

**More than Murder:
Prosecuting Crimes against Humanity at the Nuremberg SS
Einsatzgruppen Trial**

**Danica Damplo
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**Seminar Advisor: Dr. Neslihan Senocak
Second Reader: Dr. Tarik Cyril Amar**

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Abstract

This thesis examines the American Nuremberg Military Tribunal (NMT) SS Einsatzgruppen Trial. The SS Einsatzgruppen followed the Wehrmacht into the Soviet Union in June 1941, responsible for political and racial cleansing of German occupied territories. The Einsatzgruppen murdered approximately one million men, women and children. After the war the U.S charged twenty-four former Einsatzgruppen officers with membership in a criminal organization, war crimes and crimes against humanity. This trial has been largely overshadowed by the International Military Tribunal (IMT) trial for major war criminals and even the few historians who referenced the NMT Einsatzgruppen Trial have focused on the defendants and judges rather than the prosecution.

This thesis will analyze the case made by the American prosecution at the Einsatzgruppen Trial, and how they proved and argued for the individual responsibility for crimes against humanity, a relatively new charge. In this process the American prosecutors developed new interpretations of individual accountability and the meaning of “humanity” in international law. This thesis reviews each of the three main components of the prosecution’s case; how they identified international jurisdiction for the trial, interpreted their evidence and countered the claims of the defendants. After a review of the aftermath of the trial, this thesis concludes with the position of the trial in what lead prosecutor Benjamin Ferencz called “the awakening of the human conscience.”

Introduction

“It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenseless men, women, and children. This was the tragic fulfillment of a program of intolerance and arrogance. Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by international penal action man's right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law.—
Prosecutor Benjamin Ferencz, Opening Statement of the Einsatzgruppen Trial

With this statement lead prosecutor Benjamin Ferencz articulated the desperate desire at Nuremberg to repair laws shattered by Nazi crimes and to reconstitute a sense of morality and humanity in international law. Perhaps the most interesting of the Nuremberg Trials with the farthest-reaching effects on international criminal law was the Einsatzgruppen Trial of 1947, where the Americans prosecuted the SS Einsatzgruppen, responsible for over one million victims, for individual complicity in crimes against humanity. Reporters at the Einsatzgruppen Trial dubbed it the “biggest murder trial in history.”¹ The charges themselves were fairly new, the trauma fairly recent, and it was not only on the evidence, but on evolving international law and logic that the prosecution built their case. The very existence of the trial marks an attempt by the prosecution to resolve ideas of humanity, morality and law with the gruesome reality of the Einsatzgruppen, itself a mutation of perverted laws, a morality based on racial discrimination and the dehumanization sending millions to their destruction. This trial emerged in response to the impotence of international law and norms to protect Nazi victims and the manipulation of national law under the Third Reich.

The Einsatzgruppen Trial gives historians a window into this unique case in which questions of individual responsibility and humanity became intertwined in the pursuit of justice. To understand the contributions of this trial and the prosecution, one must consider how they legally built their case, perceived international law at the time, interpreted the evidence at their

¹ Hilary Camille Earl, *the Nuremberg SS-Einsatzgruppen trial, 1945-1958: Atrocity, Law, and History*, (Cambridge: Cambridge University Press, 2009).

disposal, and contended with the claims of the defendants. The present thesis is a study of this trial based largely on the prosecution records and it intends at understanding how the prosecution built their argument. It is rare that one gets to see such an immediate, articulate response to genocide. At Nuremberg a team of American prosecutors stood in a refurbished courtroom across from Hitler's executioners, in a burned out city where infamous Nazi rallies once filled the streets. The final judgment of the trial speaks to the efforts of these men to repair what appeared to be have been irretrievably broken by the war. At Nuremberg "amid the wreckage of the six continents, amid the shattered hearts of the world, amid the sufferings of those who have borne the cross of disillusionment and despair, mankind pleads for an understanding which will prevent anything like this happening again."²

In 1945, the Allied powers of the United States, Britain, France and the Soviet Union organized the International Military Tribunal (IMT) to prosecute the leaders of the Third Reich.³ After the final judgment of the IMT trial, the U.S formed the Nuremberg Military Tribunal (NMT), with Brigadier General Telford Taylor as Chief Counsel. These twelve American trials drew international jurisdiction from the agreements of the IMT and brought to justice lower level members of the Reich including doctors, lawyers, the SS and industrialists.⁴ While the IMT brought high level officials to the docks, the NMT focused on lower level defendants. While the

² "Opinion and Judgment of the Tribunal; Activities of the Einsatzgruppen," Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 (1949-1953): the Einsatzgruppen Case http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=trials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall (Accessed September 18, 2011).

³ Robert H Jackson, "Opening Statement for the Prosecution of the Major War Criminals Case," IMT Trial <http://avalon.law.yale.edu/imt/11-21-45.asp> (Accessed September 28, 2011).

⁴ "Jurisdictional Basis of the Twelve Subsequent War Crimes Trials at Nuernberg," Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 23 (1949-1953) <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?collection=trials&handle=hein.trials/twc0015&type=Text&id=51> (Accessed September 22, 2011).

NMT Doctors Trial and NMT industrialist trials charged medical and slave labor aspects of persecution, the Einsatzgruppen Trial focused on direct, targeted murder as genocide.

The NMT Einsatzgruppen Trial owes its birth to a fortuitous discovery by an NMT war crimes researcher and the determination of a twenty-seven-year-old lawyer from Brooklyn. Lead prosecutor Benjamin Ferencz remembers when he was first handed the SS Einsatzgruppen Operational Situation Reports, discovered in the Foreign Ministry Files in Berlin.⁵ The Reports bluntly listed the numbers of Jews, Communists, partisans and Gypsies exterminated in German occupied Soviet territories. A stunned Ferencz began counting the dead. When he reached one million, he flew to Nuremberg to convince Taylor that these murders warranted a trial.⁶ Despite limited time and resources, Taylor agreed and assigned Ferencz to the case, making him the youngest prosecutor at the NMT. They charged 24 Einsatzgruppen Officers with membership in a criminal organization, war crimes and, most importantly, crimes against humanity.

The prosecution focused on proving the defendants individually responsible for crimes against humanity. They claimed that unlike war crimes or spontaneous acts of brutality, it is the Nazi doctrine of the dehumanization and extermination of racial groups that “endangers all men.”⁷ The prosecution charged the defendants with executing this doctrine to the destruction of over a million lives. In proving their case and establishing a precedent for future trials, the prosecution declared “humanity” to be a sovereignty and a race with its own laws and its own conscience. They stressed that only with the defense of humanity, stretched across state lines and defined by international law, can individual lives and rights be protected.

⁵ Interview with Benjamin Ferencz, October 5, 2011.

⁶ Interview with Benjamin Ferencz, October 5, 2011. Also see Hilary Camille Earl's *The Nuremberg SS Einsatzgruppen Trial* and Roland Headland's *Messages of Murder* for more details.

⁷ “Opening Statement of the Prosecution,” Einsatzgruppen Case.

a. Historiography

The horrors of the Holocaust continue to haunt historical texts and debates today. Yet despite a recent burst of American interest in the Einsatzgruppen, for the most part in public perceptions the killing pits of Hitler's security battalions have been eclipsed by the systematic horrors wrought in Auschwitz and other death camps.⁸ Nonetheless, the Einsatzgruppen appear in many works chronicling the Holocaust, with several texts focusing on them and their auxiliaries. Much of this work draws from evidence uncovered at the Einsatzgruppen Trial, but debates persist on the motivations behind the actions of the Einsatzgruppen. While at the time of the trial the public seemed to accept strong anti-Semitism as an explanation, recent scholarship has focused more on social and behavioral factors than ideology, leading to a stronger synthesis of the two. If one were to create a spectrum across which one could string the various explanations for the Einsatzgruppen's willful exterminations, Daniel Jonah Goldhagen's thesis of eliminationist anti-Semitism, based primarily on ideological factors would be on one end, and Christopher Browning's work on the Einsatzgruppen's police auxiliaries, focusing on socializing factors, on the other.⁹ Scholar Richard Rhodes does not dismiss the role of ideology but downplays it in favor of conditioning and he argues that these men "learned to be violent."¹⁰ In this scholarly debate one might expect the prosecution's case to fall squarely in the ideology camp, however, this idea will be modified in the fourth chapter.

⁸ For more on public misconceptions on the Holocaust see Timothy Snyder's *Bloodlands*.

⁹ Browning's work does focus on the police auxiliaries, not the Einsatzgruppen, and these auxiliaries did not receive the same extensive indoctrination many attribute to the Einsatzgruppen, nonetheless they committed the same crimes and there is a Browning-Goldhagen debate today on the issue of motivation. For more, see both works and Browning's newest addition of his *Ordinary Men*, includes his response to Goldhagen's thesis. Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, New York: Knopf: 1996, Browning, Christopher R. *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*. New York: Harper Collins, 1992 (reissued in 1998).

¹⁰ Richard Rhodes, *Masters of Death: the SS-Einsatzgruppen and the Invention of the Holocaust*, New York: A.A. Knopf, 2002, 21.

The IMT received far more attention than the NMT trials at the time largely due to the infamy of its defendants, its precedents for international arbitration, accusations of victor's justice and controversial charges. The NMT received less media attention, and has since left "far less of a public historical footprint," even though the NMT trials proved to be "more legally adventurous" than their predecessor.¹¹ Legal researchers and practitioners dominated early, limited scholarship on the NMT.¹² Meanwhile, the Cold War prevented the consensus necessary for international trials until the 1990s, when genocides in Rwanda and Yugoslavia spawned International Tribunals and the International Criminal Court (ICC), while resurrecting Nuremberg "as both precedent and inspiration."¹³

Hillary Camille Earl's *The Nuremberg SS Einsatzgruppen Trial 1945-1958*, is one the only American study to deal exclusively with the mechanics of the NMT Einsatzgruppen Trial.¹⁴ Earl provides a largely descriptive account of the trial as a whole, although she does focus considerably on the defendants and defense. She and scholars Donald Bloxham and Margaret deGuzman imply that the prosecution, armed with incriminating documents, saw this as a straightforward case.¹⁵ The prosecution presented their case in a few days connecting defendants to the acts of the Einsatzgruppen, and these scholars suggest that the prosecution's case does not merit further analysis. However, the prosecution not only aimed to connect the defendants to the war crimes, but to detail a program of targeted extermination and redefine individual responsibility for the relatively new charge of crimes against humanity. Earl and Bloxham also

¹¹ Linda S Bishai, "Leaving Nuremberg: America's Love/Hate Relationship with International Law," *Review of International Studies* (2008): 436.

¹² Devin O Pendas. "Seeking Justice, Finding Law: Nazi Trials in Postwar Europe," *The Journal of Modern History* 81, No. 2 (June 2009): 350.

¹³ Pendas, "Seeking Justice, Finding Law," 350.

¹⁴ This thesis will examine English-language, mainly American scholarship and documents.

¹⁵ Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity," *Human Rights Quarterly* 22, No. 2 (2000): 343, Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, London: Oxford University Press, 2001.

cite the prosecution as stopping short of resolving historical debates and that they remained limited in their interpretations by the nature of law. While the evidence against the defendants showed them guilty of war crimes, the prosecution still had to better define and apply crimes against humanity as a term, and to prove individual culpability for acts for condoned by the state. They are one of the few NMT trials to focus their case around crimes against humanity and the only one dealing with direct mass murder by bullets. This thesis will examine the undervalued and understudied contributions of the prosecution of the Einsatzgruppen Trial.

Historians can reconstruct an event through determining the facts and also by continually reinterpreting its dimensions, constantly reevaluating interpretations. Historians of the Nuremberg trials have suggested the prosecution as incapable of producing insightful analysis. However, legal teams, especially in the case of Nuremberg, where developing an accurate narrative was an explicitly stated goal, seek to not only determine what actually transpired but to interpret it correctly for the judges. The courtroom also provided an interesting space for open debate over differing interpretations.¹⁶ As Earl, deGuzman and Bloxham suggest, trials are constrained by their own nature; the prosecution focuses on the character and crimes of the perpetrators and won't look beyond the evidence at hand and the task ahead. But to better interpret the prosecution's case, one should approach their law as a window and a framework to better understand the historical rather than see it as a limitation on the prosecution's own investigations. Considering the lack of secondary historiography on the Einsatzgruppen, and the factors overshadowing and misconstruing the legal and historical validity of the trial, this thesis will focus on the primary sources available to the prosecution at the time, marking the legal and historical context in which they operated. This is one of the first cases of crimes against

¹⁶ Helmut Langerbein, *Hitler's Death Squads: the Logic of Mass Murder*, College Station: Texas A & M University Press, 2004, 9.

humanity on trial, certainly the first to focus on individual officers, not politicians, held directly responsible for genocide and charged by an international tribunal. This is one of the first cases to put early definitions of genocide and crimes against humanity into practice, part of a trend of trials at Nuremberg reconsidering the position of the individual in international law.

This thesis will examine the prosecution's case by exploring its three principle components; in Chapter I, justification for the trial and charge through established precedent and law, in Chapter II, evidence as proof of guilt and genocide (Operational Reports, Affidavits, SS Personnel Files, Communiqués, no witnesses) and finally, in Chapter III, the prosecution's arguments in response to the defense. This thesis will also identify misconceptions about the trial, such as the controversial "Hitler Order" and the focus on anti-Semitism as a motive, which have overshadowed the prosecution's efforts. After a chapter on the effects of the trial, the concluding chapter will briefly examine the historical and legal implications of the Einsatzgruppen Trial for international law today.

Chapter I

Establishing Jurisdiction and Precedent at Nuremberg

By the end of the war Allied forces had been liberating death camps for months, and the records and relics of Nazi crimes lay strewn across battlefields and barbed wire. In early debates about postwar justice, many critics argued that the Allies ought to simply have the defendants “dispatched out of hand,” a politically expedient process that would have failed to uncover any details about the character of the deceased or their crimes.¹⁷ As Telford Taylor remarked about the Einsatzgruppen, “if we had applied to these defendants the kind of law which they administered prior to the executions they carried out, this trial would have ended the day before it began.”¹⁸ American Secretary of War Henry Stimson remarked at the time that releasing Nazi war criminals would imply that no crime had been committed, while summary executions would cost the Allies the moral high ground, and so “our anger, as righteous anger, must be subject to the law.”¹⁹ The Allies chose to reinstate the rule of law, holding a series of public trials in “response to Hitler’s infamy.”²⁰ These trials would not only expose the atrocities of the past, but also provide a series of cases for the future.²¹ Both the International Military Tribunal (IMT) and its American successor, the Nuremberg Military Tribunal (NMT), had to establish the legitimacy of the courts and their jurisdiction over the defendants. Although the IMT and NMT would face

¹⁷ Herbert Wechsler, “The Issues of the Nuremberg Trial,” *Political Science Quarterly* 62, No. 1 (1947): 23, Max Radin, “Justice at Nuremberg,” *Foreign Affairs* 24, No. 3 (1946): 374.

¹⁸ “Closing Statement of the Prosecution, 13 February 1948, by Brigadier General Telford Taylor,” *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 i (1949-1953): the Einsatzgruppen Case* http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=trials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall (Accessed September 18, 2011).

¹⁹ Henry L Stimson, “The Nuremberg Trial: Landmark in Law,” *Foreign Affairs* 25, No. 2 (1947): 179.

²⁰ Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History*, New York: Palgrave Macmillan, 2007, 57.

²¹ Telford Taylor, “The Nuremberg War Crimes Trials: An Appraisal,” *Proceedings of the Academy of Political Science* 23, No. 3, *The United States and the Atlantic Community* (May, 1949): 34.

criticism from American judges and some German civilians as “victors’ trials” of the Allies over the conquered Axis powers, Ferencz wrote at the time that “the conflict which engulfed most of the world left no real neutrals.”²²

The prosecution at the Einsatzgruppen Trial established legal parentage by presenting evidence of past interstate agreements and international consensus. The prosecution also established an ancestry of declarations, agreements and arbitrations related to international law and the prosecution of criminals across territories and nationalities. International law at the time considered states as primary actors, with individuals receiving automatic immunity for political acts. As this would have made convictions impossible, the IMT and NMT effectively restricted state sovereignty in order to prosecute individuals, recognizing that a state functions through its citizens. This also required revising international law, as previous international laws and written conventions proved too brittle a barricade against the brutality of war, especially with the new weapons and madness of modern warfare.²³ Mindful of the legal principle of *nulla poena sine lege* (no penalty without law), the IMT and later the NMT prosecution proved that they could charge the defendants with crimes against international law that existed before the war. The NMT prosecution had to establish precedent as well, although Earl concedes that little scholarship has been done on the origins of the NMT, often overshadowed by the IMT.²⁴ This chapter will trace the origins and jurisdiction of the Einsatzgruppen trial in agreements, declarations, trials and ideas with special attention to what would be relevant to the Einsatzgruppen prosecution team. As they came to challenge traditional ideas of sovereignty and

²² Benjamin B Ferencz, “Nurnberg Trial Procedure and the Rights of the Accused,” *Journal of Criminal Law and Criminology* (1931-1951) 39, No. 2 (1948): 146.

²³ Meltzer, Bernard, “A Note on Some Aspects of the Nuremberg Debate,” *The University of Chicago Law Review* 14, No. 3 (1947): 463.

²⁴ For more detail into the transition from the NMT to the IMT, refer to Earl’s chapter on “the United States and the Origins of the Subsequent Nuremberg Trials,” Earl, 24.

to connect to past declarations, the prosecution developed new ideas about humanity giving it sovereignty and strength in international law.

a. Declarations and Agreements

Secretary of War Henry Stimson observed that American and German legal critics of the Nuremberg Trial claimed to see little evidence “that before 1945 we considered the capture and conviction of such aggressors to be our legal duty.”²⁵ And yet the desire to visit justice on war criminals can be seen as early as 1942. A memorandum first prepared for Roosevelt at the Yalta Conference and later given to Justice Robert H Jackson, lead U.S Prosecutor at the IMT, contained an annexed American press statement from December 1942 proclaiming that the Nazis “are now carrying into effect Hitler's oft-repeated intention to exterminate the Jewish people in Europe” and that the Allies had resolved that the Nazis shall “not escape retribution.”²⁶ The later crimes against humanity charge described the SS as exterminating Jewish victims, and here the American press identified Nazi crimes as more than random acts of violence. That same year many European states signed the St. James Declaration, establishing a consensus on postwar justice.²⁷ In the pivotal 1943 Moscow Declaration, the main Allies, having witnessed atrocities by Hitler’s troops and speaking on behalf of the “united nations,” declared that those “whose offences have no particular geographical localization... will be punished by the joint decision” of

²⁵ Henry L. Stimson, “The Nuremberg Trial: Landmark in Law,” *Foreign Affairs* 25, No. 2 (1947): 184.

²⁶ Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22 1945 (International Conference on Military Trials : London, 1945) <http://avalon.law.yale.edu/imt/jack01.asp>, (Accessed September 23, 2011), “German Policy of Extermination of the Jewish Race (Released to the press by the Department of State December 17, 1942) Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22 1945 (International Conference on Military Trials : London, 1945) <http://avalon.law.yale.edu/imt/jack01.asp> (Accessed September 23, 2011)

²⁷ “Punishment for War Crimes (1942) The Inter-Allied Declaration,” (Signatories: (Belgium, Czechoslovakia, Free France, Greece, Holland, Luxembourg, Norway, Poland and Yugoslavia)) <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.hoil/pnhfowc0001&id=3&type=text&collection=trials> (Accessed September 23, 2011).

the Allies.²⁸ They claimed that the international community could establish joint jurisdiction. President Roosevelt issued a statement in March 1944, declared Nazi crimes beginning in peace and worsening in war constituted the “systematic murder of the Jews of Europe,” and he pledged that none of those responsible, leaders and subordinates would go unpunished as those aware of the crimes would be as guilty as the executioners.²⁹ This statement shows a public recognition of systematic extermination in peace and war. Roosevelt claimed that knowledge of crimes established guilt.³⁰ The Einsatzgruppen Trial prosecution would thus also argue that crimes against humanity could take place in peace and war, and would return to this question of accountability by casting the net of accountability over superiors and subordinates alike.

The Allies soon matched these declarations with practical steps toward justice; as early as 1943 they created the United Nations War Crimes Commission (before they formed the United Nations), and President Truman would pass Executive Order 9547 involving the U.S directly.³¹ The United Nations War Crimes Commission determined cases of criminals with no geographic location.³² On May 2, 1945 President Truman passed Executive Order 9547, voicing the United States early commitment to these trials.³³ Justice Jackson stated in a June 1945 report to the

²⁸ “Moscow Declaration,” Yale Lillian Goldman Law Library, <http://avalon.law.yale.edu/wwii/moscow.asp> (Accessed September 23, 2011)

²⁹ “Statement by the President [Released to the press by the White House, March 24, 1944]” Memorandum to President Roosevelt.

³⁰The President also specifically describes these crimes as committed “in the name of the German people” and asks the Germans to refuse to participate and “record the evidence that will one day be used to convict the guilty.” Statement by the President, 1944.

³¹ Telford Taylor’s Final Report to the Secretary of the Army on Nuremberg war crimes trials under Control Council Law no. 10 (Germany Territory under Allied occupation, 1945-1955 : U.S. Zone.

³² The Commission represented most of the UN (except Russia) and recorded the grievances of its members. “Justice Jackson’s Report to the President on Atrocities and War Crimes; June 7, 1945” Yale Lillian Goldman Library <http://avalon.law.yale.edu/imt/jack63.asp> (accessed November 4, 2009).

³³“ Executive Order 9547” May 2, 1945 <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&id=11&type=text&collection=trials> (Accessed September 23, 2011).

President: “it has cost unmeasured thousands of American lives to beat and bind these men; to free them without a trial would mock the dead and make cynics of the living.”³⁴

The London Agreement of August 8, 1945 provided the international consensus needed for the IMT trial. The London Agreement cited the Moscow Declaration and authorized the Allies to try those “whose offenses have no particular geographical location.”³⁵ This agreement also allowed for a “national or occupation court,” for each of the Allies to hold separate trials.³⁶ The four major powers signed the agreement on behalf of the international community and alongside the UN War Crimes Commission, providing for a more objective basis for jurisdiction than that of a single state seeking retribution. Thus, the London Agreement, with the IMT Charter annexed, became “an international law making treaty.”³⁷ This agreement would provide both substantive and adjective law; substantive in that the attached IMT charter defined the crimes and jurisdiction, while adjective in that it established the Tribunal.³⁸ Justice Jackson argued that this “made explicit and unambiguous” ideas and norms formerly implicit in international law, such as the attempted extermination of whole groups of people, for which individuals would be criminally liable.³⁹

The Allies signed Control Council Law 10 in December 20 1945, confirming their right to prosecute defendants in their own occupied territories for these international crimes. The NMT trials drew their jurisdiction from these aforementioned agreements as well as the right of any

³⁴ Michael Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History (The Bedford Series in History and Culture)*, Boston: Bedford/St. Martin's, 1997, 40-41.

³⁵ Moscow Declaration, 1, “London Agreement of 8 August 1945,” Nuremberg Trial Proceedings Vol. 1, Yale Lillian Goldman Law Library, <http://avalon.law.yale.edu/imt/imtchart.asp>, (Accessed September 23, 2011), 1.

³⁶ “London Agreement of 8 August 1945,” 1

³⁷ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947) “3 April 1947 memorandum to: general Taylor, subject: jurisdiction in cases of “Germans against Germans,” Columbia University, Diamond Law Library, New York, NY, 1.

³⁸ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947), “Germans against Germans,” 1

³⁹ Report to the President by Mr. Justice Jackson, October 7, 1946, Yale Lillian Goldman Law Library, <http://avalon.law.yale.edu/imt/jack63.asp> (Accessed September 28, 2011).

state to try war criminals. With the German surrender, the Allied Control Council became “the successor of the German government in sovereignty,” having jurisdiction over all German citizens.⁴⁰ Control Law 10 also cited the Moscow Declaration and London Agreement as “integral parts” of this law.⁴¹ At the Einsatzgruppen Trial, Prosecutor Ferencz cited international agreements and Council Law 10 as making the NMT trials “International Courts.”⁴² This allowed the Allies to divide up Nazi criminals for separate prosecution. American teams uncovered critical evidence on the Einsatzgruppen and acquired the defendants. Although the Einsatzgruppen had operated in the U.S.S.R, in his later correspondence General Taylor did not recall that the Soviets sought to try the Einsatzgruppen defendants or that the U.S made them the offer.⁴³ Polls taken at the time of the IMT trial showed a general interest from the German public in trials charging Germans for crimes against other Germans, which the NMT trials pursued.⁴⁴

Control Council Law 10 cast a wider net of jurisdiction; the NMT could prosecute men whose crimes had geographic origin and could charge crimes against humanity in peace as well as war. Linda Bishai notes that for the IMT, the Nazi’s final solution would only be prosecuted as part of aggressive war, respecting the internal sovereignty of the German state toward its own citizens.⁴⁵ The NMT trials would prove cautious about encroaching on state sovereignty, with only two trials, including the Einsatzgruppen Trial, not keeping crimes against humanity linked to war.⁴⁶ Control Law 10 provided a definition for crimes against humanity slightly different from that expressed in the Charter of the IMT, which charged “inhumane acts... before or during

⁴⁰ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947), “Germans against Germans,” 4

⁴¹ “Control Council Law No. 10,” Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949, <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&id=18&type=text&collection=trials> (Accessed September 23, 2011).

⁴² “Opening Statement of the Prosecution: Jurisdiction of the Court,” the Einsatzgruppen Case.

⁴³ TTP-14-7-21-455: Correspondence: 07.1985.

⁴⁴ TTP-5-1-6-100: NMT-PRO: Memo, (n.d)-Summary of German Public Opinion about the Nuremberg Proceedings.

⁴⁵ Bishai, “Leaving Nuremberg.”

⁴⁶ Bishai, “Leaving Nuremberg,” 437, DeGuzman, 357.

the war; or persecutions on political, racial or religious grounds,” but only “in connection with any crime within the jurisdiction of the Tribunal.”⁴⁷ Control Law No.10’s indictment (the one used in the Einsatzgruppen Trial) is virtually identical, except that it did not keep crimes against humanity tied to other crimes and left out the phrase “before or during the war.”⁴⁸

Einsatzgruppen Trial prosecution would cite “the plans for persecution and annihilation” as “rooted deep in Nazi ideology” citing prewar Nazi persecutions of Jews.⁴⁹ Nonetheless, “there were no trials based exclusively on crimes against humanity.”⁵⁰ In January 1946 President Truman passed Executive Order 9679 that appointed new Chief Counsel General Telford Taylor, who had worked with Justice Jackson at the IMT.⁵¹ The Einsatzgruppen prosecution and the other American legal teams argued that they had the right to prosecute these men for international crimes on behalf of the international community, but also with the Allied Council as the source of authority in Germany.

The U.S held twelve NMT trials, including the SS Einsatzgruppen trial, which offered a unique, focused examination of individual culpability in crimes against humanity.

Einsatzgruppen Trial Judge Michael Mussmano has been described as “a colorful and controversial figure” who had previously judged the Milch and Pohl trials of Nazi slave labor

⁴⁷ “Charter of the International Military Tribunal,” Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&id=13&type=text&collection=trials> (Accessed November 1, 2009).

⁴⁸ “Charter of the International Military Tribunal,” 1.

⁴⁹ “Opening Statement of the Prosecution: The Nature of the Charges Count One,” Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 i (1949-1953): the Einsatzgruppen Case <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&id=60&type=text&collection=trials> (Accessed September 18, 2011).

⁵⁰ Even the Einsatzgruppen Trial also prosecuted defendants for war crimes and membership in a criminal organization as well, Bishai, “Leaving Nuremberg,” 437, Opening Statement of the Prosecution: The Nature of the Charges Count One,” The Einsatzgruppen Case.

⁵¹ “Executive Order 9679” January 1946 <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&id=22&type=text&collection=trials> (Accessed September 23, 2011).

programs.⁵² In both cases he issued sentences of hanging and life imprisonment.⁵³ Mussmano nonetheless proved magnanimous with the Einsatzgruppen defense counsel, who later gave him a bronze penguin to commemorate his “Penguin Rule,” that the defense could introduce any evidence “including the social life of the arctic penguin” if they felt it could help their clients.⁵⁴ The most famous defendant of the Einsatzgruppen Trial, was Otto Ohlendorf, or, as Judge Mussmano called him, “Dr. Jekyll and Mr. Hyde.”⁵⁵ Ohlendorf would prove alternatively generous in his information and stubborn in his own defense, readily admitting that his own Einsatzgruppe D forces “liquidated about 90,000 men, women and children.”⁵⁶ American Leon Goldensohn, prison psychiatrist at Nuremberg, described Ohlendorf in 1946 as having a “washed-out, ghoulish appearance...his manner is of a man who is expected to be insulted at any moment and is being defensive about it.”⁵⁷ Although Earl had focused on Ohlendorf and Mussmano as the polar ends of the trial, this thesis will focus on Chief Prosecutor Benjamin Ferencz, a Harvard Law graduate for whom this trial would be his first case.⁵⁸ Ferencz had landed in Normandy at D-Day and fought with Patton’s Third Army.⁵⁹ After the war he was tasked with investigating war crimes at concentration camps.⁶⁰ Little information exists on Ferencz’s three associates. He claimed that two of them “were not really competent attorneys,” and named Ernst Horlik Hochwald as “the ‘only good’ lawyer assigned to the case.”⁶¹

⁵² Earl, 218.

⁵³ Earl, 218.

⁵⁴ Earl, 222.

⁵⁵ Earl, 69.

⁵⁶ “Evidence and Arguments on Important Aspects of the Case: Affidavit of Otto Ohlendorf, 5 November 1945, Concerning the Extermination Program of the Einsatzgruppen,” *The Einsatzgruppen Case*.

⁵⁷ Leon Goldensohn, *The Nuremberg Interviews*, New York: Knopf: Distributed by Random House, 2004, 386.

⁵⁸ Earl, 204.

⁵⁹ Benjamin B Ferencz, “A Prosecutor’s Personal Account - Nuremberg to Rome,” *Columbia Journal of Transnational Law*, Spring 1999, 1, Benjamin Ferencz, Interview by author, October 5, 2011.

⁶⁰ Benjamin B Ferencz, “A Prosecutor’s Personal Account - Nuremberg to Rome,” 1, Interview with Benjamin Ferencz, October 5, 2011.

⁶¹ Earl, 204.

b. Precedents for International Jurisdiction Concerning Crimes Against Humanity

The Einsatzgruppen Trial prosecution cited the IMT tribunal, other international arbitration and declarations in defense of minorities as precedents and evidence that a prewar history of “asserting human rights gave ample warning to the world.”⁶² Raphael Lemkin had already published the term genocide in 1944 in his work *Axis Rule in Occupied Europe*, defining genocide as “coordination of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”⁶³ While not used at the IMT, the NMT Einsatzgruppen Trial referenced genocide as an academic if not legal definition to put a name on targeted extermination. By the time of the Einsatzgruppen trials in 1947, Raphael Lemkin had coined and publicized the term “genocide.”⁶⁴ The United Nations War Crimes Commission followed Lemkin’s definition, defining genocide as actions taken against individuals as members of a targeted group, while seeking to destroy this group entirely.⁶⁵ The court defined crimes against humanity as “including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts

⁶² “Opening Statement of the Prosecution,” Einsatzgruppen Case.

⁶³ While consensus among historians credits Lemkin with devising the term “genocide” in 1944, a recent text, *Judgment At Istanbul: The Armenian Genocide Trials* by Vahakn N. Dadrian and Taner Akçam, identifies national, domestic trials in the 1920s of the Turkish genocide of Armenians. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Washington, D.C.: Carnegie Endowment for International Peace, Division of International Law, 1944, 79.

⁶⁴ While historians agree that this the term genocide originated with Lemkin, many also use the term retrospectively to reference genocides preceding World War II, such as that of the Turks against the Armenians and Germans against the Herero. Samantha Power, *a Problem from Hell: America and the Age of Genocide*, New York: Harper Perennial, 2007, 44.

⁶⁵ “Developments In The Concepts Of Crimes Against Humanity, War Crimes And Crimes Against Peace,” History of the United Nations War Crimes Commission and the Development of the Laws of War, United Nations War Crimes Commission <http://www.heinonline.org/HOL/Page?handle=hein.beal/hisunwrc0001&id=208&collection=beal&index=beal/hisunwrc> (Accessed November 14, 2011).

committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”⁶⁶

Prosecutors at both the IMT and NMT trials identified past conventions, treaties, declarations and arbitrations providing for the pacific settlements of disputes, international arbitration and condemnation of atrocities. They used these to argue that the defendants had violated preexisting international laws and norms. The Einsatzgruppen Trial prosecution also referenced the 1878 Berlin Treaty, in which Germany led nations in declaring “that religious differences could not be used to exclude a person” from his rights and “the German-Polish Convention of 1922” where “Germany obtained legal protection for her ethnic minorities in Poland.”⁶⁷ Ferencz reminded the court that Hitler had claimed to annex Sudetenland to defend German minorities.⁶⁸ Ferencz said of Germany, “so mindful of their rights; so callous of the rights of others.”⁶⁹ The Prosecution also argued that nations had long used law as a response to war crimes.⁷⁰ Ferencz claimed that the rights of the victims can be “vindicated by any nation alone or in concert with others,” as seen in past opinions and practices of states and the Permanent Court of International Justice (PCIJ), set up in 1913.⁷¹ After World War I, a Commission on Responsibility urged for “the creation of an international criminal court” establishing “that punishment of some sort for war crimes was a proper conclusion of a war,

⁶⁶ “Jurisdictional Basis of the Twelve Subsequent War Crimes Trials at Nuernberg,” Trials of War Criminals before the Nuernberg Military Tribunals.

⁶⁷ “Opinion and Judgment of the Tribunal,” Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946 -- April 1949 i (1949-1953): the Einsatzgruppen Case <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&id=441&type=text&collection=trials> (Accessed September 18, 2011).

⁶⁸ “Opening Statement of the Prosecution: The Nature of the Charges Count One,” The Einsatzgruppen Case.

⁶⁹ “Opening Statement of the Prosecution: The Nature of the Charges Count One,” The Einsatzgruppen Case.

⁷⁰ “Opening Statement of the Prosecution: Jurisdiction of the Court,” The Einsatzgruppen Case.

⁷¹ “Opening Statement of the Prosecution: Jurisdiction of the Court,” The Einsatzgruppen Case, International Court of Justice: History, <http://www.icj-cij.org/court/index.php?p1=1&p2=1> (Accessed November 15, 2011).

rather than the traditional amnesty.⁷² However, the German government never implemented what became known as the “Schmachparagrafen, the ‘shame paragraphs’ in the Versailles Treaty.⁷³ Ferencz and his team claimed that the Nuremberg trials would be the enforcement mechanism these previous statements, declarations and courts lacked.⁷⁴

The IMT proved a critical precedent for the NMT trials, establishing and testing rules, procedures, legal arguments and evidence. The IMT gave later trials “the world’s first post mortem examination of a totalitarian regime.”⁷⁵ The trial produced 750,000 mimeographed pages of evidence.⁷⁶ However, the IMT kept crimes against humanity tied to the war and as prewar crimes against German Jews were not included.⁷⁷ In restricting the crimes against humanity charge, legal teams at Nuremberg assuaged the fears of eminent scholars about its implications for state sovereignty.⁷⁸ Crimes against humanity, mostly occurring on the eastern front, were the responsibility of the Soviet legal team.⁷⁹ By the NMT, war crimes and crimes against humanity had been used interchangeably, obscuring the real nature of the charges.⁸⁰ The weight of these crimes nonetheless still impacted the fates of the IMT defendants; only those also convicted of brutal acts would hang.⁸¹ Sir Hartley Shawcross at the time said that “if there were no other

⁷² Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience*, Lawrence, Kansas: University Press of Kansas, 1999, 22.

⁷³ Ball, 23.

⁷⁴ “Opening Statement of the Prosecution: Jurisdiction of the Court,” The Einsatzgruppen Case.

⁷⁵ “Report to the President by Mr. Justice Jackson,” October 7, 1946, Opening Statement: Jurisdiction of the Court,” The Einsatzgruppen Case.

⁷⁶ Robert M. W. Kempner, “The Nuremberg Trials as Sources of Recent German Political and Historical Materials,” *The American Political Science Review* 44, No. 2 (1950):447.

⁷⁷ Wechsler, 13, Justice Birkett, “International Legal Theories Evolved at Nuremberg,” *International Affairs (Royal Institute of International Affairs 1944-)* 23, No. 3 (1947): 318.

⁷⁸ Joseph Y Dautricourt, “Crime against Humanity. European Views on Its Conception and its Future,” *Journal of Criminal Law and Criminology (1931-1951)* 40, No. 2 (Jul. - Aug.1949): 171.

⁷⁹ Quincy Wright, “The Nuremberg Trial,” *Annals of the American Academy of Political and Social Science* 246, *Making the United Nations Work* (1946), 77.

⁸⁰ McAuliffe, 346, F Honig, “War Crimes Trials. Lessons for the Future,” *International Affairs (Royal Institute of International Affairs 1944-)* 26, No. 4(1950): 524.

⁸¹ Quincy Wright, “The Law of the Nuremberg Trial,” *The American Journal of International Law* 41, No. 1 (1947): 44.

crime against these men, this one alone, in which all of them were implicated, would suffice. History holds no parallel to these horrors.”⁸²

The IMT also demonstrated that holding an international trial was the most laborious way to proceed.⁸³ The IMT trial featured judges and prosecutors from the U.S, U.K, USSR and France, with simultaneous interpretation.⁸⁴ As scholar Francine Hirsch recently noted in her article about Soviet contributions at Nuremberg, “the ‘grand alliance’ of the Second World War came undone” and the IMT became a battleground of Soviet and American propaganda.⁸⁵ Meanwhile, having uncovered evidence implicating German industrialists, Justice Jackson contacted the U.S War Department, who replied that “a second IMT trial would be ‘highly undesirable.’”⁸⁶ In memorandums between Justice Jackson and Telford Taylor, Taylor argued that the French (backed by the British) and Russians would be in favor of further IMT trials.⁸⁷ The U.S War Department however cited concerns over manpower, the dangers of German-led trials and renewed interstate tensions.⁸⁸ Finally Jackson recommended to the President that the U.S hold its own trials.⁸⁹ U.S embassies informed the Allies that “trials of German war criminals can be more expeditiously held in national or occupation courts” after which no further IMT trials took place.⁹⁰

⁸² Marrus, 193.

⁸³ “Statement by Justice Jackson on War Trials Agreement.”

⁸⁴ Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 27 (1949-1953), “Military Government: Germany-United States Zone Ordinance No. 7,” <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&id=23&type=text&collection=trials> (Accessed September 24, 2011).

⁸⁵ Francine Hirsch, “The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order,” *The American Historical Review* 113, No. 3 (2008), 723.

⁸⁶ Taylor, “Final Report,” 24.

⁸⁷ TTP-20-1-2-20: IMT-Indictment of Organizations (1946): Memorandum for Mr. Justice Jackson Subject :Further Trials.

⁸⁸ TTP-20-1-2-20: IMT-Indictment of Organizations (1946): War Department Office of the Assistant Secretary Washington DC February 18 1946 to Jackson, 1, 2.

⁸⁹ Taylor, “Final Report,” 24.

⁹⁰ Taylor, “Final Report,” 27.

The American NMT trials soon followed the IMT, including that of the SS Einsatzgruppen. The Einsatzgruppen units owed their creation, composition and mission to Hitler's SS. Heinrich Himmler, head of the SS, created the Einsatzgruppen as specialized units accountable to Reinhardt Heydrich in the Reich Main Security Office (RSHA), a man who even Hitler described as "the man with the iron heart."⁹¹ Heydrich organized the Einsatzgruppen into A, B, C and D Einsatzkommandos with Subkommando units in 1947. The NMT prosecution received a report from researchers describing the Einsatzgruppen having recruited from the Gestapo, Kripo and SD, with ordinary police, Waffen SS and Wehrmacht forces as auxiliaries.⁹² These units answered to the RSHA, Heydrich, Himmler and the Führer.⁹³ The SS Einsatzgruppen followed the Wehrmacht into Soviet territories, shooting, deporting, gassing and burying civilians. Although the Einsatzgruppen had also been deployed for intelligence and anti-partisan activities, later historians and the prosecution noted the difference between "hot-blooded" reprisals committed in the heat of battle and "cold-blooded" reprisals constituting the willful targeting of entire groups.⁹⁴ Unleashed in June 1941 and reined in by the end of 1942, the Einsatzgruppen and their accomplices had murdered more than one million men, women and children.⁹⁵ The judges at the trial remarked that "no writer of murder fiction, no dramatist steeped in macabre lore, can ever expect to conjure up from his imagination a plot which will shock sensibilities as much as will the stark drama of these sinister bands."⁹⁶ Bookending the

⁹¹ Mario R Dederichs, *Heydrich: the Face of Evil*, Annapolis, Md.: Naval Institute; 2009, 216, Rhodes, 5

⁹² TTP-5-2-5-76: NMT-Case No.9, "Einsatzgruppen Case"-Basic Information on the SS, DO, Gestapo, RSHA and the Einsatzgruppen (Sept 29, 1947) (Office of the Chief of Counsel for War Crimes Evidence Division Library Branch) Military Tribunal No 2A Case NO.9 the United States of American against Otto Ohlendorf, et al., Defendant. Prepared by Nancy H Fenstermacher Nuremberg 29 September 1947, 5.

⁹³ Christopher R Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, New York: HarperCollins, 1992, 9.

⁹⁴ Edward B Westermann, *Hitler's Police Battalions: Enforcing Racial War in the East*, Lawrence: University Press of Kansas, 2005, 19.

⁹⁵ Roderick Stackelberg, *Hitler's Germany Origins, Interpretations, Legacies*. London: Routledge, 1999, 257.

⁹⁶ "Opinion and Judgment of the Tribunal; Activities of the Einsatzgruppen," the Einsatzgruppen Case.

trial, the prosecution and judges read a witness account of a murdered family that speaks to the brutal reality of the crimes:

“I watched a family of about 8 persons...The couple were looking on with tears in their eyes. The father was holding the hand of a boy about 10 years old and speaking to him softly; the boy was fighting his tears. The father pointed toward the sky, stroked his head, and seemed to explain something to him. At that moment the SS man at the pit shouted something to his comrade. The latter counted off about 20 persons and instructed them to go behind the earth mound.... I walked around the mound and found myself confronted by a tremendous grave. People were closely wedged together ...I looked for the man who did the shooting. He was an SS man who sat at the edge of the narrow end of the pit, his feet dangling into the pit. He had a tommy gun on his knees and was smoking a cigarette. The people, completely naked, went down some steps... and clambered over the heads of the people lying there...They lay down in front of the dead or injured people; some caressed those who were still alive and spoke to them in a low voice. Then I heard a series of shots. I looked into the pit and saw that the bodies were twitching...The next batch...went down into the pit, lined themselves up against the previous victims and were shot.”⁹⁷

The Einsatzgruppen Trial focused on crimes against humanity and Chief Counsel Telford Taylor, in 1947, received memorandums of atrocities triggering an international response. The memorandums appear to have been sent to him from researchers or other members of American Nuremberg legal teams. In one report, the League of Nations High Commissioner for Refugees from Germany had requested intervention “in the name of humanity and the principles of the public law of Europe” to protect minorities from Hitler’s measures.⁹⁸ The Commissioner would soon resign, stating that Hitler’s actions were “a challenge to the conscience of mankind.”⁹⁹ One memorandum cites a 1933 meeting of the Grotius Society in London which referenced nineteenth century treaties ensuring protection of minorities, “that the protection of human

⁹⁷ “Opening Statement of the Prosecution; Methods of Execution,” the Einsatzgruppen Case http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=trials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall, (Accessed September 18, 2011), “Opinion and Judgment of the Tribunal; Authenticity of Reports,” the Einsatzgruppen Case.

⁹⁸ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947): Office of the Chief of Counsel for War Crimes, AFO 124A U.S Army Incoming Message 15 April 1947, 2215Z, classicization UNCL Priority, Action: General Taylor, 1.

⁹⁹ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947): Office of the Chief of Counsel for War Crimes, AFO 124A U.S Army Incoming Message 15 April 1947, 2.

personality is the primary object of international law.”¹⁰⁰ Other memorandums included pleas on behalf of Rumanian Jews “in the name of humanity,” crimes in Turkey and Bulgaria, giving states “sufficient ground under international law to intervene against the Nazi persecution of the Jews.”¹⁰¹ Taylor also received a 1915 telegram containing a hauntingly similar message as those broadcast during WWII: “in view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publically for the sublime forte that they will hold personally responsible for these crimes all members of the Ottoman government and those of their agents who are implicated.”¹⁰² These reports show a prewar conception of crimes connected to a larger sense of humanity. Taylor’s memorandums stand as a frightening testament to the weakness of words and the failure of a well warned world to defend the victims of Nazi oppression.

c. The Evolution of International Legal Theory at Nuremberg

Each of the NMT trials, including that of the Einsatzgruppen, argued for the evolution of international legal theory. At the IMT trial Jackson argued that at the core they charged “acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.”¹⁰³ William B Cowles, in a 1945 article referenced by Ferencz, argued that

¹⁰⁰ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947): Office of the Chief Council for War Crimes APO124 A U.S Army Incoming Message 16 April 1947 1838, 3.

¹⁰¹ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947): Office of the Chief Council for war crimes APO124 A U.S Army Incoming Message 16 April 1947 0013Z to OOC, action General Taylor, TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947): “Office of the Chief Council for War Crimes APO124 A U.S Army Incoming Message 17 April 1947 0143Z Action General Taylor (from an article published 1936).

¹⁰² TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes against Humanity (1947): Office of the Chief Council for war crimes APO124 a U.S Army Incoming Message 17 April 1947 2142Z.

¹⁰³ Joseph E Persico, *Nuremberg: Infamy on Trial*, Boston: Penguin (Non-Classics), 1995, 34.

international law allowed states to punish war criminals if they come under that state's control.¹⁰⁴ He further argued that jurisdiction of military courts has been universal, akin to the broad jurisdiction exercised by states when dealing with pirates who had committed crimes across states and constituted a threat to the international community.¹⁰⁵ While no state had made it explicitly illegal to commit crimes against humanity, the charge described serious crimes in the laws of most nations even if they have not been formally sanctioned, so that no state would "fail to punish 'crimes against humanity' ...if they were committed within their own jurisdiction."¹⁰⁶ Much of the legal discussion at the Einsatzgruppen Trial revolved around universal jurisdiction, often exercised in the past to contend with piracy, and the questions of state sovereignty.

In the case of piracy and war crimes, crimes of no geographic concentration, whichever state acquired possession of the defendant could prosecute him.¹⁰⁷ Ferencz recalled the tradition that if a man sails with pirates he will hang for their crimes, even if he does not personally commit them.¹⁰⁸ International law had allowed states to punish perpetrators regardless of the nationality of the defendant or victim and "a belligerent may punish members of enemy forces in its custody."¹⁰⁹ Prosecutor Ferencz claimed that, such as in cases of piracy, "where conduct menaces the universal social order, there can be and has been no prohibition on the right of courts to act."¹¹⁰ Law Professor Diane Orentlicher wrote that at Nuremberg they found that

¹⁰⁴ William B Cowles, "Universality of Jurisdiction over War Crimes." *California Law Review* 33, No. 2 (Jun., 1945): 216-7.

¹⁰⁵ Cowles, "Universality of Jurisdiction," 216-7.

¹⁰⁶ Trevor Heath, "Crime in Retrospect—Nuremberg," *The Australian Quarterly* 18, No. 3 (1946): 79, Max Radin, "Justice at Nuremberg," *Foreign Affairs* 24, No. 3 (1946): 372, 375.

¹⁰⁷ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes Against Humanity (1947), "Germans against Germans," 6, Wright "The Nuremberg Trial," 79.

¹⁰⁸ Ferencz, Interview.

¹⁰⁹ Opening Statement of the Prosecution: Jurisdiction of the Court," *The Einsatzgruppen Case*.

¹¹⁰ Opening Statement of the Prosecution: Jurisdiction of the Court," *The Einsatzgruppen Case*.

crimes against humanity are violations of humanity on the whole with effects beyond domestic law, and thus perpetrators threaten all humanity and must be punished by international courts.¹¹¹

International law had previously been concerned only with states as main actors, but in wake of the wreckage of World War II, states appeared to only be able enforce law through aggression. The Nazis crimes that “shock the conscience of mankind” also challenged the notions of sovereignty and immunity.¹¹² The Nuremberg trials offered a pacific settlement of disputes and active deterrent in sanctioning the acts of individuals within the state.¹¹³ Nuremberg prosecutors argued that, traditionally, if an individual commits state acts that are illegal under international law, they cannot be protected by state sovereignty.¹¹⁴ As the acts constituting crimes against humanity had long been considered crimes by the international community and most civilized states, even if the Nazis made the acts legal, the Einsatzgruppen defendants could be prosecuted. Upholding state sovereignty would essentially give the men under Hitler immunity and attribute all criminal responsibility to Germany’s dead Führer. These trials subverted international legal positivism, which “tends to assume that the sovereign state is the only subject of international law” by holding individuals accountable for international crimes.¹¹⁵ German Professor Gustav Radbruch wrote in 1946 that “with crimes against humanity...criminal law is not no longer...purely domestic.”¹¹⁶ World War II proved that the sovereign state cannot (and may not) always protect its citizens from harm, and the widening focus on the rights of

¹¹¹ Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” *The Yale Law Journal* 100, No. 8 (1991): 2556-7.

¹¹² Wright, “The Nuremberg Trial,” 78.

¹¹³ William Eldred Jackson, “Putting the Nuremberg Law to Work,” *Foreign Affairs* 25, No. 4 (1947): 561.

¹¹⁴ Quincy Wright, “Legal Positivism and the Nuremberg Judgment,” *The American Journal of International Law* 42, No. 2 (1948): 410.

¹¹⁵ Wright, “Legal Positivism and the Nuremberg Judgment,” 405.

¹¹⁶ TTP-5-1-1-2: NMT-Correspondence and Reports-Crimes against Humanity (1947) “To: General Telford Taylor, from: John h.e. Fried, Subject: acknowledgment by German lawyers of the fact that control council law no. 10 has created law applicable in Germany” Translation on excerpt from article *kriminalistische zeitbetrachtung*,” Professor Gustav Radbruch of the university of Heidelberg, published in the Easter issue (6 April 1946) of the *Rhein Neckar-zeitung*, 5.

individuals emerged from this postwar period. Justice Jackson certainly envisioned Nuremberg as a deterrent.¹¹⁷ One scholar at the time noted that new debates had begun on introducing the individual as an actor in international law.¹¹⁸ Nonetheless, the tribunals were reluctant to define crimes against humanity as violations committed by a government against its own people.¹¹⁹

While the Einsatzgruppen Trial did not receive considerable attention or targeted critique at the time, it did feature the general caution exercised throughout the NMT trials. The Allies remained wary of challenging state sovereignty, and the American trials “illustrate both the idealist and the realist strains of international law that continue to be woven into the American approach to international law.”¹²⁰

d. Conclusions

As he delivered the Opening Statement for the Prosecution, Ferencz referred to the international solidarity that armed promises of peace and justice. He spoke of past pledges on behalf of minorities and struggles to bind the barbarities of war with rules and laws. The Prosecution claimed that past law considered murder, extermination and enslavement to be crimes, and that when a universal threat menaces the welfare of the international community; universal jurisdiction has always ensured recourse to justice. One of the greatest developments to emerge from this period and these courts is the gradual erosion of state sovereignty in the particular area of trying crimes against humanity and assertion of individual rights and responsibilities. The prosecution argued that Nuremberg must establish a course of justice, as a

¹¹⁷ William Eldred Jackson, 551.

¹¹⁸ Clyde Eagleton, “The Individual and International Law,” *Proceedings of the American Society of International Law at Its Annual Meeting* 40 (1946): 23.

¹¹⁹ Telford Taylor, “When People Kill a People.” *The New York Times - Breaking News, World News & Multimedia*, <http://www.nytimes.com/1982/03/28/books/when-people-kill-a-people.html?sec=&spon=&pagewanted=all://> (accessed November 6, 2009).

¹²⁰ Bishai, “Leaving Nuremberg,” 437.

deterrent, a demonstration to the world that the rights of individuals everywhere are defended. With this a new age of international relations and law would see the fates of individual citizens intertwined. As Belgian judge and writer Joseph Dautricourt wrote of laws in 1949; “found in the deepest conscience of men and which is intended to protect the universal public order against its worst evils: crime against humanity and war, is not only superior to the State and its internal laws, but also, binds all the States and Nations on earth; each man individually, each group of men and mankind as a whole.”¹²¹

In defining individual responsibility for crimes against humanity, the prosecution urged the court to view humanity as sovereignty and an actor in international law. The prosecution argued that all of the agreements and declarations made before the war had established implicit norms, conventions and standards of behavior. They then asserted that the IMT and NMT tribunals made explicit these standards of conduct and rights meant to ensure the protection of all people. This led the judges to confirm that “humanity is the sovereignty which has been offended this is not a new concept in the realm of morals, but it is an innovation in the empire of the law.”¹²² If humanity is to be treated as sovereignty, as the prosecution suggests, reaching beyond the bounds of nations and states, its protection must also stretch across these boundaries, and must lie in international law.

¹²¹ Dautricourt, “Crimes Against Humanity,” 175.

¹²² “Opinion and Judgment of the Tribunal,” The Einsatzgruppen Case.

Chapter II

Interpreting the Evidence: What it takes to be “Masters of Death”¹²³

When Chief Counsel Telford Taylor sent Benjamin Ferencz to Berlin with a group of researchers, they came upon a pile of secret reports in which “most of the Einsatzgruppen commanders were clearly identified and the enormity of their crimes was unmistakable.”¹²⁴ The Prosecution felt so confident about their evidence that they presented their case in a matter of days. The American press echoed the prosecution in christening the defendants as “History’s Worst Killers,” exposing the scale of the nightmare, “that four Einsatzgruppen (divisions) committed an average of 1350 murders daily over two years.”¹²⁵ The Prosecution charged the defendants with crimes against humanity as well as membership in a criminal organization and war crimes. In proving crimes against humanity, they also proved the other two charges, as in making the defendants head of SS units they placed them in the SS (a criminal organization) and in detailing the crimes of the Einsatzgruppen, they gave evidence of war crimes. Both war crimes and crimes against humanity constituted inhumane acts. Having proven that individuals can be held responsible under international law, the prosecution then argued that these crimes constituted crimes against humanity and that they could demonstrate a direct connection between the defendants and the extermination doctrine and program.

Having established international jurisdiction, Ferencz’s team would follow this trend of identifying a policy and pattern of atrocities, linking defendants in knowledge and participation

¹²³ Rhodes, *Masters of Death*.

¹²⁴ Benjamin B Ferencz, *Less Than Slaves: Jewish Forced Labor And The Quest For Compensation*, Indiana University Press, 2002, xxiii.

¹²⁵ “23 Nazi Chiefs Called History’s Worst Killers,” Article, Nuremberg Sept 29, 1947, Record Group 12.000 Benjamin B Ferencz Collection 1919-1994, United States Holocaust Memorial Museum, Washington, D.C (USHMM), “Former SS Officers on Trial: Nazi ‘Systematic Murder’ Plans,” Article, Nuremberg September 29, 1947, Record Group 12.000 Benjamin B Ferencz Collection 1919-1994, United States Holocaust Memorial Museum, Washington, D.C (USHMM).

to the violence. They then connected the crimes to a larger pattern of extermination constituting crimes against humanity. These developments have been largely overshadowed by scholarly debates and descriptions of a “Hitler Order.” In connecting defendants to larger programs of extermination the prosecution connected them to ideas and acts that threaten all humanity.

a. The Prosecution’s Arsenal of Evidence

Officially sanctioned, supported and lauded, the Einsatzgruppen left a considerable trail of paperwork. The Prosecution ultimately presented 252 documents to the court, including Situation Reports, Correspondence between Nazi officers, Official Orders, SS Personnel Records and witness Affidavits.¹²⁶ These documents described the organization, associations, activities and membership of the Einsatzgruppen. Ferencz’s team based their case on these documents, rather than witnesses, as they felt these official records offered the strongest case against the defendants.¹²⁷

The discovery of the Einsatzgruppen’s own Situational Reports and their tallies proved to be the prosecution’s most critical evidence; damningly specific, signed, official statements revealing the names, locations and murderous activities of the Einsatzgruppen.¹²⁸ They left a strong impression on the Judges, as “practically every page of these reports runs with blood and is edged with a black border of misery.”¹²⁹ These reports had been prepared in the field by

¹²⁶ These 252 documents included: “personnel files, various reports, IMT (records), court transcripts, orders, correspondence, minutes of meetings, addresses, publications, charts, 48 affidavits, 34 for defendants, excerpts from 82 Operational Situation Reports” and “excerpts from action and situation reports from occupied eastern territories,” Ronald Headland, *Messages of Murder: Study of the Reports of the Einsatzgruppen of the Security Police and the Security Service, 1941-1943*. Rutherford N.J. Fairleigh Dickinson University Press; 1992, 161.

¹²⁷ Ferencz, Interview.

¹²⁸ Ferencz, Interview.

¹²⁹ “Opinion and Judgment of the Tribunal; Authenticity of the Reports,” *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 (1949-1953): the Einsatzgruppen Case*

<http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=t>

Einsatzgruppen units, delivered to their commanders and then sent to Berlin.¹³⁰ The reports often placed defendants in charge of executions, as in “Operational Report No. 155.... we see that the Defendant Strauch is listed as a commander....for...White Ruthenia... ‘In White Ruthenia....33, 210 Jews were shot.’”¹³¹ The reports claimed that the Einsatzgruppen was sent “to purge the eastern territory of Jews.”¹³² The reports identified their victims as Communists, partisans, the ill, rebellious, Gypsies and “Jews in general.”¹³³ The Prosecution references these others groups but focused on the most and transparent persecution, that of Jewish victims. Some reports related the killings to security, as Report No.31 identified Soviet Jews as “dangerous and hostile” while Operational Report 80 required liquidation of Jews “as the most dangerous social element.”¹³⁴ Reports also connected Jews to Bolshevism.¹³⁵ The prosecution showed the court that “to be a Jew or a communist official was to be guilty of a crime that warranted execution.”¹³⁶ Ferencz’s team bolstered the authenticity of these reports with affidavits swearing to their credibility, such as that of Kurt Kindow, confirmed that these had been published from “the original reports of the

[rials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall](#) (Accessed September 18, 2011).

¹³⁰ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, Nurnberg, Germany on 15 September 1947, Case 9, Columbia University, Diamond Law Library, New York, NY, 69.

¹³¹ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, at Nurnberg, Germany on 15 September 1947, 136-138.

¹³² Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al et, at Nurnberg, Germany on 15 September 1947, 98, 99.

¹³³ “Evidence and Arguments on Important Aspects of the Case: Partial Translation of Document No-3155 Prosecution Exhibit 38 Extracts from Operational Situation Report USSR NO 11 12 October 1941,” Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 (1949-1953): the Einsatzgruppen Case

http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=rials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall (Accessed September 18, 2011).

¹³⁴ Yitzhak Arad, Samuel Krakowski, Shmuel Spector (eds). *The Einsatzgruppen Reports: Selections from the Dispatches of the Nazi Death Squads' Campaign against the Jews July 1941-January 1943*. New York, N.Y: Holocaust Library, 1989, 4, 129.

¹³⁵ “Evidence and Arguments on Important Aspects of the Case: Extracts from Report of Einsatzgruppen A Covering the Period from 23 June 1941 to 15 October 1941,” The Einsatzgruppen Case.

¹³⁶ Headland, *Messages of Murder*, 78, 75-76.

Einsatzgruppen” and that of Defendant Schubert, who confirmed Ohlendorf’s instructions for the reports with “the number of Russians and Jews executed.”¹³⁷ While some defendants claimed that the numbers were exaggerated, still others argued that “they would not have filed a false report.”¹³⁸ The Defense never successfully discredited the Operational Reports.

The prosecution introduced the affidavits and testimony of witnesses and defendants that connected the defendants to the executions. Defendant Schulz’s Affidavit referenced a speech by Reinhardt Heydrich in June 1941 detailing future executions as well as an “order by the Reichsfuehrer-SS, implying that all Jews were to be shot.”¹³⁹ Defendant Blume confirmed hearing these plans as early as in June 1941 (when Germany invaded the Soviet Union).¹⁴⁰ He admitted to have been “instructed about the tasks of exterminating Jews.”¹⁴¹ Defendant Ohlendorf’s affidavit and testimony identified a “Hitler Order.”¹⁴² He claimed to have received an order to exterminate Soviet Jews that had been passed on from Hitler to the SS and issued in June 1941.¹⁴³ Earl points out that while Blume claimed to have been ordered to kill Jews,

¹³⁷ “Authenticity of the Einsatzgruppen Reports: Translation of Document NO-4327 Prosecution Exhibit 6 Affidavit of Kurt Lindow, 21 July 1947” Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 (1949-1953): the Einsatzgruppen Case http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=trials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall (Accessed September 18, 2011), “Authenticity of the Einsatzgruppen Reports: Translation of Document NO-2716, Prosecution Exhibit 4 Affidavit of Heinz Hermann Schubert, 4 February 1947,” The Einsatzgruppen Case.

¹³⁸ Headland, *Messages of Murder*, 171.

¹³⁹ “Evidence and Arguments on Important Aspects of the Case: Translation of Document NO-3644 Prosecution Exhibit 26 Affidavit of Erwin Schulz, 26 May 1947,” The Einsatzgruppen Case, Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al et, at Nurnberg, Germany on 15 September 1947, 133.

¹⁴⁰ Evidence and Arguments on Important Aspects of the Case: Translation of Document NO-4145 Prosecution Exhibit 10, Affidavit of Walter Blume, 29 June 1947,” The Einsatzgruppen Case.

¹⁴¹ “Blume Affidavit NO-4145, 29 June 1947,” Mendelsohn, *The Einsatzgruppen*, 160.

¹⁴² Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, defendants, sitting at Nurnberg, Germany on 15 September 1947, 0930, Justice Musmanno, presiding, 83.

¹⁴³ Wolfe, 55.

Ohlendorf claimed that he had been ordered to kill political enemies.¹⁴⁴ Many defendants, such as Schubert and Haensch denied receiving such orders.¹⁴⁵

The prosecution also referenced Nazi documents processed for the IMT and NMT trials, including official orders and correspondence.¹⁴⁶ One letter described Defendant Strauch as an “extremely capable chief” involved in the execution of 65,000 souls in Minsk.¹⁴⁷ Reports and letters also identified the “security concerns” linking Jews to Communists.¹⁴⁸ The Jäger Report, written by an Einsatzgruppen officer whose name, ironically, translates to “hunter,” gave the locations and dates of the executions.¹⁴⁹ The Prosecution also introduced SS Personnel records, proving the membership and position of the defendants in the SS. When Defendant Blobel lied about when he joined the SS, the prosecution used his personnel records to correct him.¹⁵⁰

The prosecution used this evidence to describe the activities of the Einsatzgruppen as constituting political, racial and ideological extermination.¹⁵¹ The Crimes against Humanity charge included inhumane acts and war crimes, and the prosecution recounted affidavits, correspondence and reports attesting to bloody, brutal executions. One German witness to the executions would recall: “I can only say that the mass shootings in Paneriai were quite horrific. At the time I said: ‘May God grant us victory because if they get their revenge, we’re in for a

¹⁴⁴ Earl, 213.

¹⁴⁵ “Final Statements of the Defendants: Haensch,” the Einsatzgruppen Case.

¹⁴⁶ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, at Nurnberg, Germany on 15 September 1947, 68.

¹⁴⁷ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, at Nurnberg, Germany on 30 September 1947, 142.

¹⁴⁸ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, at Nurnberg, Germany on 30 September 1947, 143.

¹⁴⁹ Ernest Klee, Willi Dressen and Volker Riess, (eds), Deborah Burnstone (translator), *The Good Old Days: the Holocaust as Seen by its Perpetrators and Bystanders*, New York: Free Press, 1991, 54. The Jager Report totaled 137,354 dead.

¹⁵⁰ “Blobel Case Brief,” *Punishing the Perpetrators of the Holocaust: the Brandt, Pohl and Ohlendorf Cases*, 247.

¹⁵¹ Roderick Stackelberg, *Hitler’s Germany Origins, Interpretations, Legacies*, Taylor & Francis e-Library ed. London: Routledge, 2002, 262.

hard time.”¹⁵² The superior orders defense also highlighted the bureaucracy of murder that allowed administrative officers to keep their hands clean by shunning the blood and bone of the killing fields, making them feel less guilty.¹⁵³ When Goldensohn asked Ohlendorf about children who had been executed, Ohlendorf responded “I don’t know. I didn’t see any.” No reports? “Only numbers.”¹⁵⁴ One German soldier witnessing the shootings described how he can remember “the complete terror of the Jews when they first caught sight of the bodies as they reached the top edge of the ravine...Its almost impossible to imagine what nerves of steel it took to carry out that dirty work down there.”¹⁵⁵ That this man could witness such hell and then admire the devil’s henchmen was a sentiment echoed during the trial when Defendant Blobel said he felt sorry for the executioners, and that the silence of the victims proved that “human life was not as valuable as it was with us.”¹⁵⁶ The judges repeated many details, particularly haunted by the brutal fate of those left wounded in the pits beneath the sinking corpses and rising fluids, buried alive beneath the dead.¹⁵⁷

b. What Makes a Man Guilty of Genocide

The Prosecution tied the defendants to the crimes of their subordinates, arguing that the extermination of Jewish victims constituted systematic genocide stemming from the murderous doctrine and bureaucracy of the SS, of which all defendants were willing members. The IMT had declared the SS to be a criminal organization and the prosecution argued that as willing SS

¹⁵² Klee, 43.

¹⁵³ Ronald J. Berger, “The ‘Banality of Evil’ Reframed: The Social Construction of the ‘Final Solution’ to the ‘Jewish’ Problem,” *The Sociological Quarterly* 34, No. 4 (1993): 608.

¹⁵⁴ Goldensohn, *The Nuremberg Interviews*, 392.

¹⁵⁵ Klee, Dressen and Riess, *The Good Old Days*, 67.

¹⁵⁶ War Crimes Trials Record of Case 9 United States of America v Otto Ohlendorf et al Special List No 42 compiled by John Mendelsohn National Archives and Record Service DC 1978 Court 2A case 9 Paul Blobel, Direct Examination (1495-1753) October 28 1947 by Dr Heim, 1684-1694, Columbia University Law Library.

¹⁵⁷ “Opinion and Judgment; Methods of Execution,” Einsatzgruppen Case.

officers the defendants must have known the Nazi policy of extermination. The prosecution then connected these men to the units that committed the crimes where and when they occurred.

The prosecution needed to clearly connect individual defendants to these unimaginable crimes. The 1945 American led trial of Japanese commander General Yamashita received criticism because of the physical distance and communication problems between General Yamashita and his forces. The prosecution had claimed that the defendant “knew...and permitted, the widespread crimes committed in the Philippines by troops under his command.”¹⁵⁸ They argued that because the brutality of Yamashita’s troops spread across units, time and space, Yamashita could not have been ignorant of crimes which had been so extensive and consistent they constituted a policy of brutality.¹⁵⁹ The Einsatzgruppen Trial prosecution argued that their evidence revealed a pattern of extermination and policy of crimes against humanity, defined as “atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds.”¹⁶⁰ At the end of the Einsatzgruppen Trial Chief Counsel Taylor used Yamashita as an example: “We are not aware that General Yamashita, with his own hand, took the life of anyone in the Philippines,” arguing that the defendants, aware of their orders and policy, commanded murderers, making them as

¹⁵⁸ “Trial of General Tomoyuki Yamashita, United States Military Commission, Manila, (8th October-7th December, 1945), and the Supreme Court of the United States” http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf, 1.

¹⁵⁹ “General Headquarters Supreme Commander for the Allied Powers Government Section 22 November 1949 Memorandum for the Record Subject: “The Case of General Yamashita,” by A. Frank Reel”, General Headquarters Supreme Commander for the Allied Powers Government Section Supplement to Memorandum, The Case of General Yamashite 22 November 1949” <http://heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?collection=trials&handle=hein.trials/abzz0001&type=Text&id=7>(November 15, 2011).

¹⁶⁰ “Control Council Law No. 10: Punishment Of Persons Guilty Of War Crimes, Crimes Against Humanity” <http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&id=18&type=Text&collection=trials> (Accessed September 23, 2011).

guilty as if they themselves had pulled the trigger.¹⁶¹ The Einsatzgruppen trial also referenced the Medical trial which had tied defendants to a medical policy perverted by Nazi racial theory.¹⁶² The IMT Trial had used conspiracy to reach prewar atrocities, linking defendants to an overall criminal plan.¹⁶³

Able to prove the defendants' voluntary participation in the SS, the prosecution used this as proof that they adhered to its doctrine and thus approved of its implementation. The prosecution charged all defendants with Membership in a Criminal Organization, proved by the prosecution through SS personnel files.¹⁶⁴ Nonetheless, the NMT trials occurred during U.S denazification in Germany, deciding which Germans to criminalize, and as Chief Counsel Taylor wrote to Justice Jackson, "the SS undoubtedly included some very nasty and brutal cooks as well as naughty soldiers."¹⁶⁵ Ultimately Taylor argued membership in the SS will only warrant punishment if "that the person either was aware" or his position "was high enough so that he should have know the true nature of the organization."¹⁶⁶ The prosecution thus argued that the defendants as officers knew the criminal purposes of the SS. Himmler himself said the leaders of

¹⁶¹ "Closing Statement of the Prosecution, 13 February 1948, by Brigadier General Telford Taylor," *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 i (1949-1953): the Einsatzgruppen Case* http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=trials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall (Accessed September 18, 2011).

¹⁶² Vivien Spitz, *Doctors from Hell: The Horrific Account of Nazi Experiments on Humans*, Boulder, Colorado: Sentient Publications, 2005, 60.

¹⁶³ Telford Taylor, *the Anatomy of the Nuremberg Trials: A Personal Memoir*, New York: Little Brown & Co (P), 1992, 75.

¹⁶⁴ "Evidence and Arguments on Important Aspects of the Case," *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 (1949-1953): the Einsatzgruppen Case*.

¹⁶⁵ TTP-20-1-2-20:IMT-Indictment of Organizations (Memorandum for Mr. Justice Jackson January 16 1946 "Proposed Report of the De-Nazification Policy Board to the Deputy Military Governor," 2-3.

¹⁶⁶ TTP-20-1-2-20:IMT-Indictment of Organizations (1946 Memorandum for Mr. Justice Jackson January 16 1946 "Proposed Report of the De-Nazification Policy Board to the Deputy Military Governor," 4.

the SS in 1943; “only the SS was equal to the task of exterminating the Jewish people.”¹⁶⁷

Himmler indoctrinated the SS in “principles of race and blood,” and the SS would be responsible for “the final solution for the Jewish question.”¹⁶⁸

The prosecution used their evidence to prove that the defendants commanded Einsatzgruppen units whose executions constituted crimes against humanity.¹⁶⁹ They read for the court the statistics of the Einsatzgruppen’s own reports, a numbing presentation of genocide: “during the period 22 June 1941 to 19 September 1941 in Lithuania, Einsatzkommando 3 murdered 46,962 persons....During the period 22 June 1941 to 12 October 1941 in its operation areas; Sonderkommando 4a murdered more than 51,000 persons.”¹⁷⁰ Benjamin Ferencz did not use the language of the exterminators in his delivery. He did not say liquidated, eliminated or executed. He only used the term “murdered.” The Prosecution used their evidence to prove that each defendant commanded an Einsatzgruppen Unit during a specific period of time, over a specific occupied territory, and that during that period and in that location, the Einsatzgruppen unit committed crimes against humanity. In the case of Defendant Naumann, the prosecution proved that he became chief of Einsatzgruppen B for Russia at the start of November 1941 and Neumann admitted in his Affidavit: “I know that, while I was its chief, Einsatzgruppen

¹⁶⁷ “Opening Statement of the Prosecution: Nazi Doctrine of Superior and Inferior Races,” The Einsatzgruppen Case.

¹⁶⁸ TTP-5-2-5-76: NMT-Case No.9, “Einsatzgruppen Case,” Basic Information on the SS, DO, Gestapo, RSHA and the Einsatzgruppen (Sept 29, 1947) (Office of the Chief of Counsel for War Crimes Evidence Division Library Branch) Prepared by Nancy H Fenstermacher Nuremberg 29 September 1947 Submitted for the Chief of Counsel for War Crimes by: A Horlik-Hochwald, 1, “Protocol of the Wannsee Conference January 20, 1942,” 117, “Reich Secret Document,” Yitzhak Arad, Israel Gutman and Abraham Margalio, *Documents on the Holocaust: Selected Sources on the Destruction of the Jews of Germany and Austria, Poland, and the Soviet Union*, Lincoln: University of Nebraska Press, 1999, 249

¹⁶⁹ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, Nurnberg, Germany on 15 September 1947, 4

¹⁷⁰ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, defendants, Nurnberg, Germany on 15 September 1947, 7, 10

B...carried out executions.”¹⁷¹ The Prosecution argued that from the evidence no defendant could claim ignorance or innocence while a member of the SS, adhering to their doctrine, implementing their programs, in command of units carrying out mass executions.¹⁷²

c. The Hitler Order

Earl claims that the Führer Order was pivotal and that the prosecution accepted it despite contradictory testimony, leaving the historical debate unresolved.¹⁷³ Ian Kershaw admits that historians still dispute whether the men in the field received explicit instructions and when these occurred.¹⁷⁴ James Conway suggests that the debate over the Führer Order remains inconclusive as historians have not discovered documented evidence of explicit instructions, or any other “smoking gun.”¹⁷⁵ The prosecution at the time seemed to accept the order, likely because it did not, and still today, does not appear completely implausible. Earl maintains that Ohlendorf had been forthcoming in all of his testimony.¹⁷⁶ Ohlendorf became the most infamous defendant, captivating his audience with detailed, self-incriminating evidence, prompting Hans Frank to describe him as “a man who signed his own death warrant to serve the truth.”¹⁷⁷ At the time the

¹⁷¹ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, defendants, Nurnberg, Germany on30 September 1947, 136-151, “Document NO-4150, Sworn Affidavit by SS Stand Neumann, 27 June 1947,” *The Einsatzgruppen or Murder Commandos*, 184.

¹⁷² “Ohlendorf Case Brief,” *Punishing the Perpetrators of the Holocaust : the Ohlendorf and the Von Weizaecker Cases*, 89.

¹⁷³ Earl, 206-208.

¹⁷⁴ Ian Kershaw, *Hitler, the Germans, and the Final Solution*, Jerusalem: International Institute for Holocaust Research, Yad Vashem, 2008, 67, The Intentionalist/Functionalist debate: Functionalists would base more on the structure of Hitler’s system than just to the orders of Hitler and his cronies, later these two sides would attempts to reconcile with one another, as “Browning lays out what he called his ‘moderate functionalist syntheses’ he contends that elements from both schools ;the conjuncture of Hitler’s anti-Semitic obsession, the anarchical and complete nature of the Nazi state, the vulnerable status of the European Jews, and the war ultimately resulted in the final solution,” Langerbein, 13.

¹⁷⁵ John S. Conway, “The Holocaust and the Historians,” *Annals of the American Academy of Political and Social Science, Reflections on the Holocaust: Historical, Philosophical, and Educational Dimensions* (1980): 161, Henry Friedlander, “Step by Step: The Expansion of Murder, 1939-1941,” *German Studies Review* 17, No. 3 (1994): 495.

¹⁷⁶ Earl, 184.

¹⁷⁷ G.M Gilbert, *Nuremberg Diary*, New York: Da Capo Press, 1995, 101.

prosecution had every reason to at least loosely accept his explanation. Many of the defendants swore to a Führer Order and Ohlendorf claimed to have received orders the same time other defendants had independently described receiving instructions. Defendants also testified that often commanders had passed on orders orally, leaving no trace. Furthermore, the prosecution presented their case in a post-Auschwitz world; everyone in the court knew how the story ended, even if the connections between the killing fields and death camps remained unclear. Hitler himself likely cast quite a shadow over the proceedings, considering that he had only been dead two years after holding Europe mostly captive for nearly five.

The prosecution's case did not hinge on the Führer Order; the prosecution based the bulk of its argument on what it could prove through well documented, official evidence. The idea of a Hitler Order did more for the defendants, who then claimed "superior orders" as a defense. The prosecution already had plenty of evidence and SS racial doctrine and Hitler made no secret of his racial sentiments; he screamed them from platforms and inscribed them in *Mein Kampf*. Defendants like Hoss at the IMT also admitted that they heard "Jewry must be exterminated and we all accepted it as truth."¹⁷⁸ Furthermore, the prosecution team did not rely on testimony; in fact, they did not produce a single witness and weighted their case with official documents. The prosecution's case briefs often using documents correct defendant affidavits and testimony. Earl implies that the prosecution failed to resolve this historical question and the discrepancies between testimonies. But at the time the Führer Order would not have constituted a historical problem. The judges at the Trial recognized the possibility of the order, but they also acknowledged that the defendants blamed everything on Hitler's "sinister shadow."¹⁷⁹ They

¹⁷⁸ Rhodes, *Masters of Death*, 159.

¹⁷⁹ "Opinion and Judgment of the Tribunal; The Fuehrerprinzip.

maintained that the defendants “of their own free will...enthusiastically carried out the shadow's orders.”¹⁸⁰ The final judgment did not hinge on an order that no one could conclusively prove.

Here the prosecution did not, out of negligence or conscious decision, choose to subvert their contribution to historical record in favor of legal convenience. Historians today continue to argue over the Führer Order, over sixty years after the war. The prosecution incorporated it into their case, but, as lawyers, they did not rely on what they could not prove. They did not rely on the testimony of men whose lives hung in the balance; those who touted the order claimed to have only been obeying orders and those who denied it stressed ignorance of any crimes or that they only killed partisans. The prosecution ultimately told the court that if such an order existed, it confirmed intent for the program of extermination and knowledge of the crimes, and if such an order did not exist, the defendants could not claim to have been acting under superior orders.

d. Conclusions

John Conway suggests that the impact of the Holocaust has been interpreted by historians largely according to the present needs of their audiences.¹⁸¹ Many people today would recognize the prosecution’s description of Einsatzgruppen activities, as Holocaust researchers and scholars would later draw on evidence from produced at the trial.¹⁸² Soon after the trial, Joseph Tenenbaum wrote an account of the Einsatzgruppen using almost all sources from the trial.¹⁸³ In a new age of assigning responsibility to individuals for carrying out acts approved by the state, the prosecution at the trial reasserted individual responsibility for mass murder. The

¹⁸⁰ “Opinion and Judgment of the Tribunal; the Fuehrerprinzip.

¹⁸¹ Conway, “The Holocaust and the Historians,” 153.

¹⁸² While the one million killed by the Einsatzgruppen is included in the oft cited figure of six million European Jews murdered by the Nazis, historians debate the extent to which the Einsatzgruppen shootings, which largely occurred before the 1942 Wannsee conference, lead directly to the camps or were seen as part of the Final Solution as it would come to be realized. For more, see Christopher Browning’s work.

¹⁸³ Joseph Tenenbaum, “The Einsatzgruppen,” *Jewish Social Studies* 17, No. 1 (1955): 43-64.

Einsatzgruppen defendants “operated in a hierarchical and remote fashion,” and the Prosecution had “no evidence that either Otto Ohlendorf or others themselves fired a shot during the executions.”¹⁸⁴ The prosecution connected defendants ideologically to the goals of extermination constantly articulated by the SS, and physically in time and space to command of killing units. Historian Omer Bartov has observed that “hell enjoys the advantage of accommodating only sinners...the landscape of World War I and the Holocaust...are the domain of the innocent, inhabited by souls who never expected to endure them, and conform to no rational plan or logic decipherable by their victims.”¹⁸⁵ The prosecution identified the genocidal plan of the perpetrators and executions sanctioned, supported and designed by the leaders of the Reich, not spontaneous but deliberate exterminations.

Reflecting on the prosecution’s evidence and its interpretations, the judges at Nuremberg also noted the resilience of humanity, as a race “which will go on in spite of all the fuehrers and dictators that little brains and smaller souls can elevate to platforms of tinsel poised on bastions of straw.”¹⁸⁶ As the prosecution claimed that the Nazi doctrine endangered all humanity because it devalued individuals because of their connection to certain groups, they showed how the Nazi program constituted a clear plan of dehumanization and mass murder. By describing humanity as a race of interconnected human beings, the prosecution and judges overturned the divisive Nazi doctrine in favor of an international law protecting all people, regardless of state or race, based on their humanity.

¹⁸⁴ “The Men of Einsatzgruppe D: an Inside View of a State-Sanctioned Killing Unit in the Third Reich,” Andrej Angrick, in Olaf Jensen and Claus Szejmann, *Ordinary People as Mass Murderers: Perpetrators in Comparative Perspectives*, Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2008, 86.

¹⁸⁵ Omer Bartov, *Murder in our Midst: the Holocaust, Industrial Killing, and Representation*, New York : Oxford University Press, 1996, 33.

¹⁸⁶ “Opinion and Judgment of the Tribunal,” Einsatzgruppen Case.

Chapter III

Countering the Claims of the Defense

Failing to discredit the prosecution's documented evidence, the defense teams and defendants gave more abstract justifications of orders and security. In his striking final statement, Otto Ohlendorf argued that National Socialism stemmed from the failure of democracy, which "grants individual liberties, but it does not give the reason why."¹⁸⁷ He claimed that Hitler gave them certainty. Many of the defendants announced with total conviction that that they acted in self defense and in righteous obedience to orders. This chapter will examine these twin defenses put forth by Ohlendorf's attorney, Dr Aschenaur, and subsequently adopted by many of the defendants and their counsels. Unable to deny the documentary evidence and corroborating affidavits and testimony, Dr Aschenaur admitted that "executions took place" but that defendants acted on superior orders and out of self defense.¹⁸⁸ Answering these arguments forced the prosecution to nuance their interpretation of the defendant's motivations and sharpen their definition of individual culpability. In Earl's account she claims that the prosecution neglected seeking a motive for the defendants beyond the anti-Semitic Nazi ideology that they had "built into their case."¹⁸⁹ Historians still debate this issue, posing their own interpretations of how and why these men could have committed such atrocities. The trial prosecution, in engaging with these issues, offered a more nuanced interpretation than only "anti-Semitism."

¹⁸⁷ "Closing Statements for the Defense: Defendant Ohlendorf," Einsatzgruppen Case.

¹⁸⁸ "Opening Statements for the Defense: Opening Statement for the Defendant Ohlendorf," Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 (1949-1953): the Einsatzgruppen Case http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=trials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall (Accessed September 18, 2011).

¹⁸⁹ Earl, *The Nuremberg SS-Einsatzgruppen Trial*, 137.

a. The Superior Orders Defense

The NMT trials engaged more with the superior orders defense than the IMT. In Hitler's Germany the Führer had total authority, and if they followed the superior orders claims the IMT could only prosecute a corpse. Instead the IMT judges maintained that every German soldier knew not to obey an illegal order.¹⁹⁰ The Einsatzgruppen Trial permitted counsel to raise the defense but, according to the rules of Control Council Law 10 and the IMT, only to mitigate a defendant's sentence.¹⁹¹ Legal precedent required that the court determine account for choice, the position of the defendant and "the criminal nature of the order."¹⁹²

Oaths and Orders

The Prosecution assured the court that the defendants had not been forced converts to Nazism, but rather its active missionaries.¹⁹³ Prosecutor Ferencz recalls that the defendants represented well educated and well informed men.¹⁹⁴ He later wrote that the defendants had received considerable education before the war; many had in fact been lawyers.¹⁹⁵ They should have recognized the illegality of the orders issued to them. Dr Heim, Counsel for Defendant

¹⁹⁰ Persico, *Nuremberg: Infamy on Trial*, 35.

¹⁹¹ "Opening Statement of the Prosecution: Theory Of Individual Responsibility," the Einsatzgruppen Case, "Closing Statement of the Prosecution, 13 February 1948, by Brigadier General Telford Taylor," *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 (1949-1953): the Einsatzgruppen Case* http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=trials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall (Accessed September 18, 2011).

¹⁹² Justice Birkett, "International Legal Theories Evolved at Nuremberg," *International Affairs (Royal Institute of International Affairs 1944-)* 23, No. 3 (1947): 325, Quincy Wright, "The Law of the Nuremberg Trial," *The American Journal of International Law* 41, No. 1 (1947): 55.

¹⁹³ "Closing Statement of the Prosecution," the Einsatzgruppen Case.

¹⁹⁴ Ferencz, Interview.

¹⁹⁵ "Letter to Dr Nohemiah Robinson World Jewish Congress 1634 Broadway New York 23 N.Y 31 July 1950" Record Group 12.000 Benjamin B Ferencz Collection 1919-1994, United States Holocaust Memorial Museum, Washington, D.C (USHMM).

Blobel, argued the defendants would have been executed for disobeying orders.¹⁹⁶ However, the prosecution could not find any proof of this and concluded that “when there is no fear of reprisal for disobedience, obedience constitutes a completely voluntary participation in the crime.”¹⁹⁷ In fact, few documented cases exist of SS officers punished for refusing to obey these orders.¹⁹⁸ Dr Aschenaur also claimed that Ohlendorf only executed his orders “in a limited way.”¹⁹⁹ Ohlendorf told psychiatrist Leon Goldensohn “I couldn’t stop it...By my being there, I thought I could prevent inhuman acts... it’s best to have good people present to prevent bad executions.”²⁰⁰ Defendant Schubert’s affidavit attests that “otherwise...the moral strain would have been too great for the execution squad,” and Ferencz noted, “the only concern for the unfortunate victim was that he be standing in the proper position in the tank ditch before he was shot.”²⁰¹ Furthermore, when the Einsatzgruppen used the gas vans, initially meant to be secretive and to be less psychologically damaging, soon became known as “death vans” by the locals and traumatic for those unloading the twisted corpses.²⁰² The prosecution also pointed out that the defendants killed rapidly for reluctant soldiers, averaging “1,350 human beings slaughtered on the average

¹⁹⁶ “Opening Statements for the Defense: Opening Statement for the Defendant Blobel,” the Einsatzgruppen Case

¹⁹⁷ “Blobel Case Brief,” John Mendelsohn, *Punishing the Perpetrators of the Holocaust: the Brandt, Pohl and Ohlendorf Cases*, New York : Garland, 1982, 264.

¹⁹⁸ David H Kitterman, “Those Who Said “No!”: Germans Who Refused to Execute Civilians during World War II.” *German Studies Review* 11, No. 2 (1988): 252, “International Law after the Nuremberg Trials and Rwanda: How Do Perpetrators Justify Themselves?” Gerd Hankel, in Olaf Jensen and Claus Szejnmann, *Ordinary People as Mass Murderers: Perpetrators in Comparative Perspectives*, Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2008, 212.

¹⁹⁹ “Opening Statements for the Defense: Opening Statement for the Defendant Ohlendorf,” the Einsatzgruppen Case.

²⁰⁰ Leon Goldensohn, *The Nuremberg Interviews*, 392.

²⁰¹ Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, Nurnberg, Germany on 15 September 1947, 105.

²⁰² “Translation of Document 501-PS Prosecution Exhibit 32, Extracts from Correspondence 16 May 1942, Concerning Execution Vans Used by the Einsatzgruppen in the East 1: “Evidence and Arguments on Important Aspects of the Case,” The Einsatzgruppen Case, Official Transcript Of the American Military Tribunal No.2-A in the Matter of the United States of America against Otto Ohlendorf et al, Nurnberg, Germany on 15 September 1947, 109.

day.”²⁰³ Furthermore, the defendants’ insistence that they carried out proper executions proved that, able to prescribe the manner of the “liquidations,” they still failed to halt them.

Most defendants claimed that they only behaved as obedient soldiers under oath to Hitler. Defendant Naumann placed the Führer Order as “superior to his conscience.”²⁰⁴ Defendant Six, and others claimed that “I do not have to reproach myself...as a soldier.”²⁰⁵ The defendants argued the *tu quoque* (and so did you) defense, that Allied bombers were also obedient soldiers. In what came to be known as the “Dresden defense,” Ohlendorf spoke of taking “children and women out of the burning asphalt...and with my own eyes I saw 60,000 people die within 24 hours.”²⁰⁶ Defendant Naumann argued that “on both sides soldiers executed their orders...even if it was not in accordance with their conscience.”²⁰⁷ The Judges countered that in Allied bombings “civilians are not individualized.”²⁰⁸ They give the example that bombs falling on railroad tracks and striking houses “is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them.”²⁰⁹ The prosecution did not only emphasize the brutality of the Einsatzgruppen’s acts as what made them unique. Torturing and murdering

²⁰³ “Opinion and Judgment of the Tribunal; Activities of the Einsatzgruppen,” Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 (1949-1953): the Einsatzgruppen Case http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0004&div=25&collection=trials&set_as_cursor=5&men_tab=srchresults&terms=einsatzgruppen|trial&type=matchall (Accessed September 18, 2011).

²⁰⁴ “General Asserts Racial Killings Were Justified ‘Says Hitler Sent Order’; Slaying of Jews in the East was Necessary; (Associate Press Nuremberg October 17 1947), Record Group 12.000 Benjamin B Ferencz Collection 1919-1994 United States Holocaust Memorial Museum, Washington, D.C (USHMM).

²⁰⁵ “Final Statements of the Defendants: Six,” the Einsatzgruppen Case.

²⁰⁶ Robert Wolfe, “Putative Threat to National Security as a Nuremberg Defense for Genocide,” *Annals of the American Academy of Political and Social Science* 450, Reflections on the Holocaust: Historical, Philosophical, and Educational Dimensions (1980): 65, At the IMT Justice Jackson had dismissed the *tu quoque* defense. Persico, : *Infamy on Trial*, 36.

²⁰⁷ “Final Statements of the Defendants: Naumann,” the Einsatzgruppen Case.

²⁰⁸ “Opinion and Judgment of the Tribunal: Death of Noncombatants by Bombing,” the Einsatzgruppen Case.

²⁰⁹ “Opinion and Judgment of the Tribunal: Death of Noncombatants by Bombing,” the Einsatzgruppen Case, despite the logic and efforts of the Allies, later scholars point out that “the dual standard did not go unnoticed.” Bishai, “Leaving Nuremberg,” 426.

civilians constituted war crimes as well as crimes against humanity, especially when the murders occurred as part a program of targeted extermination of racial groups. The prosecution did not deny the suffering caused by bombings, or that civilians would die as part of wartime activities, but they argued that the activities of the Einsatzgruppen occurred in occupied territories, could not be explained as security measures, and most importantly, constituted targeted attacks on racial groups meant to destroy these groups. The prosecution argued that crimes against humanity described targeted inhumane acts and the deliberate destruction of particular groups

The defendants claimed that they saw their oath to Hitler as binding even through atrocities. Ohlendorf had admitted to Goldensohn that he didn't approve of the shooting, but said "what else could I do... "I was under oath to Hitler." (Goldensohn) Under oath to commit mass murder? "Under oath."²¹⁰ Like the other defendants Ohlendorf admitted to having "surrendered my moral conscience to the fact I was a soldier, and therefore a cog in a relatively low position of a great machine...Heath: You refused to make any moral judgment, then, and you refuse now? . . . Ohlendorf: Yes."²¹¹ Historian Richard Rhodes would quote Kurt Mobius, former member of a police battalion, as saying that "the thought that one should disobey or evade the order to participate in the extermination of the Jews did not therefore enter my mind at all."²¹² The defendants collectively portrayed themselves as Ohlendorf's "cogs" in the Nazi machine. They claimed that the true fault for the consequences of their actions lay with the creators of the doctrine and orders, not the implementers and executioners. The press at the time reported Ohlendorf as saying that "Reichsführer SS Himmler said that he would carry all responsibility"

²¹⁰ Goldensohn, *the Nuremberg Interviews*, 391.

²¹¹ Wolfe, 64.

²¹² Rhodes, *Masters of Death*, 159.

with the press remarking that “he did not point out that Heinrich Himmler finally evaded the issue by committing suicide.”²¹³

The Prosecution Responds to Oaths and Orders Defense

The prosecution argued that the defendants still had agency and choice as military officers. The prosecution had established that in international law crimes against humanity would be illegal under any penal code. The Einsatzgruppen Trial prosecution referred to customary international law as the general sources of law, principles and norms predating the trial.²¹⁴ Although Taylor’s opening statement in the Judges Trial speaks to the German justice system becoming “an instrumentality of murder,” there was also a sense of natural law, that as “the crime originated in “humanity”-presumably under natural law” and even if legal under German law, the act of murder is still manifestly illegal.²¹⁵ Telford Taylor had said “there are certain standards of conduct...which all men are bound as a matter of international law to observe...men who violate these international standards are criminals and may be convicted and punished under international law...these standards...make criminal under international law...inhumane persecutions of racial, religious, or other groups.”²¹⁶ The prosecution argued that these each of these men as commanders “assumed the right to decide the fate of men, and death was the intended result of his power and contempt.”²¹⁷ But the defendants continued to blame those from whom the orders originated, as if their agency as officers ended where it began, with “the Führer

²¹³ “SS Defendants Admits Role in Race Murders,” (Oct 8 1947) Record Group 12.000 Benjamin B Ferencz Collection 1919-1994 United States Holocaust Memorial Museum, Washington, D.C (USHMM).

²¹⁴ McAuliffe de Guzman, “the Road from Rome,” 350.

²¹⁵ “Opening Statement of the Prosecution,” Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 27 (1949-1953) ; the Justice Case <http://www.heinonline.org/HOL/Page?collection=trials&handle=hein.trials/twc0003&type=Text&id=63>, (Accessed December 19, 2011), Orentlicher, “Settling Accounts,” 2556.

²¹⁶ Taylor, “Appraisal,” 21.

²¹⁷ “Opening Statement of the Prosecution,” the Einsatzgruppen Case.

and Himmler.”²¹⁸ The prosecution instead emphasized choice over compulsion that the defendants chose to obey orders they must have known to be illegal and that crimes against humanity constitute more serious offenses than regular crimes.

At the Einsatzgruppen Trial they allowed the superior orders defense as a potentially mitigating defense, but the prosecution would hold the defendants responsible for what customary and natural law considered illegal. The defendants maintained the “Befehl ist befehl,” “orders are orders” defense, that as subordinates within a sovereign state they did not question the will of the state.²¹⁹ The prosecution however, chose to insist on and emphasize choice, reinforcing the court’s rejection of international legal practice of “the doctrine of absolute sovereignty” of states and their officers.²²⁰ Defendant Naumann claimed to have been “a German soldier and officer in the truest sense of the word.... I saw... no possibility to disobey this order, even though my inner attitude resisted it.”²²¹ Naumann may well have been a true Nazi soldier in his complete and total obedience to orders which rewrote the laws of mankind to sanction murder. The Prosecution argued that under international criminal law an individual could be held responsible for acts considered legal by the state but by nature criminal.²²²

In prewar international law, subordinates had not been obliged to disobey an order unless it was “without any doubt whatever against the law.”²²³ The defense maintained that subordinates obeying commands they found legal could not be prosecuted, but most state

²¹⁸ Goldensohn, *the Nuremberg Interviews*, 392.

²¹⁹ Telford Taylor *the Anatomy of the Nuremberg Trials: A Personal Memoir*, New York: Little Brown & Co (P), 1992, 248, Wolfe, 57.

²²⁰ Stanley L. Paulson, “Classical Legal Positivism at Nuremberg,” *Philosophy & Public Affairs* 4, No. 2 (1975): 150

²²¹ “Final Statements of the Defendants: Naumann,” the Einsatzgruppen Case.

²²² Quincy Wright, “The Law of the Nuremberg Trial,” *The American Journal of International Law* 41, No. 1 (1947): 55.

²²³ (quoting the decision of the “German Supreme Court at Leipzig in the so-called Llandovery Castle Case (1921)”), “Closing Statement of the Prosecution,” the Einsatzgruppen Case.

military laws, including Nazi law made exceptions for “manifestly illegal acts.”²²⁴ Crimes against humanity would certainly constitute an exception to the superior orders defense. The IMT had determined that “superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed.”²²⁵ The prosecution claimed that the murder of men, women and children had always been illegal, and that the defendants should have known that it was against every convention, agreement, norm and law to gun them down.

b. “Whenever Death was on the Hunt:” Self Defense and Security Defense

In Hitler’s *Mein Kampf*, he referred to his experiences in WWI saying that “whenever death was on the hunt” and he felt threatened, he felt stirrings of what he claimed a “weak body” might recognize as reason, but that he argued was really cowardice, a feeling he had to overcome.²²⁶ In looking at Hitler’s hunters, one has to wonder how reason, or for that matter compassion, never surfaced. Without any irony, Ohlendorf’s Defense Counsel Dr Aschenaur, stood before the court and argued that the Soviet Penal Code should be applied in the court because Soviet law defines self defense very broadly.²²⁷ The American judges naturally pointed out “the paradox of the defendant’s invoking the law of a country whose jurisprudence, ideologies, government and social system were all declared antagonistic to Germany, and which very laws, ideologies, government, and social system the defendants... had set out to destroy.”²²⁸ While the laws of the court remained American, Aschenaur maintained this defense, which

²²⁴ Mark J Osiel, “Obeying Orders: Atrocity, Military Discipline, and the Law of War,” *Law Review* 86, No. 5 (Oct., 1998): 972, 981-2.

²²⁵ “Closing Statement of the Prosecution,” the Einsatzgruppen Case.

²²⁶ Rhodes, *Masters of Death*, 32.

²²⁷ “Opening Statements for the Defense: Opening Statement for the Defendant Ohlendorf,” Einsatzgruppen Case

²²⁸ “Opinion and Judgment of the Tribunal: Self-Defense and Necessity,” Einsatzgruppen Case.

Ferencz describes as “presumed necessity” and “presumed self defense.”²²⁹ As the press reported, Naumann argued that the shooting of defenseless people “was necessary to win the war.”²³⁰ Dr Aschenaur actually maintained that the defendants also acted out of “self defense on behalf of the state.”²³¹ He claimed that the defendants just need to have believed a threat to the state existed.²³² Aschenaur then cited threats stemming from subjective conditions, the defendant’s belief “that a solution of the problem ‘bolshevism versus Europe’ could only be brought about by a ‘solution’; of the Jewish problem,” and objective conditions, as in the war with Russia.²³³ Aschenaur said of the killings, “‘War has always promoted such outbreaks.’”²³⁴ This section will examine Aschenaur’s objective and subjective conditions, the dominate strains of the self defense and security argument. The prosecution also addressed Aschenaur’s claims that with all sides committing atrocities, murder is no longer criminal.

Subjective Conditions: Linking Jews and Bolshevism

The defendants claimed that they acted in defense of their survival and that of Germany by eliminating the Bolshevik threat posed by Soviet Jews. Hitler had connected Bolshevism and a Jewish conspiracy as early as 1924 while writing *Mein Kampf* in Landsberg Prison.²³⁵ In March 1941 he spoke to his officers referring to the war with the Soviet Union as an ideological conflict against Bolshevism and its flesh and blood carriers.²³⁶ Ohlendorf claimed, “for us it was obvious that the Jews in Bolshevist Russia played a disproportionately important role,” even

²²⁹ Ferencz, Interview.

²³⁰ “General Asserts Racial Killings Were Justified,” USHMM.

²³¹ “Opening Statements for the Defense: Opening Statement for the Defendant Ohlendorf,” Einsatzgruppen Case.

²³² “Opening Statements for the Defense: Opening Statement for the Defendant Ohlendorf,” Einsatzgruppen Case.

²³³ “Opening Statements for the Defense: Opening Statement for the Defendant Ohlendorf,” Einsatzgruppen Case.

²³⁴ “Opening Statements for the Defense: Opening Statement for the Defendant Ohlendorf,” Einsatzgruppen Case

²³⁵ Rhodes, *Masters of Death* 35.

²³⁶ Rhodes, *Masters of Death*, 14.

arguing that the extermination order for Soviet Jews “was not an anti-Semitic order... Jews in Russia were said to be the main carrier of Bolshevism.”²³⁷ Defendant Blume argued that he saw the struggle “to eliminate the moral threat of bolshevism against our Western cultural values...served by Adolf Hitler's policies.”²³⁸ Defendant Haensch admitted “I do not think that I made a mistake...it is still my conviction to this very day.”²³⁹ Prosecutor Ferencz would write later of being stunned by the utter lack of regret or remorse expressed by the defendants.²⁴⁰

Aschenaur’s argument that the defendants acted out of self defense carried little weight. The prosecution saw the defendant’s response as confirmation of a doctrine of extermination on the basis of racial or political association. Ferencz’s team argued that the Nazi racial doctrine had not been restricted to wartime insecurities and one could trace the long political, legal and social persecution of German Jews.²⁴¹ The judges also remained unconvinced that killing the Jews assisted the German war effort in any way.²⁴²

Objective Conditions: Wartime Securities

Many defendants claimed that they acted to preserve the security of German troops against the danger of partisan activity and the potential threat of Jewish Bolshevik resistance. As the recounting of subjective conditions appeared to play into the hands of the prosecution, defendants claim to have acted out of the insecurities of war, as Defendant Ott argued the Führer Order “looks quite different if we look at it today as it did then in Russia.”²⁴³

²³⁷ Goldensohn, *The Nuremberg Interviews*, 389.

²³⁸ Wolfe, 62, “Closing Statements for the Defense: Defendant Blume,” Einsatzgruppen Case.

²³⁹ “Closing Statements for the Defense: Defendant Haensch,” Einsatzgruppen Case.

²⁴⁰ “Letter to Dr Nohemiah Robinson,” 1950, USHMM.

²⁴¹ “Closing Statement of the Prosecution,” Einsatzgruppen Case.

²⁴² “Opinion and Judgment of the Tribunal: Self-Defense and Necessity,” Einsatzgruppen Case.

²⁴³ “Closing Statements for the Defense: Defendant Ott,” Einsatzgruppen Case.

Many of the defendants claimed that the Situation Reports referred to those killed for partisan activity or as reprisals. Ohlendorf and other defendants claimed that they expected that the Russians would not follow the laws of war and that certain elements of the civilian population would be a security threat.²⁴⁴ When asked why they murdered children, Ohlendorf told the court that they sought to achieve “permanent security because the children would grow up and surely, being the children of parents who had been killed, they would constitute a danger no smaller than that of the parents.”²⁴⁵ The Prosecution countered that the “contention that even small children were summarily shot because they would, when grown, offer a threat to the security of Germany is as ridiculous as it is fantastic.”²⁴⁶ Nonetheless, Ohlendorf maintained that “genocide-extinction of whole races-was never mentioned to him or his men,” though he did admit to killing tens of thousands for “the security’ of the occupation forces.”²⁴⁷

The prosecution and judges battered this defense as running counter to all legal and military precedent. The judges argued that most of these acts defied military necessity, for example, vehicles that could have been used to haul ammunition to the front were stalled because many of the Jewish drivers (forced into the position in the first place) had been shot.²⁴⁸ Prewar laws of war would never have allowed for the murder of civilians who appeared to pose a potential danger.²⁴⁹ The judges and prosecution argued that preemptive killing is not self defense. Ferencz claimed that the numbers of deaths, descriptions of the murders, defendant testimony and extensive documentation demonstrated that firstly, the reprisals would have been

²⁴⁴ “Closing Statement of the Prosecution,” Einsatzgruppen Case.

²⁴⁵ Taken from an official statement made by Otto Ohlendorf that the prosecution cited, “Closing Statement of the Prosecution,” Einsatzgruppen Case.

²⁴⁶ “Ohlendorf Case Brief,” Mendelsohn *Punishing the Perpetrators of the Holocaust: the Ohlendorf and the Von Weizaecker Cases*, 89.

²⁴⁷ “SS Defendant Admits Role in Race Murders,” USHMM.

²⁴⁸ “Opinion and Judgment of the Tribunal: Authenticity of Reports,” Einsatzgruppen Case.

²⁴⁹ “Opinion and Judgment of the Tribunal: Self-Defense and Necessity,” Einsatzgruppen Case.

criminally disproportionate to the limits allotted in international law, and secondly, that there is little proof that most of these “reprisals” or “anti partisan” activities consisted anything other than deliberate extermination of entire communities. In a 1981 letter, American Chief Counsel General Taylor made sure to correct any misapprehension that the Einsatzgruppen may have also executed partisans, but that their main mission was extermination.²⁵⁰

Total War?

The IMT proposed that even military necessity be “governed by positive international law,” which should always temper military engagement.²⁵¹ NMT defendants often made the case for Allied crimes canceling out their own and in fact, during the war, the Germans had a war crimes commission of their own.²⁵² Blobel’s attorney argued that the prosecution had presented “a simple case of murder” to the court, while the war against the Soviets “was specially characterized by atrocities and cruelties on both sides.”²⁵³ He argued that because German women and children died as well, the whole concept of legality collapses.²⁵⁴ Ohlendorf argued “I cannot morally evaluate...a deed which makes it possible, by pushing a button, to kill a much larger number of civilians...than those deeds of individual people who for the same purpose, namely, to achieve the goal of the war, must shoot individual persons.”²⁵⁵ The prosecution countered the acts of Einsatzgruppen predated bombardments at Dresden, and defendants could not claim that they committed crimes because the Allies did.²⁵⁶ The prosecution also pointed out

²⁵⁰ TTP-7-81-376: Correspondence: (06.1981), “June 25, 1981 letter to Mr. Robert John.”

²⁵¹ William Gerald Downey, Jr, “The Law of War and Military Necessity,” *The American Journal of International Law* 47, No. 2 (1953): 252.

²⁵² Alfred-Maurice de Zayas, “the Wehrmacht Bureau on War Crimes” *The Historical Journal* 35, No. 2 (1992): 387.

²⁵³ “Opening Statements for the Defense: Opening Statement for the Defendant Blobel,” the Einsatzgruppen Case.

²⁵⁴ “Opening Statements for the Defense: Opening Statement for the Defendant Blobel,” the Einsatzgruppen Case.

²⁵⁵ From a statement made by Ohlendorf that the prosecution cites in the “Closing Statement of the Prosecution,” Einsatzgruppen Case.

²⁵⁶ “Closing Statement of the Prosecution,” Einsatzgruppen Case.

that the Allied bombings ended with the war, while German atrocities began after territory had been captured, without the stress of battle, and likely would have escalated had they won the war.²⁵⁷ The prosecution concluded that the Einsatzgruppen's "crimes were a war objective, not a military means."²⁵⁸ Ferencz's team also pointed the absurdity of the defense that "after the Nazis had reviled and degraded and threatened the Jews for twenty years, it certainly might have been expected that the Russian Jews would have feared the coming of the Germans...this very circumstance is put forth as justification for slaughtering them."²⁵⁹

c. Conclusions

In response to the claims of the defense, the prosecution argued that the defendants freely bought into the absurd racial doctrine that defenseless men, women and children would be tied in their blood to Bolshevism. The NMT Medical Trial, charging Nazi doctors with human experimentation, had also criminalized Nazi ideology and obedience, warning that "the perverse thoughts and distorted concepts which brought about these savageries are not dead."²⁶⁰ The Einsatzgruppen Trial prosecution also condemned willful obedience in the face of clearly unconscionable acts as part of the "a systematic murder program."²⁶¹ It stressed that while racism is not unique to Nazism, Nazi racial ideology showed how prejudice and dehumanization can be used to commit genocide. The IMT trial defendants conveyed the complicity that swept the ranks, buoyed by ideology and the potential for self enrichment, as Hans Frank admitted that "it's

²⁵⁷ "Closing Statement of the Prosecution," Einsatzgruppen Case, "Opinion and Judgment of the Tribunal: Authenticity of Reports," Einsatzgruppen Case.

²⁵⁸ "Closing Statement of the Prosecution," Einsatzgruppen Case.

²⁵⁹ "Closing Statement of the Prosecution," Einsatzgruppen Case.

²⁶⁰ "Opening Statement of the Prosecution," Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 -- April 1949 27 (1949-1953), the Medical Case http://www.heinonline.org.ezproxy.cul.columbia.edu/HOL/Page?handle=hein.trials/twc0001&div=23&collection=trials&set_as_cursor=3&men_tab=srchresults&terms=nuremberg|doctors|trial (Accessed December 19, 2011).

²⁶¹ "Former SS Officers on Trial: Nazi 'Systematic Murder' Plans" Article, Nuremberg, Sept 29 1947, Record Group 12.000 Benjamin B Ferencz Collection 1919-1994.

not with the horns on his head or with a forked tail that the devil comes to us ...he comes with a captivating smile...we cannot say that Adolf Hitler violated the German people. He seduced us.”²⁶² The Einsatzgruppen prosecution wanted to make clear that this bureaucracy was not efficient or clinical, only brutal and savage.²⁶³ Ferencz later wrote that he remained convinced that “none of the defendants in the Einsatzgruppen acted against his will.”²⁶⁴

The idea that the Nazis murdered the Jews out of anti-Semitism was well received by the public at the time.²⁶⁵ While a cursory look at the trial might put the prosecution’s arguments closer to modern historian Goldhagen’s “eliminationist anti-Semitism,” this thesis argues that the way in which prosecution stressed obedience alongside ideology, emphasizing choice, as putting them closer to the middle as they didn’t explore Browning’s socialization factors. While the prosecutions’ interpretation stressed the racial ideology of the defendants linking them to a larger program of violence, they also recognized the dangers of a system in which unquestioning obedience to the sovereign state and its doctrines were a danger as well. Rhodes also argues that “choices may be constrained by their circumstances but they are never the only possible choices available.”²⁶⁶ By putting the prosecution closer to the middle of this spectrum examining Einsatzgruppen motivations, one can also see how the importance of choice, in the face of blind ideology and orders, drew the defendant further from the shade of state sovereignty into the bright light of individual accountability. The prosecution identified a pattern of extermination hammered and disciplined into cycles of officially sanctioned violence. Historian Omer Bartov notes how the executioners carried out genocide, as the defendants confirmed, “based on a

²⁶² Persico, *Nuremberg: Infamy on Trial*, 185.

²⁶³ Telford Taylor, “The Nuremberg War Crimes Trials: An Appraisal,” *Proceedings of the Academy of Political Science* 23, No. 3, The United States and the Atlantic Community (May, 1949): 28.

²⁶⁴ “Letter to Dr Nohemiah Robinson,” 1950, USHMM.

²⁶⁵ Earl, *The Nuremberg SS-Einsatzgruppen Trial*, 137.

²⁶⁶ Rhodes, *Masters of Death*, 22.

concept of law and discipline particular to the Nazi regime.”²⁶⁷ Scholar Mark Osiel notes that prewar law had observed “atrocities through disobedience and organizational demise,” but after World War II and Nuremberg, international law has reacted to modern atrocities committed through “obedience to bureaucracy.”²⁶⁸

The Einsatzgruppen Trial prosecution closed their case asking the court to pull away from the immunity of state sovereignty and to recognize instead the sovereignty of humanity. They asked that the court recognize that the racial doctrine of the Nazis constituted a threat to the entire race of humanity, establishing crimes against humanity as fundamentally detached from war crimes not only in the extent of human suffering, which is difficult to measure and can come from bombs as well as guns, but where “criminal intent is directed against the rights of all men.”²⁶⁹ The prosecution argued that in this case the plans and program of extermination clearly demonstrated crimes so heinous that they proved an exception to superior orders defense or claims of self defense. They argued that there is a greater law and a greater doctrine of human value and protection superseding that of the state, made from every international declaration, agreement and affirmation given before and during the war to make explicit crimes against humanity, as the judges confirmed how “each group of people through the ages has carried a stone for the building of a tower of justice, a tower to which the persecuted and the downtrodden of all lands, all races, and all creeds may repair. In the law of humanity we behold the tower.”²⁷⁰ The prosecution claimed that the defendants could be held individually responsible for breaking the laws of humanity by carrying out the orders that called for mass murder and upholding a doctrine that endangered all peoples through its dehumanization of entire populations. Each

²⁶⁷ Omer Bartov, “Soldiers, Nazis, and War in the Third Reich,” *The Journal of Modern History* 63, No. 1 (1991): 52.

²⁶⁸ Osiel, “Obeying Orders,” 1036.

²⁶⁹ “Opening Statement of the Prosecution” Einsatzgruppen Case.

²⁷⁰ “Opinion and Judgment of the Tribunal.” Einsatzgruppen Case.

individual can be defended by this law of humanity, and each individual can also be brought to justice by this same law, that holds them accountable to choices they made of obedience to a state rather than in recognition of the pain and suffering of their fellow human beings.

Chapter IV

Aftermath of the Einsatzgruppen Trial

The NMT Einsatzgruppen Trial judges confirmed the evidence and arguments of the prosecution. They convicted all of the defendants on at least one charge, sentencing 13 to death.²⁷¹ In 1952, a clemency board reduced the sentences of many NMT prisoners.²⁷² In the “Landsberg Report,” the U.S High Commissioner for Germany claimed to have commuted the sentences of Einsatzgruppen officers, some of whom, despite being “deeply guilty,” the Commissioner believed had committed “offenses...on a less opposing scale.”²⁷³ In a December 1951 letter to Telford Taylor, commenting on the reduction of the sentences of Einsatzgruppen officers, Benjamin Ferencz, noted ironically that “you may recall that the deadline for cleaning up Simferopol was Christmas 1941 and that Schubert managed to kill all the Jews by then. So for Christmas ten years later he goes Scot free. Who says there is no Santa Klaus?”²⁷⁴ Nonetheless, four Einsatzgruppen officers, Paul Blobel, Werner Braune, Erich Naumann and Otto Ohlendorf were hanged in 1952; at midnight “they dropped through the trap in the basement of bleak Landsberg Prisoner, where their Fuehrer had written Mein Kampf.”²⁷⁵

a) International Law and Jurisdiction

²⁷¹ Benjamin B Ferencz, “The Holocaust and the Nuremberg Trials,” UN Chronicle, December 2005.

²⁷² Drew Middleton, “Germans Get Their Way on the War Criminals: Under Clemency Board System Most Prisoners Can Get Their Release,” Special to the New York Times, Feb 24, 1952, Record Group 12.000 Benjamin B Ferencz Collection 1919-1994 United States Holocaust Memorial Museum, Washington, D.C (USHMM).

²⁷³ “Statement of U.S High Commissioner” John J McCloy, “Landsberg: A Documentary Report,” Office of the U.S High Commissioner for Germany, Frankfurt Germany, Record Group 12.000 Benjamin B Ferencz Collection 1919-1994 United States Holocaust Memorial Museum, Washington, D.C (USHMM).

²⁷⁴ Bloxham, *Genocide On Trial*, 163.

²⁷⁵ “U.S Hangs 7 Nazis at Landsberg: Group is Executed for mass Murder, War Criminals are Last to Die in U.S Zone, Total Numbered 274,” Associated Press, Record Group 12.000 Benjamin B Ferencz Collection 1919-1994 United States Holocaust Memorial Museum, Washington, D.C (USHMM).

The principles espoused in the Nuremberg Trials found their way to national courts and international legislation. Nuremberg became a model for other states creating national courts following the atrocities of former regimes.²⁷⁶ Although Germany tried war criminals (including Einsatzgruppen officers) on its own, it did so with increasingly smaller sentencing rates, dropping as low as 4-5 percent from 1956-1979.²⁷⁷ That the NMT trials set a legal international precedent can be observed in the 1948 Genocide Convention, which decreed that an international tribunal “may have jurisdiction” to try individuals charged with genocide.²⁷⁸ This Convention echoes the strategy of the NMT trials and Einsatzgruppen Prosecution, keeping genocide separate from aggressive war.²⁷⁹ The International Law Commission also drew from Nuremberg and as late as 1996 “deliberately rejected any connection between crimes against humanity and armed conflict.”²⁸⁰

Unfortunately, the horrors of World War II soon became displaced by the necessities of peacetime politics and the interconnectedness of humanity quickly evanesced, smoke escaping from the fires of Cold War fault lines. After the Nuremberg Trials concluded in 1949 international courts did not put a single offender in the docks until 1997.²⁸¹ Yet “if Nuremberg could be resisted, it could not be ignored.”²⁸² With the end of the Cold War polarization, “it took mass rapes in the former Yugoslavia in 1991 to shake the world out of its lethargy. In 1993, the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia

²⁷⁶ Stephan Landsman, *Crimes of the Holocaust: the Law Confronts Hard Cases*, Philadelphia: University of Pennsylvania Press, 2005, 245.

²⁷⁷ Landsman, *Crimes of the Holocaust*, 242, Landsman looks at the IMT Nuremberg Trial as the quintessential trial, without considering the American Nuremberg Trials.

²⁷⁸ Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience*. Lawrence, Kansas: University Press of Kansas, 1999, 193.

²⁷⁹ Power, *a Problem from Hell*, 58.

²⁸⁰ In its “Draft Code of Crimes against the Peace and Security of Mankind,” deGuzman, “The Road from Rome,” 357.

²⁸¹ Ehrenfreund, *The Nuremberg Legacy*, 125.

²⁸² Robert E Conot, *Justice at Nuremberg*, New York City: Carroll & Graf, 1993, 520.

(ICTY),” charging genocide and crimes against humanity.²⁸³ When over 800,000 Tutsi had been slaughtered in Rwanda, the Security Council enacted another tribunal, the International Criminal Tribunal for Rwanda (ICTR).²⁸⁴ One of the prosecutors cited the ICTY’s “debt to Nuremberg with respect to both substantive law and procedure.”²⁸⁵ The ICTY and ICTR statutes also demonstrated new codifications of crimes against humanity, keeping genocide separate from war crimes. Both of these tribunals viewed Nuremberg as precedent and promise, and the words spoken by prosecutor Ben Ferencz at the Einsatzgruppen Trial would be invoked when the President of the ITCY spoke to the UN Ferencz's own warning; “if these men are immune, then law has lost its meaning and man must live in fear.”²⁸⁶

In 1998 the Rome Statute for the International Court (ICC) was adopted, the treaty passing into effect in 2002.²⁸⁷ The ICC definition of crimes against humanity went further than the ICTY and ICTR definitions, with a longer list of chargeable acts and “cognizable grounds for persecution.”²⁸⁸ The ICC soon encountered opposition from the United States for its ability to charge nationals of any state, although only after that individual’s states fails to prosecute. Ferencz remarked in 2005 that “the United States, which had done so much to advance the rule of law, turned its back on the Nuremberg principle espoused by Robert Jackson, Telford Taylor and many others that law must apply equally to everyone.”²⁸⁹

b) Evidence Contributions

²⁸³ Ferencz, Benjamin B. “The Holocaust and the Nuremberg Trials.” UN Chronicle, December 2005.

²⁸⁴ Ferencz, “The Holocaust and the Nuremberg Trials,” 1.

²⁸⁵ Landsman, 247.

²⁸⁶ Benjamin Ferencz, “A Prosecutor's Personal Account - Nuremberg to Rome,” Columbia Journal of Transnational Law, Spring 1999.

²⁸⁷ Ferencz, Benjamin B. “The Holocaust and the Nuremberg Trials.” UN Chronicle, December 2005.

²⁸⁸ deGuzman, 353.

²⁸⁹ Ferencz, “The Holocaust and the Nuremberg Trials,” 1.

Current historiography, instruction and common knowledge of the Holocaust has greatly benefited from documents discovered, processed and presented at Nuremberg. These include around “42,000 Court exhibits of various sizes, mainly of German origin” and “thousands of prosecution documents” including “17,000 pages of oral evidence.”²⁹⁰ Henry Stimson stressed that this documented record on Nazi criminality would be available for historical record “not in spite of our insistence upon law, but because of it.”²⁹¹

For the Prosecution, the picture they paint of the Einsatzgruppen’s role in the Holocaust, communicated to them through the evidence they present, shows crimes against humanity linked and justified by a cruel ideology and bureaucracy, enforced by a mutual apathy and pressure, enacted through the steps of a pitiless bureaucracy that churned out a nightmarish death for over a million souls. The Judges at the Einsatzgruppen Trial said of the condemned men, “their normal reactions drugged by the opiate of their blind fealty, their human impulses twisted by the passion of their ambitions, they made themselves believe that they were advancing the cause of Germany. But Germany would have fared better without such patriotism.”²⁹² Historians such Christopher Browning and Richard Rhodes examining the Einsatzgruppen and their auxiliaries would reach the same disturbing conclusions, noting that not only the doctrine of anti-Semitism, but blind loyalty and nationalism had enflamed the blood of the Einsatzgruppen commandos. This made their case all the more disconcerting, as Browning concluded “in such a world, I fear, modern governments that wish to commit mass murder will seldom fail in their efforts for being able to have “ordinary men” become their “willing executioners.””²⁹³

²⁹⁰ Robert M W Kempner, “The Nuremberg Trials as Sources of Recent German Political and Historical Materials.” *The American Political Science Review* 44, No. 2 (1950): 447, Quincy Wright, *the Law of the Nuremberg Trial.*” *The American Journal of International Law* 41, No. 1 (1947): 42.

²⁹¹ Stimson, Henry L. “The Nuremberg Trial: Landmark in Law.” *Foreign Affairs* 25, No. 2 (1947): 187.

²⁹² “Opinion and Judgment of the Tribunal: The Fuehrerprinzip,” *Einsatzgruppen Case.*

²⁹³ Browning, *Ordinary Men*, 223.

c) Superior Orders and Self Defense

The Einsatzgruppen Trial prosecution rejected the defense of superior orders. Unfortunately, German courts “accepted that the vast majority of the Einsatzgruppen officers did not make an independence decision to kill the Russian Jews” claiming that Einsatzgruppen they only obeyed Hitler’s orders, indicting “the Einsatzgruppen officers only as accomplices until the conclusion of the last Einsatzgruppen trial in 1991.”²⁹⁴ However, for the ICTY and ICTR charters, the UN Security Council “disallowed superior orders as a defense, permitting its use only in mitigation of sanction.”²⁹⁵ The Rome Statue of the ICC generally discounted superior orders as a defense, ruling as the Einsatzgruppen Prosecution did, that “orders to commit genocide or crimes against humanity are manifestly unlawful.”²⁹⁶ The Einsatzgruppen Trial also challenged the notion of a justifiable preemptive attack, that “to slaughter “the other”—it is the crime of murder.”²⁹⁷ In discussing the question of the legality or illegality of preemptive strikes, Ferencz quoted a U.S 2002 statement ““to exercise our right of self-defense by acting preemptively against such terrorists.””²⁹⁸ The debate about preemptive strikes and presumed self defense appears to have reemerged, and the conclusions from the Einsatzgruppen trial concerning self defense stresses the danger of the term being used to couch murder in terms of security and to act blind to the true nature of the danger and of those

²⁹⁴ Langerbein, *Hitler's Death Squads*, 12.

²⁹⁵ Osiel, 949, “Obeying Orders,” “These Security Council pronouncements suggest that international law offers no excuse of due obedience to the soldier of any rank who performs a criminal act of any sort, even the most minor. But this would almost certainly be mistaken as a general statement of inter-national law; there is virtually no authority for such a proposition. Moreover, it probably does not reflect the intentions of those who drafted the Tribunals' statutes.”

²⁹⁶ “Part III: General Principles of Criminal Law,” Rome Statute of the International Criminal Court [as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999] <http://untreaty.un.org/cod/icc/statute/rome.htm> (Accessed January 15, 2011).

²⁹⁷ Ferencz, Benjamin B. “The Holocaust and the Nuremberg Trials,” 1.

²⁹⁸ “the National Security Strategy of the United States announced by the White House in September 2002,” Ferencz Letter in Wippman article, 881.

Conclusion:

“The Awakening of the Human Conscience”

The prosecution engaged with questions about orders, obedience and security that to them were not historical, but present, human dilemmas. They charged the defendants with genocide, legally defined at the time as crimes against humanity, the most transparent example being the extermination of the Jews. The final judgment of the trial upheld the guilt of the defendants in not only participating in executions but propagating the racist ideals that engendered them; “Hitler struck the match, but the fire would have died a quick death had it not been for his fellow arsonists, big and little, who continued to supply the fuel until they, themselves, were scorched by the flame they had been so enthusiastically tending.”²⁹⁹ In proving the Einsatzgruppen guilty, the prosecution determined that an individual would be responsible for crimes against humanity through acquiescence to a genocidal doctrine and connection to a process of extermination, as guilty as superiors and subordinates if they follow the illegal orders of their superiors and have power over the program of their subordinates.

In the process, the prosecution also argued for individual responsibility in international law and the new conceptualization of a united, sovereign humanity with laws to defend it. The prosecution argued for individuals to be actors under international law, unable to hide in the shadow of state sovereignty when they violate the sovereignty of humanity. World War II demonstrated how not all states defend their own people and that there must be recourse to justice beyond the state. The prosecution’s evidence showed a doctrine and program of targeted extermination toward whole racial groups and extreme dehumanization of the victims. They argued for an interconnectedness of humanity, defined, represented and protected by

²⁹⁹ “Opinion and Judgment of the Tribunal: The Fuehrerprinzip,” Einsatzgruppen Case.

international law against the artificial divisions drawn by states and ignorant men. It showed that to deny the humanity of certain groups is a crime against the race of humanity as a whole, making genocide a kind of fratricide. Now in the burnt and blackened city of Nuremberg, the Einsatzgruppen Trial judges confirmed that although before these trials “Humanity could only plead at the doors of the mighty for a crumb of sympathy and a drop of compassion,” now, “Humanity can assert itself by law. It has taken on the robe of authority.”³⁰⁰

In 1947 prosecution Benjamin Ferencz said in his opening statement “The conscience of humanity is the foundation of all law. We seek here a judgment expressing that conscience and reaffirming under law the basic rights of man.”³⁰¹ In 2011, he spoke of the SS Einsatzgruppen Trial as being an early manifestation of an “awakening of the human conscience.”³⁰² This process of recognizing the interconnectedness of humanity in international law can also be seen in the construction of International Tribunals and the ICC. Emerging from a catastrophic war, the American prosecutors saw the crimes of the Nazis as indicative of a larger crisis of conscience, of a fraying of the bonds that hold humanity together and a frailty of an international system that failed to protect and preserve. That men, women and children had devalued and dehumanization so easily, whose cries had echoed in such overwhelming silence and apathy. The prosecution asked that the conscience of humanity awaken in the defense of its sovereignty, to uphold its own laws, to weave stronger connections between its members, and for each member of humanity to recognize this common thread of grace and justice, and their individual responsibility to uphold it.

³⁰⁰ “Opinion and Judgment of the Tribunal,” Einsatzgruppen Case.

³⁰¹ “Opening Statement of the Prosecution” Einsatzgruppen Case.

³⁰² Ferencz, Interview.

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