judgement. Here, the silences of the courtroom cannot be overheard but only be imagined.

proceedings in Robert H. Jackson (ed.), *Report of Robert H. Jackson, United States Representative, to the International Conference on Military Trials, London, 1946* (Washington: USGPO, 1949) [henceforth: *London Report*].

⁸⁵ Brief Survey concerning the records of the War Crimes Trials held in Nurnberg, Germany, 3 January 1949, NARA, RG 238, Entry 165, Box 7, F.6.

⁸⁶ Conspicuously absent in the present study are Soviet sources, reflecting the author's limited grasp of Russian rather than an oversight. Partly, this gap is filled by drawing on Francine Hirsch's and Irina Schulmeister-André's work, but a gap it remains.

⁸⁷ Burns, *Theory*, 50f., 67f.; Bruner, *Making Stories*, 41.

⁸⁸ See Cornelia Vismann, 'Action Writing', in Vismann, *Das Recht und seine Mittel. Ausgewählte Schriften* (Frankfurt: Fischer, 2012), 394–416, and Guido Acquaviva, 'At the Origins of Crimes Against Humanity. Clues to a Proper Understanding of the Nullum Crimen Principle in the Nuremberg Judgment', *Journal of International Criminal Justice*, 9 (2011), 881–903. While I have relied mostly on the transcripts' English version, I have tried to check the French and German protocols whenever stumbling over odd expressions, especially since the language most frequently used in court was German. A systematic cross-referencing, however, was beyond my capacity. All translations, both from archival and printed sources, are my own unless indicated otherwise.

⁸⁹ Selections are available from the Steven Spielberg Film and Video Archive, <<http://www.ushmm.org/online/film/search/simple.php>>.

2

Mapping the West Nuremberg's Sources

The year 1789 is hereby eradicated.

Joseph Goebbels

The fact is that the French and the English are part of Western civilisation; it is questionable whether the Germans are.

A. L. Rowse

But how are we to talk to people who use familiar words but mean something else?

Hamilton Fish Armstrong¹

2.1. THE ORIGIN OF SPECIES

The poem which W. H. Auden published in the *New Republic's* issue of 18 October 1939 was topical. Plainly titled 'September 1, 1939', the nine stanzas were reminiscent of Yeats' famous 'The Second Coming', equally elegiac in tone, minus the eschatological imagery.² Whereas Yeats had looked on World War I's ruins in retrospect, Auden foresaw the second war's catastrophes, the 'unmentionable odour of death'. But the poet endeavoured to do more than merely issue a dire warning; he also set out to explain how the latest disaster had come about. Auden criticized international apathy in the face of fascist aggression during the past 'low dishonest decade'; he attacked the Versailles Treaty and American neutrality; and he articulated forebodings of a technocratic age dominated by 'blind skyscrapers' worshipping 'the strength of Collective Man'. Even less poetically encrypted was his portrayal of the nation chiefly responsible for bringing about war, Nazi Germany. Alluding to contemporary academic analyses of the Third Reich, Auden observed how 'Accurate scholarship can | Unearth the whole offence | From Luther until now | That has

¹ A. L. Rowse, 'What Is Wrong with the Germans', *Political Quarterly*, 11 (1940), 16–29, 17; Hamilton Fish Armstrong, 'We or They', *Two Worlds in Conflict* (New York: Macmillan, 1936), 6, Goebbels' quote from Jan-Werner Müller, *Contesting Democracy. Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press, 2011), 93.

² *The New Republic*, 100, 18 October 1939, 297. Auden also invoked *Easter, 1916*, another Yeats poem. My reading of Auden's lines is indebted to Nicholas Jenkins, 'Auden in America', in Stan Smith (ed.), *The Cambridge Companion to W. H. Auden* (Cambridge: Cambridge University Press, 2004), 39–54, at 43–6.

driven a culture mad.’ In a mere four lines the poem referenced a complex interpretation which looked for the clues to the rise of National Socialism in German history or, more precisely, in a historical trajectory which had driven Germany away from the virtues and values of the Enlightenment.³

Auden’s nod to academia was not gratuitous, and even if the degree of accuracy of the genre he had in mind was contentious, its magnitude was remarkable. Since 1933 a flood of newspaper and journal articles, of book chapters and monographs, had poured on to a literary market whose readers seemed ravenous to receive more insights into the Third Reich and an answer to the one basic question, bluntly formulated by British historian A. L. Rowse: What was wrong with the Germans? New publications would be added to this heap of writings until the end of hostilities and indeed well into the post-war period. Understanding Germany was a massive job-creation scheme for journalists of all media, academics of various disciplines, politicians of differing creeds, and whoever else qualified as an expert on European affairs.

While the numbers of publications and sales were novel, the genre was not. Reflections on Germany and its people, their cultural peculiarities as well as their historical and future trajectory, went back all the way to Tacitus (who was duly invoked by many latter-day writers). Ironically, however, it was only in the waning days of the Holy Roman Empire, according to Nazi lore the first German Reich, that German Studies had become a distinct literary field. Madame de Staël’s *De l’Allemagne*, published in 1810, became the archetype of the now worn-out image of the land of poets and philosophers. Not unlike Montesquieu a century before (whose travelogue, however, had remained unpublished), de Staël’s portrait idolized Germans as quasi-constantly engaged in philosophic discourse and the arts, blessed by great regional diversity, and endowed with naïveté and gentle harmlessness. In short, the many German states—whose federalism Montesquieu had praised while presciently warning against Prussia’s impending ‘dreadful tyranny’⁴—were everything that Napoleon’s centralized and militarized France was not, and so the book was duly banned upon publication.⁵

Censorship only enhanced the tome’s attraction and de Staël’s characterization provided a model for many foreign depictions of the German states and their inhabitants. The influence of the English translation, timely published in 1813, was marked and with British animosity firmly fixed on France, German culture in general enjoyed a mostly sympathetic reputation in the Isles,⁶ even if Prussia in

³ Unhappy with its didacticism, Auden cut or wholly omitted the poem in subsequent collections of his work.

⁴ Baron de Montesquieu, *Voyages de Montesquieu*, vol. 2, ed. Albert de Montesquieu (Bordeaux: Gounouilhoul, 1896), 129–216, at 197.

⁵ Among the many excellent biographies see Angelica Goodden, *Madame de Staël. The Dangerous Exile* (Oxford: Oxford University Press, 2008), 125–51. Michel Winock, *Madame de Staël* (Paris: Fayard, 2010), 211–33, 369–92, defends his protagonist against charges of naïveté and points to her belief in Franco-German complementarity.

⁶ See Michael Pratt, ‘A Fallen Idol. The Impact of the Franco-Prussian War on the Perception of Germany by British Intellectuals’, *International History Review*, 7 (1985), 543–75, 543–5; Schwarz, *Reise*, 38f.

particular was looked upon less kindly. Lord Castlereagh for one did not hide his suspicion of what he regarded as an aggressive upstart in the European concert of powers and the 'martial spirit' which accounted for Prussia's rise to great-power status. Yet, in the British balance-of-powers strategy Prussia and the other German states were factored in as a counterforce against the major threat to continental stability, France, and thus figured on the right side. Meanwhile, the comprehensive reform programme in Prussian administration, education, and military organization was noticed with respect and some degree of admiration.⁷

The Franco-German war of 1870–1 and the consequent establishment of a Prussian-led empire marked a decisive turning-point in the British public perception of Germany. The failure of the liberal revolutions in 1848–9 had already raised doubts as to how close the oft-invoked kinship of Anglo-Saxons and Germans actually was. But sympathies in the early stages of the war lay firmly with the Germans, backed by vocal supporters such as Thomas Carlyle. Only the crushing defeat of the French Army at Sedan, the German troops' relentless advance, the Siege of Paris and the capital's shelling, and finally the harsh terms of the peace treaty imposed on the defeated Third Republic, caused a turnaround in the public debate. The influential *Fortnightly Review* not only highlighted instances of German cruelty but re-evaluated its general take on Germany: previously held to be the standard-bearers of civilization, the Prussians and their allies were now charged with having brought 'Eastern barbarism' into the heart of Western Europe. The establishment of a major new power on the continent, dominated by an authoritarian, aggressive, expansionist Prussia and legitimized by German historicism, menaced the balance of powers, as Lord Acton analysed. But rather than simply substituting the older image of German culture by Prussian authoritarianism, both views continued alongside each other in the dualistic concept of 'two Germanys'.⁸ By 1914, however, the imperialist competition between the Reich and the Empire, in conjunction with Anglo-French rapprochement, saw German culture recede into the background, overshadowed by the continuous, noisy threat it posed to peace and stability in Europe.⁹ Across the Atlantic, similar concerns regarding the 'aggressive military spirit characteristic of the German Empire' were voiced. Alfred Thayer Mahan, the leading US strategist of his time, reminded his readers in 1897

⁷ Brendan Simms, *Europe. The Struggle for Supremacy, 1453 to the Present* (London: Allen Lane, 2013), 178–80; Wolf D. Gruner, 'Vom Deutschen Bund zum Deutschen Reich. Aspekte eines britischen Deutschlandbildes vor der Reichsgründung', in Bernd Jürgen Wendt (ed.), *Das britische Deutschlandbild im Wandel des 19. und 20. Jahrhundert* (Bochum: Brockmeyer, 1984), 55–78, 61.

⁸ Pratt, 'Fallen Idol', 559–69, at 562; Schwarz, *Reise*, 41f.; Hugh Tulloch, 'Lord Acton and German Historiography', in Benedikt Stuchtey and Peter Wende (eds.), *British and German Historiography. Traditions, Perceptions, and Transfers* (Oxford: Oxford University Press, 2000), 159–72; Thomas Kleinknecht, 'Die Gründung des Deutschen Reiches 1870/71 aus der Sicht des britischen Gelehrtenliberalismus', in Wendt, *Deutschlandbild*, 81–102, at 94–7. Simms, *Europe*, 245, finds a lack of consensus on the new Germany in Britain.

⁹ Joachim Koropka, '"Militarismus" und das "Andere Deutschland". Zur Entstehung eines Musters britischer Deutschlandinterpretation', in Wendt, *Deutschlandbild*, 103–24, and Schwarz, *Reise*, 44–8.

that the Teuton might have been 'civilized, humanized' by Rome, but whether or not the process was complete was yet to be determined.¹⁰

Unsurprisingly the war of 1870–1 also fundamentally altered French perceptions of their eastern neighbour. Not so much defeat itself but the ease with which it had been accomplished, along with the humiliation at Versailles, led to a process of prolonged soul-searching in the French public. In search for answers to the question of how the new continental hegemon could be challenged or at least contained, Germany itself became a source of inspiration, if not a model, for reform, in particular in the institutions of higher learning. One result was a growing interest in *Völkerpsychologie*, the German science searching for national psychological patterns; another was the emergence of German Studies as a distinct academic discipline around the turn of the century. Under the tutelage of Charles Andler and Henri Lichtenberger, French *Études Germaniques* would start from the assumption that the key to understanding contemporary Germany lay in its historical and philosophical legacy.¹¹ In that, the scholars were in agreement with right-wing intellectuals who rallied in the *Action Française*. Here Léon Daudet, in equal measures anti-German and antisemitic, conceived of idealism in general and Kant in particular as a double threat: as the philosophy underlying the German claim to superiority which made Kant's ideas no less formidable a weapon than Krupp's canons; and as an insidious alien force which infiltrated French thinking. Consequently, notions of a 'dual Germany' were held to be misleading: 'There are no two Germanys, that of the philosophers, the learned, the men of letters, and the people, and that of the Kaiser, the pan-Germanists and the militarists, as is obstinately maintained by an obstinate French romanticism which is as backward as it is ignorant; in fact, we know of few historical examples of a whole nation so utterly permeated by a comparable collective aberration.'¹²

When war broke out in 1914, intellectual armament thus was not lagging far behind military preparations, and the acquired competences in German Studies were put to use over the next years. Andler would publish a history of pan-Germanism in 1915, soon to be translated into several European languages, in which he argued that the German expansionist spirit went back to the Teutonic Knights and had been rekindled in nineteenth-century Prussia. Andler also drew a dividing line between French civilization as steeped in the traditions of Greco-Roman antiquity on the one hand and a distinctly German culture on the other.¹³ Ironically, his interpretation found nowhere stronger support than among his German peers. In the notorious Manifesto of the Ninety-Three, issued in early October 1914,

¹⁰ Alfred Thayer Mahan, *The Interest of America in Sea Power. Present and Future* (Boston: Little, Brown, 1918 [1st ed. 1897]), 8, 266f.

¹¹ Katja Marmetschke, *Feindbeobachtung und Verständigung. Der Germanist Edmond Vermeil (1878–1964) in den deutsch-französischen Beziehungen* (Cologne: Böhlau, 2008), 84–8, 104–7; Egbert Klautke, *The Mind of the Nation. Völkerpsychologie in Germany, 1851–1955* (New York: Berghahn, 2013), 38–44.

¹² Léon Daudet, *Contre l'Esprit Allemand De Kant à Krupp* (Paris: Bloud et Gay, 1915), 64. Cf. Marmetschke, *Feindbeobachtung*, 119.

¹³ Charles Andler, *Le Pangermanisme. Ses plans d'expansion allemande dans le monde* (Paris: Colin, 1915). Cf. Marmetschke, *Feindbeobachtung*, 142–5.

prominent scholars and artists backed the German conduct of war and vehemently denied any war guilt. What followed was a 'battle of the manifestos', some of them mere skirmishes, others major crusades such as the even more radical declaration signed by a staggering 3,000 German academics a few weeks later.¹⁴ On the other side, Western European scholars and intellectuals were incensed by the devastation of the University of Louvain's ancient library; aerial bombardment by Zeppelins was castigated for its inhumanity; and abroad, the sinking of the *Lusitania* in 1915 helped in swinging public opinion from neutralism towards support of the Entente.¹⁵ After the US had finally entered the war, the eminent American historian Charles A. Beard solemnly declared that this was a 'war against the German menace to civilization'.¹⁶

Such verdicts did not altogether rule out dualistic notions of Germany, yet these were increasingly phrased as chronological narratives in which the noble world of arts and science had succumbed to the militaristic, authoritarian side. Proof was easily available when luminaries like Rudolf Eucken, Thomas Mann, or Werner Sombart defended the war and found German culture superior to both Anglo-Saxon liberalism and the old Roman Occident.¹⁷ Accordingly, British historian and international relations scholar Alfred Zimmern considered the Great War nothing less than 'a conflict between two different and irreconcilable conceptions of government, society, and progress'.¹⁸ Sure, there were other voices. In France, Henri Lichtenberger, more cautious than Andler, placed German policies in the wider context of economic imperialism and great-power rivalry, putting rather less emphasis on Prussian peculiarities.¹⁹ And in Britain a whole conference set out to prove the 'unity of Western civilization', embracing the Central Powers and the Entente. Yet the very fact that such an undertaking seemed necessary suggested that the idea of a communal identity was no longer self-evident in the face of

¹⁴ Peter Hoerres, *Der Krieg der Philosophen: Die deutsche und britische Philosophie im Ersten Weltkrieg* (Paderborn: Schöningh, 2004), 127–9, at 128; Harmut Pogge von Strandmann, 'The Role of British and German Historians in Mobilizing Public Opinion in 1914', in Stuchtey and Wende, *Historiography*, 335–71; Marmetschke, *Feindbeobachtung*, 140f.

¹⁵ For a comprehensive discussion of both German war crimes and Allied propaganda see John N. Horne and Alan Kramer, *German Atrocities, 1914. A History of Denial* (New Haven: Yale University Press, 2001), especially 35–42, 292–9, 387–9. For the parties' legal concerns (and, in the German case, the lack thereof) see Isabel Hull, *A Scrap of Paper. Breaking and Making International Law during the Great War* (Ithaca: Cornell University Press, 2014), 4–7, 41–3, 51–94, 229f., 257–64.

¹⁶ Charles Beard, 'The University and Democracy', *The Dial* 65 (1918), 335–7, 335.

¹⁷ Cf. the critique formulated against the backdrop of another war by Leon W. Fuller (who would go on to the State Department): 'The War of 1914 as Interpreted by German Intellectuals', *Journal of Modern History*, 14 (1942), 145–60.

¹⁸ Quoted from Hew Strachan, 'Total War in the Twentieth Century', in Arthur Marwick, Clive Emsley, and Wendy Simpson (eds.), *Total War and Historical Change. Europe 1914–1955* (Buckingham: Open University Press, 2011), 255–83, 272.

¹⁹ Henri Lichtenberger, *L'Impérialisme économique allemand* (Paris: Flammarion, 1918); cf. Marmetschke, *Feindbeobachtung*, 145, and Gilbert Merlio, 'Lichtenberger, d'Harcourt, Vermeil. Trois germanistes français face au national-socialisme', in Hans-Manfred Bock, Reinhart Meyer-Kalkus, and Michael Trebitsch (eds.), *Entre Locarno et Vichy. Les relations culturelles franco-allemandes dans les années 1930*, vol. 2 (Paris: CNRS, 1993), 375–90.

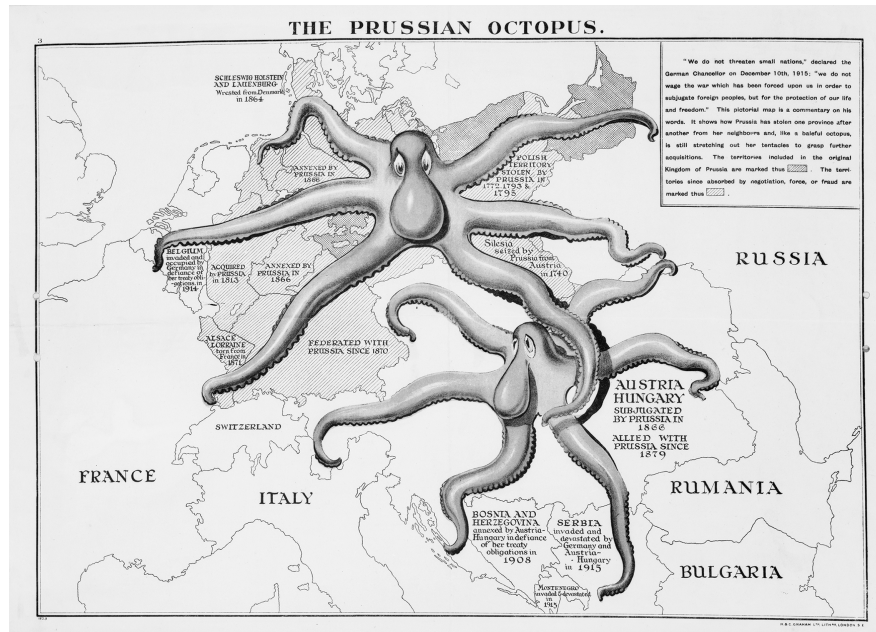


Fig. 2.1. The Prussian Octopus, 1916
Imperial War Museum

Prussian aggression. Tellingly, its portrayal as a hideous, land-grabbing octopus appropriated a symbol previously reserved to Russia's eastern empire (Fig. 2.1).²⁰

The German scholars' support for the war and the way it was waged roused a sense of betrayal in their European and American peers. And it provoked the question why these intelligent, talented men and women were unable to see the fallacy of their cause. The fault, the British, French, and American observers found, was in the thinking itself or, more precisely, in the philosophical traditions in which German intellectuals had been raised, their *Weltanschauung*. It was thus no accident that Eucken attracted so much criticism, for he was not only particularly vociferous in his defence of German warfare; as a Nobel laureate who had been awarded the prize for his neo-idealist work,²¹ he also stood in a long line of philosophers who had embarked on a road which George Santayana, in a scathing critique, labelled German egotism, 'something sinister...at once hollow and aggressive'.²² The Harvard philosopher, who a decade later would profess sympathy with European fascism,²³ wholly agreed with Daudet that things had gone

²⁰ F[rancis]. S. Marvin, *The Unity of Western Civilization* (London: Milford, 1915). Cf. Hoerres, *Krieg*, 170f.

²¹ See the detailed account in Hoerres, *Krieg*, 122f., 209–11.

²² George Santayana, *Egotism in German Philosophy* (London: Dent, 1916), 5.

²³ Cf. John McCormick, *George Santayana. A Biography*, 4th ed. (New Brunswick: Transaction, 2009), 343, 352–4, 407f.

wrong with Kant. Although a child of the Enlightenment, Santayana argued, Kant had advocated moral inwardness rather than universal ethics while at the same time placing the individual in the service of the state, understood not as the outer shell of society but as the incarnation of power. In Santayana's reading Kant had thus deviated from the mainstream of modern thought, legitimizing servitude rather than citizenship and private morality and individual contemplation rather than collective reason and science. Hegel had merely taken up the thread, rephrased it in historicist terms, and come up with a nationalist teleology in which 'the world ended with Prussia and himself'.²⁴

Less sarcastic but along very similar lines argued John Dewey's 1915 tract on *German Philosophy and Politics*. Starting from the assumption that ideas could and did translate into political action and that there was no better case study than the Wilhelmine Empire, Dewey traced the peculiarities of German thinking back to Kant, Hegel, Fichte, and Eucken, finding a 'distinctively German civilization' marked by a 'combination of self-conscious idealism with unsurpassed technical efficiency and organization'.²⁵ Dewey's critical reading of Kant as the philosopher of duty and service, his criticism of Hegel's nationalism, or his elaboration of the German distinction between civilization and *Kultur* were hardly original. But they proved influential due to his pivotal role in supporting the American entry into the war. Moreover, he added a socio-economic aspect which was absent in Santayana's analysis. Social and economic modernization, Dewey observed, had come about belatedly and thus more rapidly in nineteenth-century Germany but without the concomitant political revolutions which other European countries had gone through. Change had been 'accomplished under the guidance of established political authorities instead of by revolt against them', and the state had remained a key player and indeed moderator in Germany's capitalist economy ever since.²⁶

Dewey struck a note very similar to that of Thorstein Veblen's *Imperial Germany and the Industrial Revolution*, published in the same year. Rejecting biologist theories of what Germans were supposedly like, Veblen stressed the Reich's late industrialization and its lopsided modernization. While Germany had adapted technologies from the more advanced nations, notably Britain, it suffered from a continuing 'feudalistic animus of fealty and subservience', and had therefore failed to reform its political and economic institutions. Parliamentarianism was underdeveloped, industries were state-directed or state-regulated, and tariffs hampered foreign competition:

Modern technology has come to the Germans ready-made, without the cultural consequences which its gradual development and continued use has entailed among the people whose experience initiated it and determined the course of its development. . . . The case of Germany is unexampled among Western nations both as regards the abruptness, thoroughness and amplitude of its appropriation of this technology, and as regards the archaism of its cultural furniture at the date of this appropriation.

²⁴ Santayana, *Egotism*, 12, 30, 54–64, 148, at 87.

²⁵ John Dewey, *German Philosophy and Politics* (New York: Henry Holt, 1915), 28.

²⁶ *Ibid.*, 96.

In other words, Veblen considered Germany still a part of Western culture but at the continuum's far, most backward end.²⁷ What was more, the hold of militarist Prussia over the Reich and its aggressive foreign policy did not merely thwart German progress but threatened to cause 'a substantial, though presumably temporary, impairment and arrest of Western civilisation at large'.²⁸

The two philosophers and the economist found a ready audience in the East Coast elites and, more specifically, among policy advisers in Washington. Veblen had access to the famous Inquiry, the think tank of young academics Woodrow Wilson had assembled to take on post-war planning under the management of Walter Lippmann, then of the *New Republic*, that product of 'the marriage of established wealth and reform politics'.²⁹ The Wilson administration's own stance towards Germany had been ambiguous for most of the war. While top officials distinguished between the criminal rulers, notably the Kaiser, his entourage, and the military on the one hand, and the ill-informed, if not oppressed people on the other, they also professed scant sympathy for the German inclination to servility. Meanwhile US propaganda adopted the 'Huns' rhetoric with its implications of Eastern savagery which was so widespread in Europe.³⁰ Wilson, in his pre-presidential life a professor of political economy, oscillated between criticism of Prussian leadership which had lost its internal checks and balances with Bismarck's dismissal, and a vague disapproval of an authoritarian-minded German society requiring fundamental reform. With the progress of war, the president increasingly veered to the latter position, in particular when his expectations of mounting German discontent with Junker rule turned out to be wishful thinking after Brest-Litovsk. Hence his insistence during the Paris peace conference that didactic punishment, in particular trials of war criminals, mattered more than material retribution which only threatened to undermine the reformation of Germany.³¹

In his disdain for Prussian militarism and the necessity to teach both the Junker elite and the German people a lesson, Wilson found himself in agreement with his Paris sparring partners Georges Clemenceau, David Lloyd George, and Jan Smuts. Consensus was much less unequivocal on the issue of reparations which Clemenceau and Lloyd George conceived of as part of the lesson to be driven home to the Germans—and as a means of easing the burdens on their war-torn economies.

²⁷ Thorstein Veblen, *Imperial Germany and the Industrial Revolution* (London: Macmillan, 1915), 67, 82f.

²⁸ *Ibid.*, 262.

²⁹ Robert B. Westbrook, *John Dewey and American Democracy* (Ithaca: Cornell University Press, 1991), 234; quote from Barry D. Riccio, *Walter Lippmann—Odyssey of a Liberal* (New Brunswick: Transaction, 1994), 30f. Cf. Craufurd D. Goodwin, *Walter Lippmann. Public Economist* (Cambridge, Mass.: Harvard University Press, 2014), 25–7.

³⁰ See Binoy Kampmark, '“No Peace with the Hohenzollerns”. American Attitudes on Political Legitimacy towards Hohenzollern Germany, 1917–1918', *Diplomatic History*, 34 (2010), 769–91.

³¹ Manfred F. Boemeke, 'Woodrow Wilson's Image of Germany, the War-Guilt Question, and the Treaty of Versailles', in Manfred F. Boemeke, Gerald D. Feldman, and Elisabeth Glaser (eds.), *The Treaty of Versailles. A Reassessment after 75 Years* (Cambridge: Cambridge University Press, 1998), 603–14. For recent reassessments of Wilson's internationalism see Adam Tooze, *The Deluge. The Great War and the Remaking of Global Order, 1916–1931* (New York: Viking, 2014), 43–6, 53–67, 119–23, and Susan Pedersen, *The Guardians. The League of Nations and the Crisis of Empire* (Oxford: Oxford University Press, 2015), 17f., 28.

Wilson and especially Smuts were taken aback by what they considered imprudent and short-sighted vindictiveness (while the Washington administration was also careful to safeguard American interests by refusing to link debt and reparations issues, thereby subverting a possible compromise).³² In the US, the newly established Council on Foreign Relations, quasi-instantly an influential clearing house for foreign policy debates, argued for easing the reparations burden.³³ So did the politically radical and aesthetically modernist fortnightly *The Dial*. Reinvigorated under the editorship of Dewey and Veblen, the journal had backed the entry into the war but now called for a more conciliatory stance towards Germany. Norman Angell—author of *The Great Illusion* which would win him the Nobel Peace Prize, and later affiliated with the Council's British counterpart, the Royal Institute of International Affairs (Chatham House)—warned the Allies that too harsh a settlement would undermine any likelihood of winning Germany 'from her old evil past of militarism, suspicion, distrust, and hate'. He was seconded by the several other contributors who mocked simplistic narratives in which the British appeared as angels and the Prussians as demons.³⁴ Meanwhile Veblen, in a lucid article on the nascent League of Nations, pointed out that the Covenant, for all its high-minded aspirations, was essentially 'an instrument of realpolitik, created in the image of nineteenth century imperialism'.³⁵ American disenchantment with international affairs generally and Europe in particular increased in the following decade. The democratic vice-presidential candidate in 1920, Franklin Delano Roosevelt, was thus hardly alone in his notion 'that the rest of humanity must be saved from Europe and Europe from itself'.³⁶ With rampant isolationism and the non-accession of the US to the League of Nations, however, this mission was stalled.

The 'moral' clauses of the Versailles treaty did not fare much better. Codifying German war guilt in the notorious article 231 may have been a short-lived triumph for the Entente statesmen whose past decisions were retrospectively sanctioned. But it also became a major bone of contention around which German right-wing forces could rally and win popular support (and on which historians still feast a

³² Tooze, *Deluge*, 278f., 289–94, 299–303; Michael Graham Fry, 'British Revisionism', in Boemeke, et al., *Treaty*, 565–601, 583; David Stevenson, 'French War Aims and Peace Planning', in Boemeke, et al., *Treaty*, 87–110, 96f.; Sally Marks, 'David Lloyd George. "An Infernally Clever Chap..."', in Steven Casey and Jonathan Wright (eds.), *Mental Maps in the Era of Two World Wars* (Basingstoke: Palgrave Macmillan, 2008), 21–37, 25.

³³ Conference of 11 January 1921, SMLP, CFR Meetings Records, Series 4, Box 435. On the Council's origins see Robert D. Schulzinger, *The Wise Men of Foreign Affairs. The History of the Council on Foreign Relations* (New York: Columbia University Press, 1984), 4–21.

³⁴ Norman Angell, 'How to Treat Germany', *The Dial*, 66 (1919), 279–82, 281; Lewis Mumford, 'International Angling', *ibid.*, 298–9; Editorials, *ibid.*, 309–11. For *The Dial's* editorial outlook see Westbrook, *Dewey*, 233–5. On Chatham House cf. Inderjeet Parmar, *Think Tanks and Power in Foreign Policy. A Comparative Study of the Role and Influence of the Council on Foreign Relations and the Royal Institute of International Affairs, 1939–1945* (Basingstoke: Palgrave Macmillan, 2004), 25–30.

³⁵ Thorstein Veblen, 'Peace', *The Dial*, 66 (1919), 485–7, 485. The same argument has lately been refreshed by Mark Mazower, *No Enchanted Palace. The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), and Mazower, *Governing*.

³⁶ John Lamberton Harper, *American Visions of Europe. Franklin D. Roosevelt, George F. Kennan, and Dean G. Acheson* (Cambridge: Cambridge University Press, 1994), 34.

century later).³⁷ As to the prosecution of war criminals, the Kaiser was neither hung nor tried but hurried into Dutch exile, followed by his personal belongings in a modest fifty-nine railway cars. Nor were any other prominent policymakers or military leaders put before an international tribunal. Despite the treaty's stipulations and against French resistance, the Allies agreed to relinquish their right to extradition so that it fell to the Imperial Court of Justice at Leipzig to try a number of mid-level officers for war crimes. In a dozen proceedings in 1921–2 the acquittals outnumbered the guilty verdicts with their mostly mild sentences, and established Leipzig's reputation as sham trials and a warning to the future, underplaying their pioneering role in international criminal law.³⁸ At the same time, British efforts to take Ottoman officials to trial for the mistreatment of prisoners of war and the Armenian genocide came to naught because of political expediency and the legal conundrum whether or not Britain had any authority to prosecute crimes against Ottoman subjects.³⁹

Since, to most Europeans, Turkey's place among the so-called civilized nations was arguable at best, the notion that Germans alone were accused of war crimes roused a strong feeling of indignation in Weimar's public debate. The impression that the defeated nation was punished because it had been defeated, not because it had been wrong, and that the victorious Allies were guilty of hypocrisy was commonplace. A monumental, government-sponsored (and approved) edition documenting the imperialist powers' pre-war policies did not merely refute allegations of German war guilt but rebutted the underlying storyline of Prussian aggression since 1871. The gist of the forty volumes was that all European powers shared responsibility in bringing about the war.⁴⁰ Ironically, evidence to back up claims that the Entente and the Austrian–German alliance had also shown distinct similarities in their conduct of war was readily supplied by what must have been the most extensive research project in the humanities of its day, *The Economic and Social History of the World War*. Funded by the Carnegie Endowment for International Peace, the massive undertaking would amount to an overwhelming 150 volumes which investigated a wide array of subjects, from the financing of war to armaments production and from labour allocation to nutrition under wartime

³⁷ See Christopher Clark's recent *The Sleepwalkers* (London: Penguin, 2013), whose revisionist account triggered a storm of either celebratory or positively hostile reviews, with few commentators covering the middle ground—overall a debate strangely reminiscent of a past century.

³⁸ See Gerd Hankel, *Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburg: Hamburger Edition, 2003); Paul Betts, 'Germany, International Justice and the Twentieth Century', *History and Memory*, 17 (2005), 45–86; Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte 1872–1945* (Paderborn: Schöningh, 2010), 225–32.

³⁹ Betts, 'Germany', 48; Segesser, *Recht*, 223f., 232; Michelle Tusan, '“Crimes against Humanity”. Human Rights, the British Empire, and the Origins of the Response to the Armenian Genocide', *AHR*, 119 (2014), 47–76, 64–8. A number of domestic trials were held by the Ottoman government but these rapidly lost momentum and the verdicts were subsequently compromised by the Kemalist policy of rehabilitation; cf. Vahakn N. Dadrian and Taner Akçam, *Judgment at Istanbul. The Armenian Genocide Trials* (New York: Berghahn, 2011).

⁴⁰ See Sacha Zala, *Geschichte unter der Schere politischer Zensur. Amtliche Aktensammlungen im internationalen Vergleich* (Munich: Oldenbourg, 2001), 57–77.

conditions. The series covered all warring nations plus a number of neutral countries in an effort to comprehend the war's global dimension. Individual country studies were commissioned to scholars from the respective academic communities, including German, Austrian, and Turkish authors. While it seems unlikely that anyone ever read the whole set, the broad panorama suggested two conclusions: first, modern war was total in character, implying an all-out mobilization of available resources whether these were material, ideological, or human, and by necessity including those of enemy states.⁴¹ Second, on the technical level of running war economies and reorganizing industrial societies to wartime needs, differences between the opposing sides often got lost in detail, and the individual countries' policies converged along similar lines. In other words, the Carnegie studies offered ammunition to those who argued that the Germans had had little choice once war had broken out, and that their opponents had essentially done the same.⁴²

At the same time the history project pointed to the catastrophic implications of modern war. What the Carnegie Endowment's president, James T. Shotwell, took away from his reading was that war as the 'competition in the science of destruction' was 'by its very nature international' and had ceased to be controllable and hence had lost all legitimacy. In other words, Shotwell demanded that war be outlawed.⁴³ In this he found backing from Carnegie's Division of International Law, which published a series of research reports and *de lege ferenda* discussions, i.e. reform proposals which not only agreed on the salient issue that international law should preserve peace and help eliminate war, as the Chicago law professor Quincy Wright put it, but also found evidence that this was indeed the current trajectory of international law. The League of Nations' Covenant, the (unratified) 1924 Geneva Protocol, and the Kellogg–Briand Pact of 1928 were duly invoked as milestones on a path to banning aggressive war.⁴⁴

History would not be kind to such scholarly optimism. The following collapse of the League of Nations system attested to the frail foundations of supranational policymaking and led to that 'low, dishonest decade' mourned by Auden. Worse, there was also a notable lack of reflection among scholars who either uncomfortably shifted in their seats when it came to colonial rule or, like Smuts and Zimmern, indeed intended international institutions to preserve European empires and the white man's supremacy. The interwar discussion on the juridification of international politics and the outlawing of war between, not *within*, sovereign states, thus marked the high point of nineteenth-century liberal

⁴¹ For the contemporary debate of 'total war' see the contributions to Roger Chickering and Stig Förster (eds.), *The Shadows of Total War. Europe, East Asia, and the United States, 1919–1939* (Cambridge: Cambridge University Press, 2003).

⁴² See the overview by James T. Shotwell, *Economic and Social History of the World War. Outline of Plan, European Series* (Washington: Carnegie, 1924).

⁴³ The Story of the Origins, undated, YUL, Lippmann Papers, Reel 91, Box 102, F.1941. With Nuremberg in mind, Carl Schmitt would later comment that Shotwell's 1927 talk in Berlin was one of the truly 'fateful lectures' held in Germany: Carl Schmitt, *Glossarium. Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard Freiherr von Medem (Berlin: Duncker & Humblot, 1991), 7.

⁴⁴ Wright, *Research*, 23–33, 25; Hans Wehberg, *The Outlawry of War* (Washington: Carnegie, 1931).

internationalism and its belief in the rule of law along with a 'breathtaking civilizational self-assurance'.⁴⁵

Indeed, by the 1920s the notion of law as a 'gentle civilizer of nations' (a paraphrase of George Kennan's famous formula) suffered from a fundamental design flaw: it referred to a concept whose validity seemed increasingly dubious precisely because it hailed from a bygone age. The concept of 'civilization' had grown out of European colonial expansion, rationalizing imperial rule with 'a logic of exclusion-inclusion'. While incorporating the ethical provisions of older concepts such as 'Christianity' and 'Europe', its emphasis on scientific rationality, the rule of law, and bureaucratic organization had proved both adequate to the secularizing societies it sought to describe and sufficiently flexible to allow the accession of new members to the club such as Russia and Japan.⁴⁶ Yet this process also implied a diversification of the concept: civilization only made sense if applied in the plural, thus further reducing the differentiating potential of a term which was already under critique for its Eurocentrism by legal scholars such as Hersch Lauterpacht. And World War I, with its poison gas attacks and air raids, called into question whether the observance of the standards of civilized warfare, reformulated in various Geneva and Hague conventions and protocols since the 1860s, indeed qualified as proof of ethical superiority.⁴⁷

If civilization alone would no longer do, a new marker was needed to draw frontiers on mental maps. An eloquent answer was found at New York's Columbia College just after the end of hostilities in Europe. Replacing the previous class on War Aims in 1919, the mandatory Introduction to Contemporary Civilization, 'probably the most famous course ever in the American curriculum', combined history, philosophy, economics, and government studies, and was organized along notions of a socially, culturally, and politically distinct West.⁴⁸ The course which soon became a model for most elite colleges and universities in the US would not only come to epitomize—as Danish writer David Gress has disparagingly remarked—a 'grand narrative' of Western civilization but helped to shape the very Western identity it purported to analyse, investing it with 'the modern triad of democracy, science, and capitalism'.⁴⁹

⁴⁵ See Mazower, *Palace*, 14–42, 69–90; quote from Mazower, *Governing*, 160. Mazower's analysis builds on the magisterial study by Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002).

⁴⁶ See Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984), 5–15, 24–53, 100–6, 164–200; Marc Panka, *Kultur, Fortschritt und Reziprozität. Die Begriffsgeschichte des zivilisierten Völkerrechts* (Baden-Baden: Nomos, 2012), 90–2, 103–6, 188f., 196f.; Koskenniemi, *Gentle Civilizer*, 101–10, 127–32, at 472.

⁴⁷ Cf. Panka, *Kultur*, 162f., 221, 238f.; Gong, *Standard*, 74–6; Segesser, *Recht*, 76–140, 187f., 233–51, 282–91.

⁴⁸ Walter B. Carnochan, *The Battleground of the Curriculum. Liberal Education and American Experience* (Stanford: Stanford University Press, 1993), 70f. Cf. Timothy P. Cross, *An Oasis of Order. The Core Curriculum at Columbia College*, New York: Columbia College, 1995, ch. 1, <<https://www.college.columbia.edu/core/oasis/history1.php>> accessed 14 February 2014.

⁴⁹ David R. Gress, *From Plato to NATO. The Idea of the West and Its Opponents* (New York: Free Press, 1998), 30–48, at 47f., takes the course as a starting point for a revisionist critique of what he perceives as an ahistorical and falsely universalist notion of the West.

Columbia's professors did not start from scratch. Their vision of Western identity combined various strands of nineteenth-century thinking whose common thread had been the transformation of a geographical direction into a cultural concept which, moreover, was dynamic and teleological: peoples, nations, civilizations could and indeed ought to become Western. After their annexation by Prussia, German liberals in the Rhine Province had conceived of the 'newly emerging east-west divide in terms of a backward East and "civilized West"';⁵⁰ and Russia's modernization thrust, prominently articulated in the Tsar's sponsorship of legal internationalism, had not prevented its relocation from the North to the East on imagined atlases of Western authors to whom Russia was the defining 'other'.⁵¹ Civilized or not, neither Russia nor a Prussianized Germany were self-evident parts of the West. Thus at Columbia and elsewhere, syllabi told the story of Western civilization with Germany on its margins and discussed its recent history in Veblen's terms—and indeed with Veblen's book on the reading list—as one of failed democratization and institutional backwardness.⁵² While obviously an opportune concept against the background of World War I, this notion was vindicated by many German intellectuals' insistence that theirs was a distinct *Kulturkreis*, separate from both West *and* East, which did not disappear at the end of the war. Quite on the contrary, right-wing thinkers like Arthur Moeller van den Bruck expressly claimed that 'We have lost the war against the West'.⁵³ The salient point, or so it seemed to Weimar's large community of conservative, nationalist, and reactionary protagonists, was whether Germany had lost a war or merely a battle.

2.2. GERMANS AND NAZIS

Although the far right in Weimar Germany remained unwavering in its hostility to the West and to what it perceived as its shallow materialism (Britain and the US) or its decadence and vengefulness (France), this did not preclude international and in particular economic cooperation. While Gustav Stresemann's foreign policy reached out to the Western Allies—though not the Reich's eastern neighbours—German businessmen met eye to eye with their European competitors in the organization of cross-border cartels and frequently travelled to the US where they raised Wall Street money and visited the wonders of modern mass production in

⁵⁰ Riccardo Bavaj, "'The West". A Conceptual Exploration', *European History Online* (2011), <<http://www.ieg-ego.eu/bavajr-2011-en>>, quote at para. 15, accessed 17 December 2013.

⁵¹ See Manfred Hildermeier, 'Osteuropa als Gegenstand vergleichender Geschichte', in Gunilla Budde, Sebastian Conrad, and Oliver Janz (eds.), *Transnationale Geschichte. Themen, Tendenzen und Theorien* (Göttingen: Vandenhoeck, 2006), 117–36, and Martin Aust, *Globalisierung imperial und sozialistisch. Russland und die Sowjetunion in der Globalgeschichte 1851–1991* (Frankfurt: Campus, 2013), 16–18, 35f., 168–73.

⁵² German (and Russian) thinkers and poets were few and far between, and those who figured—Luther, Nietzsche, and Marx—appeared as challenging Western modernity rather than contributing to it: *Introduction to Contemporary Civilization. A Syllabus* (New York: Columbia University Press, 1921), 62, 132; cf. Gress, *Plato*, 174–7.

⁵³ Arthur Moeller van den Bruck, *Sozialismus und Aussenpolitik* (Breslau: Korn, 1933), 100.