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# Legacies of the Nuremberg SS-Einsatzgruppen Trial after 70 Years

HILARY EARL\*

## I. INTRODUCTION

War crimes trials are almost commonplace today as the normal course of events that follow modern-day wars and atrocities. In the North Atlantic, we use the liberal legal tradition to redress the harm caused to civilians by the state and its agents during periods of State and inter-State conflict. The truth is, war crimes trials are a recent invention. There were so-called war crimes trials after World War I, but they were not prosecuted with any real conviction or political will. The Soviets prosecuted war criminals beginning in 1943, but many of these trials lacked the markers of western justice; the most important, of course, is the presumption of innocence.

By this measure, Nuremberg was the first real (and successfully prosecuted) war crimes trial held in the North Atlantic. As with many things in history, the first is often the most important. Nuremberg prosecuted representatives of the German State for crimes committed by the State, in what the Allies called “crimes against peace.” Simply put, Nuremberg prosecuted high-ranking German officials for waging an aggressive and illegal war. It has been argued that for these reasons, Nu-

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remberg stands out as significant. It set a legal precedent for all other trials that followed, including the twelve subsequent Nuremberg trials, or Nuremberg Military Tribunals (“NMT”), prosecuted between 1946 and 1949, the 1961 Israeli trial of Adolf Eichmann, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”), and even the domestic tribunals in Guatemala and Germany, which prosecuted State agents as accessories to murder and other atrocities. All of these, some scholars argue, have their origins in the 1945 International Military Tribunal at Nuremberg (“IMT”).

This essay discusses one of the IMT’s legal legacies: the Nuremberg SS-*Einsatzgruppen* trial, the ninth of the twelve NMT prosecuted by the Americans at the Palace of Justice in Nuremberg between 1946 and 1949. The *Einsatzgruppen* were special paramilitary forces of the Schutzstaffel (“SS”) that worked alongside the German army to kill the racial enemies of the Reich. It is estimated they deliberately murdered between 1.1 and 1.5 million innocent Jewish men, women and children. The “*Einsatzgruppen* Reports,” discovered in 1946, contained damning evidence of criminal wrongdoing, and in the summer of 1947, Telford Taylor—the head of the American Office of Chief of Counsel of War Crimes (“OCCWC”)—indicted two dozen group leaders for crimes against humanity, war crimes and membership in organizations declared criminal by the IMT.<sup>1</sup> These defendants were not tried for crimes against peace. In some ways, as Kim Priemel has noted, the *Einsatzgruppen* trial is not technically a “war crimes trial,” but rather an atrocity trial.<sup>2</sup>

Responsible for carrying out the Nazi policy for “extermination” in the east, many of these men were extremely well educated professionals who had come to the mobile killing units by way of the Security Service (“SD”) offices. None of the defendants were rank-and-file members of the *Einsatzgruppen*.<sup>3</sup> Michael Musmanno, a judge in the Superior Court of Pennsylvania and a controversial figure at Nuremberg, presided over the court, which was in session for 138 days. Thousands of pieces of evidence were reviewed and every defendant testified about their behavior

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1. See generally *Amended Indictment, July 29, 1947*, IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 13–22 (U.S. Gov’t Printing Office Oct. 1946–Apr. 1949).

2. Kim Christian Priemel, *War Crimes Trials, the Holocaust and Historiography, 1944–2014*, in THE WILEY-BLACKWELL COMPANION TO THE HOLOCAUST (Simone Gigliotti & Hilary Earl eds., forthcoming 2017).

3. See MICHAEL WILDT, GENERATION DES UNBEDINGTEN. DAS FÜHRUNGSKORPS DES REICHSSICHERHEITSHAUPTAMTES (4th ed. 2003).

during the war.<sup>4</sup> After much consideration of the evidence, the tribunal found all but one of the defendants guilty of crimes against humanity for their part in the murder of an estimated one million civilians.<sup>5</sup> Fourteen defendants received the death penalty, seven received prison sentences, and one defendant was released with time served.<sup>6</sup> With the exception of an unusually large number of death sentences, on the face of it, this trial seems no different than any of the other Nuremberg trials—or was it?

Here, I suggest that in the context of the postwar period, the *Einsatzgruppen* trial had a significant and lasting impact on our understanding of the Holocaust, the European-wide murder of Jews. Unlike the IMT, the *Einsatzgruppen* trial more closely resembles modern day “perpetrator trials.” That is, trials designed to deal exclusively with individuals whose criminal activity was their participation in atrocities committed against non-combatants or civilians. Whereas the IMT trial focused mainly on the charge of crimes against peace, the *Einsatzgruppen* trial focused on crimes against humanity, making it a template for later atrocity trials including those of major perpetrators such as: Adolf Eichmann (1961), Slobodan Milošević (2006) and Radovan Karadžić (2016). Lawrence Douglas has referred to this shift away from the crimes committed by a State against another State and crimes against peace, toward crimes committed against civilians as the “atrocity paradigm.” Today, the atrocity paradigm “dominates international criminal law.”<sup>7</sup> Unlike the first Nuremberg trial or IMT which prosecuted former Nazis for crimes against peace, the Nuremberg SS-*Einsatzgruppen* trial, one of the twelve NMT, focused almost exclusively on the “Final Solution to the Jewish Question” and the role of the defendants in their murder. From opening to closing statement, the *Einsatzgruppen* trial was devoted to constructing a narrative of Nazi genocide—defined by the prosecution as the deliberate and systematic targeting and murder of the

4. See HILARY EARL, *THE NUREMBERG SS-EINSATZGRUPPEN TRIAL, 1945–1958: ATROCITY, LAW, AND HISTORY* 217–52 (Cambridge Univ. Press 2009); see also Michael A. Musmanno, in *THE PAPERS OF JUSTICE MICHAEL A. MUSMANNO* (unpublished manuscript) (on file with Gumberg Library, Duquesne University, Pittsburgh, Pennsylvania) [hereinafter MMP].

5. The prosecution used the reports of the *Einsatzgruppen* to estimate the number of civilians killed. This number is contested today. See *Id.* at 81–83.

6. *Sentences*, IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 587–89 (U.S. Gov’t Printing Office Oct. 1946–Apr. 1949).

7. LAWRENCE DOUGLAS, *From IMT to NMT: The Emergence of a Jurisprudence of Atrocity*, in *REASSESSING THE NUREMBERG MILITARY TRIBUNALS: TRANSITIONAL JUSTICE, TRIAL NARRATIVES, AND HISTORIOGRAPHY* 288 (Kim Christian Priemel & Alexa Stiller eds., Berghahn 2012).

Jewish population in the occupied territories that culminated in their total extermination—and the *Einsatzgruppen*'s role in it. It was a simple and powerful story in which Hitler's hatred of the Jews as expressed in his own speeches, writings, and anti-Jewish policies, and his 1941 orders to the SS—the so-called *Führerbefehl*—led directly to the murder of European Jews. The villains in this story were hybrid perpetrators; men who gave orders to kill and who ensured these orders were carried out in the field.

Unlike later trials where the “Miranda rule” was in effect, the guilt of the *Einsatzgruppen* leaders was never questioned because many of them confessed to their crimes either in pre-trial interrogations or on the witness stand in open court. For those who did not confess, there was an abundance of documentary evidence penned by their own hand to prove their atrocious deeds. The evidence was so overwhelming in this trial that it was, as chief prosecutor Benjamin Ferencz noted, an “open and shut” case.

For a trial of such historic dimensions, it was not well planned. At the eleventh hour, a small but dedicated group of lawyers, researchers, and interrogators worked at a frantic pace to put the case against the *Einsatzgruppen* leaders together, and by the summer of 1947, they had decided that of the two to three thousand members, twenty-four of the highest-ranking leaders of the groups would be indicted.<sup>8</sup> Why so few? For the same reason that all the NMT were capped at twenty-four—because there were no more seats in the courtroom and the Nuremberg prosecutors were not interested in trying rank-and-file members of the groups—only the leaders were of interest.<sup>9</sup> The number of defendants in the dock, however, is not nearly as significant as who was prosecuted.

Here, I argue that our historical and legal understandings of the “Final Solution” and the *Einsatzgruppen*'s role in it were shaped by the trial and its participants. The prosecutors and the way they conceived of the role of the *Einsatzgruppen* in the Holocaust contributed to subsequent historical interpretations, especially our understanding of how the genesis of the Final Solution was articulated by lead defendant, Otto Ohlendorf, whose narrative of the events still has currency today. In the absence of documentary evidence, Ohlendorf's testimony established a version of the Final Solution that was clearly hierarchical and premedi-

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8. *Id.*

9. Benjamin B. Ferencz, Speech at the McGill Conference on Human Rights (Nov. 3–4, 1987), in THE PAPERS OF BENJAMIN B. FERENCZ (transcript available in U.S. Holocaust Mem'l Museum archives), <http://collections.ushmm.org/search/catalog/irn508277>.

tated; elements of the crime have become codified in the crime of genocide. According to Ohlendorf, Hitler, Himmler and Heydrich were at the center of the decision-making process, and the members of the killing units had little or no agency. They were, as Ohlendorf told his captors, simply following orders.<sup>10</sup> His co-defendants reinforced the obedience to superior orders defense as, one by one, they took the stand and told the court that even though they deeply respected Hitler, they had no power to alter his decisions. They were, as one defendant significantly noted, “small wheel[s] in a large machinery” with no choice but to obey.<sup>11</sup> The idea that the murder of the Jews was a large and complex bureaucratic process carried out by the SS and SD on the orders of Hitler was persuasive, influencing some of the most prominent postwar scholars.<sup>12</sup> The trial especially influenced the work of Raul Hilberg, who used the records of the *Einsatzgruppen* trial to explain the machine-like nature of the destruction process.<sup>13</sup> This view of the events of World War II has helped shape our legal and historical understanding of genocide and its corporate structure.

## II. COLLECTING EVIDENCE

In 1946, when the Americans decided to undertake the additional twelve Nuremberg trials, they did so with a clear sense of which Nazi agencies they wanted to hold accountable. They targeted the SS, Gestapo, Security Service and representatives from finance and industry, and made concerted efforts to locate evidence against specific people and groups.<sup>14</sup> Defendants’ selections for prosecution depended largely on the

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10. Testimony of Werner Braune (November 25, 1947), in RECORDS OF THE UNITED STATES NUREMBERG WAR CRIMES TRIALS, *microformed on* Nat’l Archives Microfilm Publ’n M895, roll 13, *United States of America v. Otto Ohlendorf* 3035, 3047–48 (Nat’l Archives & Records Admin.).

11. *Id.*

12. *See generally* GERALD REITLINGER, THE FINAL SOLUTION: THE ATTEMPT TO EXTERMINATE THE JEWS OF EUROPE, 1939–1945 (Vallentine, Mitchell, 1st ed. 1953); LÉON POLIAKOV, HARVEST OF HATE: THE NAZI PROGRAM FROM THE DESTRUCTION OF THE JEWS OF EUROPE (Syracuse Univ. Press 1954); HELMUT KRAUSNICK & MARTIN BROZAT, ANATOMY OF THE SS STATE (Dorothy Long & Marian Jackson trans., Paladin 1973).

13. RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS (1961) (Raul Hilberg used nearly forty thousand prosecution documents including documents from the *Einsatzgruppen* trial to write his masterful, *The Destruction of the European Jews* (1961)); *see also* RAUL HILBERG, THE POLITICS OF MEMORY: THE JOURNEY OF A HOLOCAUST HISTORIAN 70 (Ivan R. Dee 1996) (Hilberg’s revised English edition was published in 1985 as 3 volumes and is slightly different than the original. This essay uses the 1961 English edition).

14. *See generally* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 79–80 (U.S. Gov’t Printing Office 1949).

evidence available and whether the individual was in allied custody. In the case of the *Einsatzgruppen*, there was never any intention to prosecute this branch of the SS because no one was all that familiar with their activities.

Though unfamiliar with the *Einsatzgruppen* during their initial investigations in late 1945, the Americans soon learned of its crimes by one of its foremost members, SS-Brigadeführer Otto Ohlendorf, who was head of Office III of the RSHA, Undersecretary in the Economics Ministry, and leader of *Einsatzgruppe D*, which operated behind enemy lines in the south of Ukraine, Bessarabia, and the Crimea. The British arrested Ohlendorf in May 1945 and interrogated him repeatedly until they transferred him to American custody in October.<sup>15</sup> Ohlendorf was not easily rattled and seldom incriminated himself. It was not until August that he actually admitted to his role as leader of *Einsatzgruppe D*. British intelligence reports suggest they were not interested in prosecuting Ohlendorf for his crimes as leader of a mobile killing unit. Rather, they viewed him as a good source of information against other higher-ranking, and thus more important, Nazis. When the Americans asked to have Ohlendorf transferred to their custody to question him about some of the major war criminals then being prosecuted before the IMT—especially in the case against Ernst Kaltenbrunner who Ohlendorf knew quite well from his work in the RSHA—the British were more than willing to oblige.<sup>16</sup>

While Ohlendorf was in captivity, he was interrogated over and over about the crimes of the regime. It was during this time that the Americans first understood the scope and systematic nature of *Einsatzgruppen* criminal activities. They learned that the *Einsatzgruppen* were special para-military task forces of the SS (not trained military personnel) who were used in all military campaigns to assist the German army in “pacifying” the civilian population. Their campaign in the Soviet-occupied territory required that they follow the German army into conquered areas, identify and round-up enemies of the Reich, strip them of their valuables, kill them in open-air shootings, and dispose of the victims’ bodies.<sup>17</sup> Ohlendorf told the British that they employed mo-

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15. Hillary Earl, *Confessions of Wrong-doing or how to save yourself from the Hangman: An Analysis of British and American Intelligence Reports of the Activities of SS-Einsatzgruppenführer Otto Ohlendorf, May–December 1945*, in *SECRET INTELLIGENCE AND THE HOLOCAUST* 301–26 (David Bankier ed., Enigma Books, Yad Vashem 2006).

16. EARL, *supra* note 4, at 50, 53–54; see also PETER BLACK, *ERNST KALTENBRUNNER: IDEOLOGICAL SOLDIER OF THE THIRD REICH* (Princeton Univ. Press 1984).

17. Summary, Morning Interrogation of Otto Ohlendorf (October 24, 1945), in *INTERROGATION RECORDS PREPARED FOR WAR CRIMES PROCEEDINGS AT NUREMBERG 1945–*

bile gas vans to asphyxiate Jews, mainly women and children, beginning in December 1941; prior to that, men, women and children were treated the same.<sup>18</sup> He also told the British about his role in the killing process in August 1945, and he divulged the same to the Americans when he was transferred to their custody in October.<sup>19</sup> Not knowing he might have to answer for his own wartime actions,<sup>20</sup> Ohlendorf freely confessed that the mobile unit he commanded was responsible for the deaths of ninety thousand people, the overwhelming majority of whom were Soviet Jews.<sup>21</sup> Ohlendorf also stated these facts for the public record when he testified at the IMT in January 1946.<sup>22</sup> Even after his confessions of wrongdoing, however, American authorities were uncertain about what to do with Ohlendorf. Some wanted to try him for his crimes; others simply wanted to use him for his knowledge against those they perceived to be more important Nazis.<sup>23</sup> One prosecutor noted:

A careful review of the material evidence on hand in Nuremberg reveals few personalities against whom a prima facie case can be made out. To date, only two personalities have been discovered to-wit: Otto Ohlendorf and Adolph [sic.] Eichmann who could be prosecuted by using the evidence now in the Nurnberg files. . . . Ohlendorf has thus far proven to be a mind of information on all phases of the RSHA and other personalities

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1947, OCCPAC INTERROGATIONS, *microformed on* Nat'l Archives Microfilm Publ'n M1270, roll 13 (Nat'l Archives & Records Admin.); Memorandum from Lt. Col. S. W. Brookhart to Col. Amen (October 24, 1945), *in* INTERROGATION RECORDS PREPARED FOR WAR CRIMES PROCEEDINGS AT NUREMBERG 1945–1947, OCCPAC INTERROGATIONS, *microformed on* Nat'l Archives Microfilm Publ'n M1270, roll 13 (Nat'l Archives & Records Admin.) (discussing the interrogation of Ohlendorf).

18. Summary, Morning Interrogation of Otto Ohlendorf, *supra* note 17, at 14:30-17:00; Summary, Evening Interrogation of Otto Ohlendorf (October 24, 1945), *in* INTERROGATION RECORDS PREPARED FOR WAR CRIMES PROCEEDINGS AT NUREMBERG 1945–1947, OCCPAC INTERROGATIONS, *microformed on* Nat'l Archives Microfilm Publ'n M1270, roll 15–16 (Nat'l Archives & Records Admin.) (in this interrogation, Ohlendorf said Einsatzgruppe D used the gas vans only in the spring of 1942).

19. *See* EARL, *supra* note 4, at 49–58 (discussing Ohlendorf's confessions to the British in the summer of 1945).

20. LEON GOLDENSOHN, THE NUREMBERG INTERVIEWS: AN AMERICAN PSYCHIATRIST'S CONVERSATIONS WITH THE DEFENDANTS AND WITNESSES 390 (Robert Gellately ed., Alfred A. Knopf 2004) (Dr. Leon Goldensohn, one of the Nuremberg psychiatrists who interviewed Ohlendorf concluded that he was remorseless and his "conscience, if it can be called such, is clean as a whistle and as empty").

21. Summary, Evening Interrogation of Otto Ohlendorf, *supra* note 18, at 5–6; EARL, *supra* note 4, at 52–53, 71–72.

22. *Testimony of Otto Ohlendorf (January 3, 1946)*, IV TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 319 (Nuremberg, 1947).

23. *See, e.g.*, TAYLOR, *supra* note 14, at 80.

in the Third Reich. As a matter of expediency, it is thought best to postpone any trial of this individual until all information, he is able to give, has been obtained from him.<sup>24</sup>

That time came in early 1947, when the OCCWC located and analyzed a near complete set of the field reports of the *Einsatzgruppen*.

Unlike the other trials that formed the OCCWC's original roster, the *Einsatzgruppen* trial was *ad hoc* and in response to hitherto unknown, or at least, misunderstood crimes that were discovered in fits, beginning with Ohlendorf's confessions in 1945 and ending with an analysis of the *Einsatzgruppen* field reports by American researchers from March to April 1947. Because the reports were the main evidence against the defendants (other than confessions and affidavits), the prosecutors had to read and analyze each in order to determine who was responsible and for what crime. Each report contained pertinent information about who was killed, where, and by which *Kommando*. Yet, as detailed as the reports were, the specific identity of the killers was not revealed anywhere within them.

Inadequate evidence against individual *Einsatzgruppen* personnel prompted American prosecutors to approach the Soviets for help in their case.<sup>25</sup> The Americans specifically looked for "further evidence and accounts of witnesses from the territories and population" that had come face-to-face with units of the *Einsatzgruppen*.<sup>26</sup> Along with evidence that might link individuals to the crimes they committed, the Americans sought Germans in Soviet custody who could help further their case. American efforts came to naught and prosecutors had to come up with alternate ways to prove individual guilt. Thus, it was up to the prosecutors to establish defendants' individual responsibility. The prosecution's decision has had lasting consequences on our historical understanding of the Final Solution in the Soviet Union.

### III. THE PROCEEDINGS AND THE INDIRECT CHARGE OF GENOCIDE

Through close scrutiny of the field reports, the prosecution noted

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24. Memorandum from P.W. Walton (Sept. 30, 1946) (on file with Nat'l Archives & Records Admin., Record Group 238, Entry 202, Box 2, folder 3). The author would like to thank Kim Priemel for kindly sharing this document with her.

25. Memorandum from Frederic S. Burin to Henry Sachs, Chief, SS-Section Berlin Branch, OCCWC (March 5, 1947) (on file with Nat'l Archives & Records Admin., Record Group 238, Entry 202, Box 4, folder 1); Memorandum from Benjamin Ferencz to Col. Gen. Serov, Commander in Chief, Civil Administration of Germany, Berlin-Karlshorst (March 12, 1947) (on file with Nat'l Archives & Records Admin., Record Group 238, Entry 202, Box 4, folder 1). I want to thank Alexa Stiller for sharing these documents with me.

26. *Id.*

that between May 1941 and July 1943, the *Einsatzgruppen* were responsible for the murder of approximately 1 million people.<sup>27</sup> The indictment stated that four units of approximately 500-800 men each were formed under Himmler's orders, with the "primary purpose" of exterminating "Jews . . . and other elements of the civilian population regarded as racially 'inferior' or 'politically undesirable'" and that these murders were "part of a systematic program of genocide."<sup>28</sup>

Genocide is a corporate crime and to carry it out requires many different types of perpetrators. At trial, who did the killings and who did the jobs that facilitated the killings were not discussed. Thus, four groups of approximately two to three thousand individuals were identified, rounded-up, robbed, shot, killed, and buried in a little less than two years remained the mistakenly accepted wisdom for years. Today, we know that the murder of one million people was accomplished with the help of many thousands of local peoples—from teenagers who helped pack down dead bodies to adult men who identified and rounded up potential victims—as well as large groups of reinforcements sent by Himmler to help in the actual killing process.<sup>29</sup>

Until the historiographical turn, which began with the publication of Christopher Browning's path-breaking *Ordinary Men* in 1992, the role of the Order Police in the killing operations on the eastern front, for instance, was not well understood.<sup>30</sup> Since the publication of Karl Berkoff's 2004 *Harvest of Despair: Life and Death in Ukraine under Nazi Rule*, his current research on Babi Yar, and Patrick Desbois's *The Holocaust by Bullets*, we have begun to see a more complete picture of those who participated in the killing process.<sup>31</sup> Discovering the full extent of the *Einsatzgruppen* trial has been a slow process that continues today, a clear indication that this trial has had a significant and lasting impact on our historical consciousness.<sup>32</sup>

27. *Amended Indictment*, *supra* note 1, at 15–21 (Count One—Crimes Against Humanity).

28. *Id.* at 15.

29. PATRICK DESBOIS, *THE HOLOCAUST BY BULLETS: A PRIEST'S JOURNEY TO UNCOVER THE TRUTH BEHIND THE MURDER OF 1.5 MILLION JEWS* 83–86 (Palgrave MacMillan 2009).

30. CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (Harper Perennial 1992).

31. KAREL BERKHOFF, *HARVEST OF DESPAIR: LIFE AND DEATH IN UKRAINE UNDER NAZI RULE* (Harv. Univ. Press 2004); *see also* Karel Berkhoff, *Babi Yar in History and Memory* (Working Paper), <http://www.niod.nl/en/projects/babi-yar-history-and-memory>.

32. HILBERG, *supra* note 13, at 321 (Hilberg used the records from the *Einsatzgruppen* trial to write *Destruction* and although he does note that auxiliary units were employed in the east, he gives the impression that it was the *Einsatzgruppen* alone who operated in the Soviet Union); *see also* Hans Heinrich Wilhelm, *DIE EINSATZGRUPPE A DER SICHERHEITSPOLIZEI UND DES SD 1941/42* (Frankfurt 1996) (detailed discussion about the composition of *Einsatzgruppe A* and how they recruited helpers).

While the OCCWC formulated the indictment based on information it gleaned from the *Einsatzgruppen* reports, it did not contain any novel legal charges. Like virtually all twelve NMT, it charged the defendants with war crimes, membership in organizations declared criminal by the IMT, and crimes against humanity.<sup>33</sup> Given the emphasis on the systematic and planned murder of civilians, the one charge that could have distinguished this trial from all the others—genocide—was not included in the indictment.<sup>34</sup> To be sure, the prosecutors were familiar with the term “genocide” at the time they wrote the indictment. Genocide as a legal concept had been brought to world attention in 1944 with the publication of Raphael Lemkin’s book, *Axis Rule in Occupied Europe*; simultaneously, the crime was in the process of being codified by the United Nations when the *Einsatzgruppen* trial was in progress.<sup>35</sup> Lemkin was also intent to have the term not only recognized, but also employed at Nuremberg. As a Polish-Jewish survivor and an expert in international criminal law, Lemkin was a tenacious lobbyist of the new term he coined in 1944. When he learned of the American decision to hold war crimes trials, he became determined to disseminate his ideas and, in the spring of 1945, he got a job with the War Crimes Office of the Judge Advocate General working at the Pentagon to analyze evidence against Nazi war criminals.<sup>36</sup> He took advantage of his new position when, two days after President Truman appointed Supreme Court Justice Robert H. Jackson to head up the American war crimes program, Lemkin wrote to the Chief Justice informing him about the publication of his book.<sup>37</sup> Lemkin’s timing was impeccable. The Judge Advocate General decided Lemkin was the perfect man to assist Jackson in drafting an indictment against the major Nazi war criminals to be tried before the IMT. In the summer of 1945, Lemkin went to London and worked for several months with Jackson and a team of legal experts.<sup>38</sup>

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33. *Amended Indictment*, *supra* note 1, at 13–22.

34. TAYLOR, *supra* note 14, at 69.

35. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79–95 (Carnegie Endowment for Int’l Peace 2005); *see also* G.A. Res. 260 (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948), <http://www.un.org/millennium/law/iv-1.htm> (codifying genocide).

36. *See* Raphael Lemkin, *Writings–Autobiography*, in *RAPHAEL LEMKIN PAPERS* (1947–1959), *microformed on* New York Public Library ZL-273 (on file with New York Public Library, #83, M-39, Box 1, file 39, reel 2).

37. Letter from Raphael Lemkin to Robert H. Jackson (May 4, 1945) (on file with the Library of Congress).

38. John Q. Barrett, *Introduction* to *NUREMBERG AND GENOCIDE: HISTORICAL PERSPECTIVES*, in *PROCEEDINGS OF THE SECOND INTERNATIONAL HUMANITARIAN LAW DIALOGS* 25–26 (Elizabeth Anderson & David M. Crane eds., 2008); JOHN COOPER, RAPHAEL

Apparently, Jackson was quite influenced by Lemkin's newly defined crime, as it appears in the IMT indictment in at least two incarnations. First, it shows up as a group crime in count one, which laid out the group nature of Nazi criminality in a "common plan or conspiracy." This count explained that through membership in the Nazi party and its criminal agencies, such as the SA, SS, SD, and Gestapo, individuals can be held responsible for group crime.<sup>39</sup> Secondly, Lemkin's ideas found their way into count three of the indictment—war crimes.<sup>40</sup> In fact, it is here that genocide is officially described as "the extermination of racial and national groups, against the civilian populations . . . in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."<sup>41</sup> Lemkin clearly had some influence at Nuremberg, although genocide was left out of the most important charge—crimes against humanity.<sup>42</sup> Still, Lemkin was hopeful that the prosecution would develop this concept at trial and perhaps link it to crimes against civilians. Indeed, his ideas seem to have caught on with members of the IMT prosecution team and the NMT, who had met him in person and/or who read his scholarly works as several of the IMT prosecutors invoked the term at the trial of the major war criminals, even so they did not impress the tribunal who did not mention "genocide" in its judgment. Eager to influence the subsequent generation of Nuremberg jurists, Lemkin went to Germany in May 1946 and took the opportunity to lobby for the inclusion of "genocide" as a crime.<sup>43</sup>

Even though Lemkin was disappointed that the IMT did not adequately develop the new crime of genocide, he did his best to define and reinforce the meaning of genocide with the younger jurists he encountered at Nuremberg. His efforts seemed to have paid off. While none of the NMT prosecutors formally charged the defendants with the novel crime of genocide, at least two of the trials made real efforts to employ

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LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 63–64 (Palgrave Macmillan 2008); WILLIAM KOREY, AN EPITAPH FOR RAPHAEL LEMKIN 26 (Jacob Blaustein Institute for the Advancement of Human Rights 2001); TAYLOR, *supra* note 14, at 69.

39. *Indictment Count One—The Common Plan or Conspiracy*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 29–42 (Nuremberg, 1947).

40. COOPER, *supra* note 38, at 64.

41. *Indictment Count Three—War Crimes*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 42–65 (Nuremberg, 1947).

42. Hilary Earl, *Prosecuting Genocide Before the Genocide Convention: Raphael Lemkin and The Nuremberg Trials, 1945-1949*, 15 J. GENOCIDE RES. 317–38 (2013).

43. Raphael Lemkin, *supra* note 36.

the term.<sup>44</sup> By the time the *Einsatzgruppen* trial had begun in the autumn of 1947, the word had achieved some recognition, and although prosecutors did not formally use the word “genocide” in the case, they “certainly had in mind that people were killed because they were Jews.”<sup>45</sup> This was unquestionably borne out at trial where the focus was almost exclusively on the Jews as special victims of *Einsatzgruppen* activities and Nazi policy. The difference between the *Einsatzgruppen* case and the other two that employed genocide in prosecution is that neither the RuSHA trial (Case 8) nor the Medical trial (Case 1) focused exclusively on Jewish victims. Rather, both considered Nazi racial and resettlement policy, but as it was directed against other victim groups.

If the *Einsatzgruppen* trial impacted our historical understanding of the Final Solution and how it unfolded, it did not help to advance genocide as a legal term. Even though the trial was one of the most clear-cut cases of genocide—the opening statement by the prosecution stated as much and the vast majority of murders committed by the perpetrators was against one victim group, the Jews—the attorneys never pursued a line of questioning that would lead to the development of a usable definition for international law or history.<sup>46</sup> In fact, the opposite occurred. Crimes against humanity was the main charge against the defendants but, based on its description in the indictment, the prosecutors did not need to prove that the individual acts of murder committed by the defendants were part of a larger group crime. Instead, the prosecution only needed to show that an individual defendant had ordered or participated in an individual and seemingly disconnected incident of mass murder.<sup>47</sup> As a result of the indictment the prosecutors made no attempt to show that the murders the defendants had participated in constituted a systematic program of murdering Jews; it was accepted as fact.<sup>48</sup>

Today, genocide is described in the UN Charter as the deliberate and systematic attempt by one group to kill, in whole or in part, another racial, religious, or ethnic group. This is not how crimes against humanity were prosecuted at Nuremberg, not even against the *Einsatzgruppen*

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44. Earl, *supra* note 42, at 17 (case 1 against the Nazi doctors and Case 8 against members of the Race and Resettlement office both invoked genocide to describe the crimes of the defendants).

45. Interview with Benjamin B. Ferencz (Apr. 24, 1997).

46. *Opening Statement of the Prosecution*, IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 30–31 (U.S. Gov't Printing Office Oct. 1946–Apr. 1949).

47. *Amended Indictment*, *supra* note 1, at 15–20.

48. *Id.*

leaders who arguably formed a very distinct group and whose sole task was to kill other distinct groups. No effort whatsoever was made to explicate the group nature of the crime. This is largely because crimes against humanity were liberally defined to include individual murder. Thus, the prosecution relied on tried and true methods of criminal prosecution that enabled them to secure convictions on an individual basis. This may have been a wise course of action; after all, prosecutors in international criminal tribunals today have great difficulty securing convictions for genocide because the burden of proof is so high that it is difficult to illustrate an individual perpetrator's intention to destroy the group.<sup>49</sup>

The most famous instance maybe that of Slobodan Milošević. Before his death in March 2006, Milošević taunted ICTY prosecutors by daring them to prove that he had “intended” to kill Bosnian Serbs. Of course the prosecutors never had the opportunity to do so because he died before the conclusion of the trial. Importantly, the “intention to destroy the group” is what distinguishes crimes against humanity from genocide today. By opting to prosecute defendants along more traditional criminal lines, the attorneys ensured an extremely high rate of conviction, and in the case of the *Einsatzgruppen* trial, near perfect. Even though the *Einsatzgruppen* trial introduced the world to a fairly thorough description of genocide, in the end, the issue was largely avoided as a legal concept, and the prosecutors thereby missed an early opportunity to develop it as such.

#### IV. OHLENDORF'S NARRATIVE OF THE *FÜHRERBEFEHL* AND ITS IMPACT(S)

As the only trial to deal exclusively with crimes against Jews, the *Einsatzgruppen* case occupies a special place in our understanding of the history of the Final Solution. The narrative of events, as they were explicated after the war, is based largely on trial testimony from the Nuremberg courtroom—in particular, the testimony given by the lead defendant, Otto Ohlendorf. Important to the historical record, the details of Ohlendorf's testimony went unchallenged. Perhaps a less enigmatic person would have been questioned more rigorously by the court, but not Ohlendorf. Ohlendorf controlled proceedings in the courtroom from his very first appearance in 1946, when he was a witness for the prosecu-

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49. See, e.g., NICOLAS A. JONES, *THE COURTS OF GENOCIDE: POLITICS AND THE RULE OF LAW IN RWANDA AND ARUSHIA* (Routledge 2010); WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* (Cambridge Univ. Press 2006); KARIN N. CALVO-GOLLER, *THE TRIAL PROCEEDINGS OF THE INTERNATIONAL CRIMINAL COURT: ICTY AND ICTR PRECEDENTS* (Martinus Nijhoff 2006).

tion at the IMT. He (and his crimes) commanded attention and few doubted the veracity of his pre-trial confessions or trial testimony, even the presiding judge felt he was the “very personification of . . . truth.”<sup>50</sup>

More important than what Ohlendorf said about individual Nazi personnel was what he said regarding the genesis and timing of the Final Solution. He especially targeted how it was carried out, when it was decided as policy, and who made the decision. Not insignificantly, these questions formed the core of the *Einsatzgruppen* trial. Because the prosecution had no documentation, whatsoever, they looked to the defendants for answers to prove who ordered the murders, when they were ordered, or under what circumstances. More than any of the co-accused, the court believed Ohlendorf because his knowledge of events appeared most authoritative.

Why was Ohlendorf’s testimony so compelling? Part of the reason was his gift of speech, and according to his contemporaries, he was also charming, well-mannered, and smart. Undoubtedly many of the major war criminals were intelligent, but according to Nuremberg psychologists, Ohlendorf was among the brightest in custody, having one of the highest IQs of any of the Nuremberg defendants.<sup>51</sup> Reminiscent of a modern-day celebrity, Ohlendorf attracted attention. People were ghoulishly fascinated by him and the crimes he had committed, and they came to court specifically to see him.<sup>52</sup> Quite simply, Ohlendorf was a young, articulate and unwavering defendant who captivated his audience. No one, especially not the presiding judge, Michael Musmanno, doubted he was a reliable source of information.

What did Ohlendorf have to say? According to one British intelligence report Ohlendorf was determined to explain every detail of his experiences during the life of the Reich. He was, the report explains, “quite ready to give details of his organisation and . . . condemn fellow Nazis. He asked for one hour to explain the development of the SD and its place in the Nazi Party. This intimate session, which he begged for repeatedly, had to be denied him for lack of time.”<sup>53</sup> There was ample

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50. Michael A. Musmanno, commentary, *Review of Film Judgement at Nuremberg*, in MMP (1961) (on file with Gumberg Library, Duquesne University, Pittsburgh, Pennsylvania).

51. See Selbst die Schwester, *Unbedingt Notwendig*, DER SPIEGEL (Feb. 7, 1948), <http://www.spiegel.de/spiegel/print/d-44415555.html>.

52. *Id.*

53. Supreme Headquarters Allied Expeditionary Force, *Second Preliminary Interrogation Report of G-2 Special Sections* (June, 10 1945), in RECORDS OF THE ARMY STAFF, RECORDS OF THE OFFICE OF THE ASSISTANT CHIEF OF STAFF G-2, SECURITY CLASSIFIED INTELLIGENCE AND INVESTIGATIVE DOSSIERS OF THE COUNTER INTELLIGENCE CORPS (on file with Nat’l Archives & Records Admin., Record Group 319, Box 165a, folder Ohlendorf).

opportunity for Ohlendorf to tell the story of the *Einsatzgruppen* and their role in the Final Solution. After all, he was arrested in May 1945 and was not indicted until July 1947. This gave him more than two years, forty interrogations, and three war crimes trials to disclose the way the Reich functioned and how policy unfolded. He never ran out of new information to tell his interrogators and often remembered forgotten details in subsequent meetings. Whether or not this was a survival strategy is difficult to tell; what is for certain is that Ohlendorf never seemed to tire of talking. Nor did his captors seem to tire of asking him questions when they interrogated him more than three dozen times. Prior to October 1945, the main focus of his discussions was organizational (structural); after October, though, the focus shifted to the war on the eastern front and the role of the *Einsatzgruppen* in the extermination policy of the Reich that Ohlendorf noted matter-of-factly, had begun before the invasion of the Soviet Union in June 1941.<sup>54</sup>

The genesis of orders to the *Einsatzgruppen* is a source of some debate among historians, and of interest to legal scholars largely because of its relationship to the issue of intention. In 1945, Ohlendorf stated in no uncertain terms that the decision to “exterminate all Jews” had been made before June 1941 “by Hitler directly,” and that Himmler had repeated Hitler’s orders orally on two occasions—once in May 1941 (four weeks before the *Einsatzgruppen* were deployed), and again in September when he visited the front.<sup>55</sup> Ohlendorf made it perfectly clear who had been in charge of operations. For example, when asked to clarify exactly how much leeway *Einsatzgruppen* leaders had in the course of their daily operations, he was adamant: they had no independence and operated under strict “orders . . . from Berlin.”<sup>56</sup> The *Einsatzgruppen*, Ohlendorf explained, were controlled by higher authorities; Hitler, Himmler, and Heydrich were their bosses and because of this, the individual leaders of the four units had no room for manoeuvre.<sup>57</sup> Ohlendorf remained faithful to this story during his entire incarceration.

When Ohlendorf disclosed that Hitler’s *Führerbefehl* order—to murder all Soviet Jews, men, women, and children—was issued before the deployment of the groups in June 1941, no one doubted him because

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54. Summary, Morning Interrogation of Otto Ohlendorf (October 24, 1945), *supra* note 17, at 1–3.

55. *Id.*; Summary, Evening Interrogation of Ohlendorf, *supra* note 21, at 7–8, 14–15; see also Letter from Lt. Col. S.W. Brookhart to Colonel Amen, *supra* note 17.

56. Summary, Evening Interrogation of Ohlendorf, *supra* note 21, at 7–8.

57. *Id.*; Summary, Morning Interrogation of Otto Ohlendorf (October 24, 1945), *supra* note 17, at 1–2.

of the lack of documented facts available to the prosecution. This reinforced the prosecution's pre-existing ideas about the hierarchy of the Third Reich. It especially reinforced their assumption that all decisions pertaining to racial policy and the Jews had come directly from Hitler.<sup>58</sup> The timing of the order was also not questioned. As a legal defense, lawyers cited the order to justify, excuse, and explain the behavior of their clients in Russia. After all, obedience to superior-orders was one of their principal defenses.

On the other hand, the judges and the prosecutors also saw superior-orders as integral to the trial because they believed it was *the directive* that was at the heart of Hitler's racial war against the Jews. Depending on which side of the case one was on, the *Führerbefehl* proved that the defendants were not responsible, and thus, legally innocent before the indictment (because they were following superior orders) or, according to the prosecution, that they were guilty because it meant there had been a racial war directed specifically at the Jews. Regardless of which side of the case one was on, the fact was that both sides argued that the order to murder the Jews was given before the *Einsatzgruppen* were deployed on June 22, 1941, and it came directly from Hitler. Once the court accepted the *Führerbefehl* as fact, they could make their case that the murder of Soviet Jews was not accidental, but rather premeditated by Hitler and intended to eradicate the entire Jewish population of Soviet Russia, perhaps even Europe—in what we call genocide today.<sup>59</sup> The proof of the crime was contained within the so-called *Einsatzgruppen* reports, which the prosecution entered as evidence because they detailed the exact number of murders, which the prosecution then linked to Hitler's long standing anti-Semitism, making a clear causal link between Hitler's hatred of the Jews and the *Einsatzgruppen*'s murder of them. As the prosecution made clear to the court, “[t]he actions of the *Einsatzgruppen* in the conquered territories will demonstrate the purpose for which they were organized,” namely the genocidal mass murder of “undesirable” groups.<sup>60</sup>

The issue of the *Führerbefehl* order to murder all Jews is extremely important to our historical understanding of the genesis of the Final Solution. Similarly, the *Einsatzgruppen* trial is central to the establishment of the intentionalist (premeditated) narrative, illustrating that the courtroom has had a significant impact on history. For example, in Hil-

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58. *Opening Statement of the Prosecution*, *supra* note 46, at 31 (the prosecution noted in their opening statement that, “They put their faith in Hitler and their hope in his regime”).

59. *Id.*

60. *Id.* at 37.

berg's original 1961 edition of *Destruction*, he seems to take Ohlendorf's claims at face value. He writes, "How was the killing phase brought about? Basically, we are dealing with two of Hitler's decisions. One order was given in the spring of 1941, during the planning of the invasion of the USSR; it provided that small units of the SS and Police be dispatched to Soviet territory, where they were to move from town to town to kill all Jewish inhabitants on the spot. This method may be called the "the mobile killing operations."<sup>61</sup> Clearly, the trial seems to have influenced interpretations. Not only did it make perfect sense that the *Einsatzgruppen* would be informed of their tasks before they were deployed, but also because other defendants reinforced Ohlendorf's claims that the *Einsatzgruppen* were organized for the express purpose of killing Jews. For instance, Walter Blume, head of *Sonderkommando 7a* in 1941, claimed that "during the setting-up of the *Einsatzgruppen* and *Einsatzkommandos* during the months of May–June 1941... we were already being instructed about the tasks of exterminating the Jews," implying that Nazi plans had targeted Jews specifically and in advance of the invasion.<sup>62</sup> The testimony of the participants was convincing and meshed perfectly with the prosecution's view of the events and the motivation of the Nazis for carrying out a genocide. Therefore, it should not be surprising that historians were influenced by this interpretation.

Another interpretive and highly contentious issue to come out of the *Einsatzgruppen* trial concerns how the victims were perceived to have behaved in reaction to deportations and almost certain death, like in the *Einsatzgruppen* executions, instead of how the perpetrators perceived the victims. When asked, many perpetrators told the courts at Nuremberg that the victims went to their deaths passively and without any resistance whatsoever. The idea of the passive victim has been reinforced with the images that have emerged subsequently, often taken illegally and by members of the killing squads themselves, which depicts the Jewish victims docilely waiting to be deported or shot by *Einsatzgruppen* personnel. We have also heard accounts of the orderly lines of people marching to the crematoria in Auschwitz without so much as a single person stepping out of line. As Emmanuel Ringelblum so passionately asked after the clearing of the Warsaw ghetto, "why didn't we resist when they began to resettle 300,000 Jews from War-

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61. HILBERG, *supra* note 13, at 177.

62. *Affidavit of Walter Blume (June 29, 1947)*, IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 139–140 (U.S. Gov't Printing Office Oct. 1946–Apr. 1947).

saw? Why did we allow ourselves to be led like sheep to the slaughter? Why did everything come so easy to the enemy? Why didn't the hangmen suffer a single casualty?"<sup>63</sup>

Hilberg had early answers to these troubling questions, but they were not well received by the Jewish community as the political scientist conceived of Jewish passivity due to 2000 years of Jewish history. According to his fatalistic reading, European Jewry had learned that if they waited long enough the persecution would end and they could resume their normal lives once again.<sup>64</sup> History then, was responsible for the complete lack of resistance we see in the photographic images of the killing process.<sup>65</sup> Not surprisingly, Hilberg's interpretation set off a historiographical firestorm, which still rages today. It was taken up most famously by Hannah Arendt in her discussion regarding the role of the Jewish councils.<sup>66</sup> The question is, "What evidence did Hilberg use to draw these conclusions?" Tellingly, it all came from the perpetrators, found in the *Einsatzgruppen* trial materials and other Nuremberg trials documents. There are numerous examples in which the perpetrators claim that the victims did not resist or fight back, but rather complied with their orders to line-up and be shot. For example, in a discussion of *Einsatzgruppen D's* use of the gas van, Ohlendorf insisted that the victims had lined up and entered the gas vans without any resistance and had felt nothing in the process of being killed.<sup>67</sup> In terms of "resettlement," as an effective means of pacification, the *Einsatzgruppen* relied on the Jewish councils and local committee members to identify victims and gather them for transportation to death camps since the Jews implicitly trusted their community leaders.<sup>68</sup> We also know that Hilberg's interpretation is highly problematic because it duplicates perpetrator perceptions by displaying a peculiar lack of *Quellenkritik* in one of the otherwise most scrupulous researchers of the Holocaust. We have ample evidence to suggest that victims were not oblivious to their fate, nor were the killing processes pain-free. The scholarship on this topic has changed substantially in the years since the first publication of Hilberg's *Destruction*, and historians have convincingly shown it was shock and paralysis, rather than fatalism and absence of resolve, which accounts for the apparent lack of resistance. The irony is that the stereotype of

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63. HILBERG, *supra* note 13, at 321.

64. *Id.* at 662–63.

65. *See Id.* at 662–69.

66. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (Penguin rev. ed. & enlarged ed. 1964).

67. Summary, Evening Interrogation of Ohlendorf, *supra* note 21, at 22–23.

68. *Id.* at 15–16.

Jewish passivity was doubly promoted in the trial. First by Ohlendorf and his co-defendants and second by the prosecution, whose decision to try their case by documents ensured that the perpetrators' were the only voices in the courtroom.

## V. CONCLUSION

From our understanding, the events of 1941 and their relationship to the Final Solution is clearly embedded in the legal process. What matters in criminal law is proving the facts of the crime. In the *Einsatzgruppen* trial, the issue that mattered to the prosecution was that civilians had been killed in record numbers by the defendants, not the issue of when the decision to kill them was made. The defendants were commanders of the killings and testified that the mass murder of Jews was a direct result of an order from Hitler. The order had been decided before the invasion of the Soviet Union was initiated and disseminated by Himmler and Heydrich. These facts were never questioned. Rather, the emphasis during cross-examination was on why the defendants participated in the killing process, what brought them to it, and how they felt about it. The issue was not how, when, or from whom the decision was made.

Witness testimony and the way the prosecution interprets it is integral to the historians' craft. The tone and tenor of witness testimony and the cross-examination of the witnesses factor into our professional judgment about the events under question just as much as the supporting documents of a case do. As Christopher Browning astutely observed when he was working with trial documents, the believability of witnesses is on a case-by-case basis, and ultimately, it is up to the individual historian who is using the court records.<sup>69</sup> The fact is that war crimes trials are oral forums, where a defendant's public performance, as much as the documentation used to try him, impacts the courts view of events. Just like historians, courts of law privilege documentation over oral testimony. However, if the court has no documentary evidence, facts are established through the direct testimony of witnesses. And just like the way in which historians exercise their judgment, the court determines what is and what is not true or believable.

In the case of the timing and nature of the *Führerbefehl*, the court had no documentation about these issues, but they did have an articu-

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69. Christopher Browning, *German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony*, in *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE FINAL SOLUTION* 29–30 (Saul Friedlander ed., Harv. Univ. Press 1992).

late, smart, and verbose witness whose version of events seemed reliable. Even before the trial began, the prosecution had already made up their mind when they accepted as fact Ohlendorf's version of events concerning the organization of the *Einsatzgruppen* and the nature and timing of their orders. The *Führerbefehl* claim fit perfectly with the prosecutors' belief that the actions of the *Einsatzgruppen* had been part of a master plan to intentionally and systematically exterminate the Jews and take over Europe. In a civilian court, this would have been a clear case of first-degree murder. In the court at Nuremberg, it proved easily that these men were guilty of crimes against humanity and it is this intentionalist narrative that historians subsequently embraced.

There can be little doubt that in the history of the Holocaust, the *Einsatzgruppen* trial occupies an important place. The trial provides a relatively in-depth and descriptive narrative of the crimes perpetrated in Russia and the Baltic states during World War II that came directly from the perpetrators themselves and in a relatively accurate fashion, supporting Lawrence Douglas's claim that war crimes trials can succeed both legally and didactically.<sup>70</sup> This trial highlighted central planning as a feature of genocide, which is a historically contentious claim. Yet beyond that, the trial also proved that central planning does not nullify the role of human agency in carrying out those orders either legally or morally. The perpetrators themselves admitted that they could refuse orders and sometimes without repercussion. The legal and procedural norms that governed the *Einsatzgruppen* trial may have distorted our historical understanding of certain elements of the Final Solution, but the law did not get everything wrong. Broadly speaking, it recognized the racial crimes of the Third Reich were not solely the responsibility of one man; rather, it highlighted just how many people and agencies were required to carry out Hitler's vision. This has had a significant impact on the way atrocity trials are prosecuted today.<sup>71</sup> As the *Einsatzgruppen* trial so clearly illustrates, trials of these perpetrators were an attempt by the Americans to redeem the tragedies of World War II and that practice continues in American-influenced international and national courts.

Mischaracterized sometimes as "victor's justice", Nuremberg was the first time in history that other governments held major and minor

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70. LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 3 (Yale Univ. Press 2001).

71. G.A. Res. 260 (III), Convention on the Prevention and Punishment of the Crime of Genocide, at Art. 4 (Dec. 9, 1948), <http://www.un.org/millennium/law/iv-1.htm> ("Persons committing genocide of any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.")

leaders of a legitimate government accountable for crimes committed during wartime. Although law has always been important in the west, Nuremberg was infused with a moral task. Not only did the planners want to punish individual Nazis, they also wanted to teach Germans a lesson by showing them the government they supported was evil, and showing democracy was a better form of governance than authoritarianism. They wanted Germans to become democrats. They believed the best way to do this was to publicly illustrate that liberal democratic justice could be fair. They would do this by using law. Thus, I would argue, Nuremberg was accompanied by a real sense of American idealism; a form of optimism rooted in a faith in the transformative power of law. And that faith, I would argue, is still with us today.