

Victim Nationality in US and British Military Trials: Hadamard, Dachau, Belsen

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That girls are raped, that two boys knife a third,
Were axioms to him, who'd never heard
Of any world where promises were kept,
Or one could weep because another wept.

W.H. Auden, *The Shield of Achilles*

From almost the beginning of the Second World War, troubling reports of German atrocities committed on the civilian populations of the east had reached the allied governments then resident in London. Hitler's plans in 1939 to invade and 'Germanize' (*Eindeutschung*) Polish territory entailed the genocidal corollary that large segments of the Polish population would be either resettled or murdered en masse. Hitler left no doubt in the minds of his confidants that the Polish campaign would be waged with unsparing brutality. On 22 August 1939, he had urged military commanders in a meeting at the Obersalzberg 'to close [their] hearts against pity. Brutal action. 80 million people must get their due. Their existence has to be secured. The stronger has the right. The maximum degree of toughness.'¹

In accordance with Hitler's instructions, the German army and security forces in Poland enforced a ruthless policy of mass arrests and shootings of civilians. While many such instances were attributable to premeditated decisions by the Nazi leadership, particularly

the so-called 'A-B Operation' (*allgemeine Befriedigung*, or 'general pacification') that targeted the Polish intelligentsia for extermination, Germany's violent occupation policies were pushed towards greater radicalization by the 'Bromberg Massacre' of 3–5 September 1939, in which Polish civilians unhinged by the invasion of their country killed an undetermined number of Polish ethnic Germans in the town of Bromberg. German security forces retaliated with summary executions of as many as eighty Poles in the Bromberg marketplace. In the wake of these shootings, Heinrich Himmler ordered the arrest of 500 hostages in Bromberg (most taken from the ranks of Polish communists and the intelligentsia), who were to be shot 'in the event of the slightest attempts at rebellion and resistance'. The net effect of these policies was to unleash a campaign of mass murder against Polish civilians at the very onset of the German occupation.²

Similar actions characterized German occupation policy in other European countries invaded by the Wehrmacht. On the orders of Field Marshall Maximilian von Weichs, Supreme Commander of German forces in the occupation of Greece and Yugoslavia, 100 civilians were to be taken hostage and shot for every German soldier killed by partisan attacks.³ Thousands of civilians were executed in connection with Weichs's orders. In Crete, during the spring of 1941, the Germans razed entire towns and shot scores of civilians in reprisal for attacks on German troops. Against the backdrop of mass shootings and murderous reprisal actions, the policy of Germanization through the expulsion of indigenes and resettlement of ethnic Germans moved forward apace. In Alsace-Lorraine, Germanization unfolded through forced transfers of 'ethnically undesired' persons. By the end of 1940, some 155,000 Jews had been expelled from these areas into unoccupied France. When the German army invaded the Soviet Union in June 1941, the same pattern of expulsion and resettlement was extended to the newly conquered territories in the east, where it acquired the title of 'General Plan East'. Policymakers within the Reich Security Main Office held that 31,000,000 civilians would have to be 'evacuated' from Soviet territory to make way for German resettlement. The implication of the bureaucratic term 'evacuated' (*ausgesiedelt*) was clear: the native population would be either deported to Siberia or murdered.⁴

Hence, even before the most heinous of Nazi crimes, the Final Solution, was launched in the autumn of 1941, the Germans were

waging a war of unparalleled savagery in the occupied territories of Europe. In late October 1941, Franklin Roosevelt issued a vaguely worded statement condemning German reprisal shootings against civilian populations in the east as the acts of 'desperate men who know that they cannot win'. These acts, said Roosevelt, would produce 'the seeds of hatred which will one day bring fearful retribution'. The American president's condemnation, which did not elaborate on the specific form this 'fearful retribution' would take, was prompted by requests from the British Foreign Office for a joint declaration on Nazi atrocities. The British had approached the Americans shortly before Roosevelt's announcement about joining them in denouncing the Germans for carrying out 'measures of repression' in the occupied territories – particularly reprisals against civilians for resisting the occupation. The text of the Foreign Office's draft declaration, like its forthcoming American counterpart, lacked detail on how precisely the allies would retaliate for German atrocities; instead, the British alluded to the refusal of 'world opinion' to allow the Germans 'to escape just punishment for their crimes'. The Americans at this time declined the British invitation, issuing instead Roosevelt's nebulous condemnation in late October.⁵

Though lacking in specifics, Roosevelt's statement evoked an echo from Winston Churchill, who issued his own declaration on Nazi atrocities that dovetailed with Roosevelt's. In this declaration, Churchill identified 'retribution for [German] crimes' as one of the 'major purposes of the war'. With these words, Churchill publicly committed the British to a policy of seeking punishment of German offenders. By November 1941, Roosevelt's and Churchill's statements had energized the allied exile governments in London – Poland, Czechoslovakia, Norway, the Netherlands, Belgium, Luxembourg, Yugoslavia, Greece and the National French Committee – to issue their own joint declaration based on those of the American and British leaders. On 13 January 1942, the representatives of these governments-in-exile met at St James's Palace in London to sign the declaration. Modelled on Roosevelt and Churchill's earlier denunciations, the document asserted that a 'principal' aim of the war henceforth was the judicial prosecution of German war criminals for attacks on civilians in occupied Europe.⁶ The 'St James Declaration', as it became known, is notable for at least two reasons: first, it signified an intention by the exile allied governments in London to prosecute the crimes of

National Socialism at war's end; second, it bespoke a sense of unease among the exile governments with British and US commitment at that time to prosecute Nazi war criminals.⁷

The apprehensions of the exile governments were not without foundation. The British and United States (after the latter's entry into the war in December 1941) were initially reluctant to publicize any intention to prosecute Germans for violations of international law in future trials. The sources of this reluctance were twofold. On the one hand, the USA and Great Britain shared a long-held ambivalence about subjecting sovereign leaders to criminal prosecution under international criminal standards. Furthermore, both countries feared that public announcement of future trials could lead to retaliation against American and British Prisoners of War in German hands. With the passage of time, however, the Americans and British gradually changed their minds, and began in late 1942 and 1943, for the first time, to move beyond their vague earlier condemnations and threaten the Germans with judicial prosecution. For this sea-change in policy the exile governments can largely be credited. The diplomatic correspondence of the exile governments in London with the USA and Great Britain during this period reflects the exiles' repeated entreaties to Roosevelt and Churchill to communicate more directly their resolve to hold German actors responsible for their crimes.⁸ By the summer of 1942, at a time when the Western powers first discovered the contours of the Final Solution and the initial phases of its implementation,⁹ the exile governments were lobbying forcefully for the British and Americans to deter the Germans from committing further atrocities. The British 'War Cabinet Committee on the Treatment of War Crimes' proposed to Roosevelt in August 1942 that a United Nations commission might be established to address such concerns. The commission would 'investigate atrocities committed against nationals of the United Nations' and relay information on these atrocities to the 'Governments of those Nations', identifying by name the suspected perpetrators. Only 'organized atrocities' would be investigated. The proposed commission's function would be restricted to 'fact-finding'; solely the affected countries, if so disposed, would be able to prosecute the offenders identified in the commission's reports.¹⁰

From this proposal of August 1942, out of which the UN War Crimes Commission would emerge on 30 October 1943, we may gather two themes that will prove decisive in the jagged history of

allied war crimes policy. In the first place, the UN War Crimes Commission – and, by implication, the British and Americans¹¹ – were only concerned with crimes committed by citizens of enemy countries against United Nations nationals. Equally important, the commission would focus primarily on 'atrocities organized and committed in pursuance of a deliberate policy'. In centring the commission's attention squarely on war crimes traceable to 'deliberate policy,' the British and Americans sought to peripheralize atrocities unrelated to the war, such as pre-1939 persecution of German Jews within Germany, as well as crimes inflicted on German or Axis nationals by Axis governments. Such offences, because they fell within the domestic policy of the enemy and thus qualified as exercises of inner-directed sovereign power, were not technically war crimes, and would not be the concern of the proposed commission. The implication was clear: these acts would not be punished as war crimes – at least not in courts administered by the British and Americans.

Despite British and American reluctance, the exile governments in September 1942 continued to press for a forceful public statement by the allies condemning German atrocities and promising retribution for them. The British expressed willingness to announce their support for a 'Fact Finding Commission', as well as a statement insisting on the insertion of a provision for surrendering war criminals into any armistice signed with Germany. In early October, the Americans agreed to the proposed statement, objecting only to the word 'atrocities' in the title 'United Nations Commission on Atrocities'. The Americans offered an alternative: they preferred to call it the 'United Nations Commission for the Investigation of War Crimes', an alteration indicative of American opposition to investigating and prosecuting anything other than conventional, legally recognized 'war crimes'.¹² Roosevelt issued his own statement independently of the British on 7 October 1942, in which he declared that after the war the armistice would 'include provision for the surrender to the United Nations of war criminals'. He also affirmed American cooperation with the allied governments 'in establishing a United Nations Commission for the Investigation of War Crimes', which would gather and evaluate evidence of German war crimes for the purpose of 'establishing responsibility of the guilty individuals'.¹³

It is far from clear why a delay of more than a year ensued between the announcement of a UN Commission for the Investigation of War Crimes and its actual establishment in the autumn

of 1943. Certainly, a flurry of tide-turning events consumed the British and Americans during this twelve-month interval: El Alamein and the surrender of the Germans in North Africa, the German defeat at Stalingrad and withdrawals from Demyansk and Rzhev, the (first) fall of Mussolini, allied landings in Sicily and Calabria, the Soviets' expulsion of the Germans from the Donets Basin and Kharkov – all transpired during this period. From the diplomatic record, however, can be gleaned the influence of British Jewish groups and members of the exile governments in London in shaping the creation of the UN Commission. Spurred to action in late 1942 by reports of the Final Solution in the East, Jewish groups in London implored the USA, USSR and Great Britain to protest against the annihilation of Jews in the German-occupied territories, in the belief that such protest might deter further Nazi atrocities. British Foreign Minister Anthony Eden prepared a text condemning, in remarkably specific language, the Nazi Final Solution in Poland and threatening punishment for it. This statement was joined by the USA, USSR, Great Britain and other allied governments-in-exile and published on 17 December 1942.¹⁴

In the months between this statement in late 1942 and the Moscow Declaration of 30 October 1943, the USA made at least two public announcements condemning the crimes of the Holocaust – the first by the US Congress in March 1943, the second by the US State Department in August 1943. In the March 1943 statement, Congress resolved 'that this inexcusable slaughter and mistreatment shall cease and that it is the sense of this Congress that those guilty, directly or indirectly, of these criminal acts shall be held accountable and punished'.¹⁵ In the statement of August 1943, the State Department issued a joint 'Declaration on German Crimes in Poland' with the British. The original text of this declaration opened as follows:

Trustworthy information has reached the United States Government regarding the crimes committed by the German invaders against the population of Poland. Since the autumn of 1942 a belt of territory extending from the province of Bialystok southwards along the line of the River Bug has been systematically emptied of its inhabitants. In July 1943 these measures were extended to practically the whole of the province of Lublin, where hundreds of thousands of persons have been deported from their homes or exterminated.

The declaration went on to accuse the Nazis of segregating Jews capable of hard labour from the elderly, children and women; the latter groups were sent 'to concentration camps, where they are now being systematically put to death in gas chambers'.¹⁶ In their closing paragraph, the Americans 'resolve[d] to punish the instigators and actual perpetrators of these crimes'.¹⁷

In sum, in the thirteen months preceding the Moscow Declaration and the formal creation of the UN War Crimes Commission, the USA had made two specific public declarations on Nazi atrocities, demanding their cessation and promising that the perpetrators would be held accountable. The Americans would continue to threaten punishment for these and other crimes until the end of the war in Europe in May 1945.¹⁸ Under the terms of the Moscow Declaration,¹⁹ the plan was to return suspected German war criminals after the war to the scene of their crimes for punishment by the newly liberated countries. This applied solely to lower-ranking members of the German military and Nazi Party. The 'major criminals', however, 'whose offenses have no particular localization', would be dealt with separately: they would 'be punished by joint decision of the Governments of the Allies'. (The latter sentence was ambiguous; eventually, the 'joint decision' of the allies was to try the Nazi leadership before an international military tribunal.) Concurrently with the Moscow Declaration, the long-planned UN War Crimes Commission was officially launched.

The plan for dealing with German war criminals was clear enough as far as many of the harms threatened in allied declarations during the war were concerned: mistreatment of allied POWs, slave labour, the expropriation, deportation and mass murder of civilian populations, and the crime of crimes – the Holocaust – could and would be prosecuted in American and British courts. A singular problem was posed, however, by German crimes in concentration camps. Such crimes were among the most shocking and reprehensible of the Nazis' misdeeds. This notwithstanding, the nationality of concentration camp victims was the *sine qua non* to prosecuting the war crimes committed against them. As we know, Himmler had established the first of Germany's concentration camps, Dachau, in March 1933, as a detention centre for German communists and Social Democrats. Beginning in 1935, other prisoners entered the camp, including Jehovah's Witnesses, Gypsies, churchmen and homosexuals, among others, all of whom were German. After the *Reichskristallnacht* pogrom in November

1938, more than 10,000 German Jews were sent to Dachau and Buchenwald, most of whom were released a few months later. As the Nazis invaded one after the other the countries of western and eastern Europe, they transported to Dachau and other concentration camps in Germany partisans, Jews and opponents of the occupation, so that camp populations soared between 1939 and 1945. When the Second World War began in Europe, the German prisoners at Dachau quickly became a minority in the camp, which by 1944 included Soviets, Jews, Germans, Czechs, Spaniards, Dutch, Belgians, Norwegians, Lithuanians, Austrians, Italians and French. These prisoners were subjected to a constant round of beatings, harassment, intimidation, starvation, brutalization and murder.²⁰ In the closing phases of the war, one of the intractable problems facing allied war crimes trial planning was how to deal with these sorts of crimes by German perpetrators on victims from Germany or its co-belligerents.

In early 1944, the issue was thrown into stark relief in a clash between the newly-established UN War Crimes Commission and the British and American governments. The crux of the disagreement centred on the commission's remit for investigation. In its original form, the remit called for the commission to consider only war crimes committed by enemy nationals on citizens of the United Nations. The commission members, including the American representative, Herbert Pell, chafed at this restriction and petitioned the British Foreign Office and US State Department to expand the commission's jurisdiction to investigate crimes committed by Axis nations against their own citizens.²¹ The British and Americans rebuffed these petitions, citing the impossibility under international law of prosecuting as war crimes the harms inflicted on their own citizens by national governments. In a communiqué to Herbert Pell from Secretary of State Cordell Hull, dated 13 March 1944, Hull rejected the commission's plea:

You inquire whether acts by German authorities against German nationals actively opposed to the existing German Government are to be considered as war crimes. The Department is of the opinion that to assume to punish officials of enemy governments for action taken against their own nationals pursuant to their own laws would constitute an assumption of jurisdiction probably unwarranted under international law.²²

By the late summer of 1944, the War Refugee Board, an independent agency formed by Roosevelt in January 1944 to use psychological warfare to dissuade the Nazis from harming Jews and other minorities, issued a memo to Undersecretary of State Edward Stettinius Jr, Cordell Hull's representative on the Board. The memo expressed concern that the State Department had not instructed Herbert Pell to expand the UN War Crimes Commission's remit to include 'crimes against Jews and other minorities ... where the victims are or were nationals of Germany or of a satellite power'. The memo's author, the Executive Director of the Board, John W. Pehle, referred Stettinius to past declarations in which the Americans had threatened punishment for such acts. Failure to follow through on these threats would, according to Pehle, not only 'be a fearful miscarriage of justice' that would expose the USA to 'ridicule', but would invite repetition of similar atrocities in the future. By way of illustration, Pehle suggested that the Final Solution could be blamed on the 'failure to punish the criminals of World War I: prosecution of German war criminals twenty-five years earlier for attacking civilians during the Great War might have deterred the contemporary extermination of European Jews.'²³

While the USA tenaciously adhered to the view that crimes by Germans against German or Axis nationals were not prosecutable as war crimes, the position espoused in this memorandum that American promises to punish such crimes obligated the USA to fulfil its threats struck a chord with US policymakers. In a letter of 27 October 1944 to Cordell Hull, Secretary of War Henry Stimson raised the issue of prosecuting Nazi perpetrators for atrocities committed against their co-nationals. Such atrocities committed by an Axis government 'would not ordinarily come within the usual legal definition of the term "war crime"'. If such atrocities were to be investigated by the UN War Crimes Commission, then, according to Stimson, 'an extension of the commission would be necessary. Whether this should be done would seem to be primarily a political question.'²⁴ Stimson appended an undated and unsigned memorandum to his letter. The author of this memo asserted that many of the Axis atrocities had been committed before war was declared, and that 'some of the worst outrages were committed by Axis powers against their own nationals on racial, religious, and political grounds. As to these, the offenders can plead justification under domestic law.' For the memo's anonymous author,

prosecuting offenders for crimes inflicted on their own nationals 'would set the precedent of an international right to sit in judgment on the conduct of the several states towards their own nationals. This would open the door to incalculable consequences and present grave questions of policy.' The bind, the author hastened to add, was this: the allied leadership had made 'widely publicized statements' threatening Axis war criminals with prosecution for their involvement in such atrocities.²⁵ The author added: 'To let these brutalities go unpunished will leave millions of persons frustrated and disillusioned.'²⁶

How could the allies prosecute arguably domestic crimes – and thus fulfil their earlier promises – without compromising the national sovereignty of the Nazi government and setting 'the precedent of an international right' to adjudicate such crimes? The memo's author proposed a means of cutting this Gordian knot: namely, to trace all of the Nazi government's sprawling criminality to a giant conspiracy 'to commit murder, terrorism, and the destruction of peaceful populations in violation of the laws of war'. In this way, the allies could prosecute 'domestic atrocities' without violating German national sovereignty: 'in view of the nature of the charge, everything done in furtherance of the conspiracy from the time of its inception would be admissible, including domestic atrocities against minority groups within Germany, and domestic atrocities induced or procured by the German Government to be committed by other Axis Nations against their respective nationals'.²⁷

Commenting on this memorandum, Secretary of War Stimson – perhaps the most important architect of the US war crimes trial programme in its earliest phases – remarked:

You will observe that the memorandum deals in part with the possible prosecution of enemy nationals for atrocities committed against other enemy nationals, particularly minority groups. The proposal is that these atrocities, whether committed before or after the formal declaration of war, be regarded as steps in the execution of a general conspiracy to which all members of certain enemy organizations were parties.²⁸

Stimson advised that the State Department give careful consideration to this proposal for dealing with Axis victims of Axis crimes.²⁹

The point here is that, by the autumn of 1944, the pressure brought to bear by exile governments and Jewish groups in London

on the British and Americans to punish crimes by Germans against Germans or other Axis nationals was beginning to affect allied thinking on the issue. Clearly, the brutalities visited on German, Austrian and Axis citizens in German concentration camps fell within this category. In the British and American planning for war crimes trials, concentration camp crimes would be dealt with not only by the International Military Tribunal and trials under Control Council Law No. 10, but by US and British military courts. The British – just as the United States, Soviet Union and France – opted for a dual strategy: military courts and special courts with jurisdiction for more than war crimes alone.

First, courts with jurisdiction for crimes against peace and crimes against humanity were established by Control Council Law No. 10 (20 December 1945). Law No. 10 also applied to crimes committed by Germans against German victims. It established a trans-zonal criminal jurisdiction for all of occupied Germany consisting of two parts: the applicability of the Nuremberg Charter in national trials and rules for extradition. Law No. 10 was implemented in all of the zones of occupation in 1946. Article III, paragraph 2, stated: 'The tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone.' The following sentence eliminated any imperative: 'Nothing herein is intended to, or shall impair or limit the Jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.' Because the Charter of the International Military Tribunal was an integral component of Law No. 10, it is unsurprising that the elements of the offence specified in both cases were substantially the same. Law No. 10 did enlarge the definition of crimes against humanity to include false imprisonment, torture and rape. The connection between crimes of aggression and war crimes, however, was erased. At the same time, the restriction of justiciable offences to the Second World War was deleted and Law No. 10 interpreted to cover the entire period of the Nazi regime.

Second, the British established military courts in their zone of occupation, which tried accused war criminals under the Royal Warrant of 14 June 1945, for violations of the laws and usages of war. Crimes against humanity and crimes against peace were not included. Suspected war criminals subject to military law were

mostly tried in British courts martial. From July 1945 until 22 December 1949, around 420 military trials were held in Italy, Germany, the Netherlands and Norway on the basis of the Royal Warrant.³⁰ We would mention as one of many examples in this connection the so-called 'baby home trials' conducted by British royal warrant courts, which charged German civilians with killing through wilful neglect a number of children of Polish mothers deported to Germany as slave labourers. Infants were taken from their mothers eight to ten days after birth and confined in a facility where many perished from what the court described as criminal neglect.³¹

The same rules governing the British proceedings also applied to the American Dachau trials: a charge of war crimes could only be maintained if the defendant's actions could be considered to some extent a crime against humanity. Not all of the more than 470 Dachau trials took place at the former concentration camp. As far as we can ascertain, ten cases were held in Italy and fourteen in Austria. Within Germany the Americans established military courts in eleven towns. (See Table 1. Dachau trials cases.) Most of these cases dealt with atrocities in concentration camps and war crimes inflicted on prisoners of war, especially downed US fliers. (See Table 2. Dachau trials cases in Germany, Austria and Italy.) In all these cases the victims were allied nationals.

TABLE 1. DACHAU TRIALS CASES IN GERMANY.

Town	Number
Dachau	394
Ludwigsburg	38
Heidelberg	4
Munich	3
Ahrweiler	2
Augsburg	1
Darmstadt	1
Düren	1
Freising	1
Ludwigsburg/Dachau	1
Wiesbaden	1
Total	447

Unlike the International Military and American National Military Tribunals at Nuremberg, these US and British military courts would prosecute only war crimes as defined under the Geneva

and Hague Conventions.³² Hence, the question of whether and how to charge concentration camp defendants for crimes against camp prisoners from Germany or its co-belligerents was critical. The military courts would follow the practice recommended by Stimson in his October 1944 letter to Cordell Hull – but not without false starts along the way to this solution.

TABLE 2. DACHAU TRIALS CASES, GERMANY, AUSTRIA AND ITALY.

Concentration Camp Cases	83
Concentration Sub-Camp Cases	155
POWs	221
Others	11
Total	470

Three military trials illustrate the sinuous path towards charging Germans for crimes against their co-nationals or co-belligerents. Two of the cases that follow were tried by American military courts in the autumn of 1945: the October 1945 trial of health care personnel from the Hadamar psychiatric hospital and the November 1945 American case against the former commandant and staff (particularly SS guards) of the Dachau concentration camp. The third case, also held in the autumn of 1945, was conducted by the British army under the Royal Warrant, charging forty-five camp personnel from Auschwitz and Bergen Belsen with war crimes. By juxtaposing these three trials, we will see how the Anglo-Americans ultimately finessed the prosecution of a type of crime which had historically been immune to prosecution under international law.

At one end of the spectrum was the early trial before a US army military commission of German medical personnel charged with murdering hundreds of Russian and Polish workers at the Hadamar mental hospital in Hessen-Nassau. Although the trial did not relate directly to concentration camps, it was the first in a series of American army trials of lower-echelon offenders charged with war crimes. The American Hadamar trial is useful for our purposes here because it forced the Americans during the initial stages of their judicial reckoning with Nazi criminality to deal with the issue of crimes by Germans against German nationals. From 1939 to 1940, Hadamar served as both a mental hospital and a lazaretto for German soldiers and POWs. In late 1940, it replaced the T-4 killing centre at Grafeneck, which, along with the euthanasia institution at Brandenburg, was closed in December 1940. Over the next nine months, the medical staff at Hadamar

gassed some 10,000 mentally disabled German nationals. The murders of the disabled abated from August 1941 until August 1942, at which time the killings resumed. During this second phase, additional groups of German nationals were targeted for destruction: mentally disabled youngsters, half-Jewish children, and concentration camp prisoners sent to Hadamar as part of the so-called '14f13' operation. In July or August 1944, the first transport of seventy-five Russian and Polish workers afflicted with tuberculosis arrived at Hadamar. These persons were subsequently murdered through overdoses of narcotics. The killing of the sick forced labourers was the subject of the US Hadamar trial in October 1945.

It is noteworthy that the army's correspondence about the Hadamar killing centre early on characterized the murders of German nationals by the German government at Hadamar as sanctioned by domestic German law. Based on this erroneous characterization, military officials, a full six months before the Hadamar trial began, were already denying that the murders of German citizens could be prosecuted under international law. An April 1945 memorandum from the Office of the Inspector General declared that under international law the army was 'only concerned with the murder of these foreign forced laborers, and the fact must be established that the forced laborers were in good health at the time of extermination, otherwise no war atrocity has been committed under the existing laws of the German government'.³³ Subsequent memoranda on the subject confirmed the view that crimes by Germans against Germans were immune to prosecution under international law.³⁴ As the trial of members of the Hadamar medical staff unfolded in October 1945, its form remained faithful to this strategy of focusing single-mindedly on war crimes involving United Nations nationals. When, for example, the defence counsel repeatedly attempted to inject into the trial references to the murders of German civilians at Hadamar, the prosecution objected on the grounds that the indictment contained no mention of such crimes. The defence counsel countered that it was nonetheless essential for the commission members to be aware of the history of mass murder at Hadamar which had preceded the murders of the eastern workers. The prosecution's objections to including such information were sustained – meaning that the commission deliberated on the killings of the eastern workers in abstraction from Hadamar's murderous history prior to 1944.³⁵

At the other end of the spectrum in the American army's approach to crimes involving German victims was the main, or 'parent', Dachau case tried at roughly the same time (November 1945) as the Hadamar trial.³⁶ The Dachau main trial charged forty former guards and staff at the Dachau concentration camp with participating in a 'common design' to commit war crimes ('killings, beatings, tortures, starvation, abuses and indignities') on thousands of foreign civilian nationals and military members of belligerent nations. As in the indictment of the Hadamar defendants, the Dachau indictment did not include reference to Axis nationals as victims, even though, as at Hadamar, thousands of German civilians were among the victims. At the trial, the defence counsel filed a motion to dismiss based on the failure of the prosecution to identify specifically the names and nationalities of all the Dachau victims. On the defence's theory, if the victims *were* German or Axis nationals, then the military court would have no jurisdiction over them. As the defence counsel noted, many of the victims were in fact enemy nationals from Hungary and Romania, or Italians whose country had been allied with Germany until 1943. Prosecuting acts committed against such individuals by German perpetrators was impermissible under international law. In response, the prosecutor asserted that the basis of the indictment was the 'common design' to persecute camp prisoners, which could be proven with evidence of any persecution at Dachau regardless of the victims' nationality. The military court agreed with the prosecution, and allowed evidence of mistreatment of enemy nationals into the record of the trial.³⁷

The organizers of the American Dachau trial based their approach to concentration camp offenders on the parallel British military trial under Royal Warrant of German personnel from Auschwitz and Bergen-Belsen (referred to in the literature as 'the Belsen Case'). Bergen-Belsen began as a detention camp (*Aufenthaltslager*) in April 1943, in which hostages were held pending exchange with German citizens in allied countries. In March 1944, the Germans began sending to Belsen transports of invalids, unable to work, from other concentration camps. The first of these transports, consisting of 1,000 ill prisoners from the Dora camp, were housed in unsanitary conditions without blankets, access to medical care or adequate nourishment; within a short time nearly all perished. In subsequent months additional transports containing thousands of prisoners characterized as 'unfit for work' arrived

in Belsen from other camps. Most of these persons were Hungarian Jews. Between their arrival in April 1944 and June 1944, 820 of these prisoners died. The survivors and others housed in their section of the camp were forced to run a lethal gauntlet of sadistic abuse at the hands of criminal *kapos* sent to Belsen from Dora and the camp doctor, Karl Jäger, who tormented the prisoners by forcing them into enervating runs. Mortality in the camp soared, fuelled by wilful acts of violence, wanton neglect of the prisoners' most basic needs, and rampaging typhus epidemics, which in March 1945 claimed the lives of 18,168 prisoners. By mid-April 1945, there were 60,000 prisoners in Belsen; of this number, 14,000 died within five days of the camp's liberation by the British, and another 14,000 in ensuing weeks.³⁸

In a trial that lasted from 17 September 1945 to 17 November 1945, the British army prosecuted forty-five of the Belsen camp staff before a military tribunal convened under Royal Warrant. In many respects, the Belsen trial resembles its American counterpart at Dachau. As at Dachau, the Belsen trial charged the accused with violations of the laws of war for their contributions to the deaths of allied and Hungarian nationals between 1 October 1942 and 31 April 1945. Like the Dachau trial, moreover, the Royal Warrant court accused the defendants both of individual war crimes and with participating in a 'common plan' to commit acts of murder and persecution in Belsen and Auschwitz. In presenting its case against the accused, the prosecution offered the affidavit testimony of a Jewish woman from Greece, Dora Almaleh, which implicated two of the defendants, an SS member named Karl Egersdorf and a female camp guard, Hilda Liesewitz, in the murders of camp inmates. According to the affidavit, Egersdorf had shot a Hungarian girl for having in her possession a loaf of bread; Liesewitz had beaten and stamped on the chests of two prisoners for removing turnips from a cart. The defence counsel objected to the portion of Dora Almaleh's affidavit relating to the murder of the Hungarian girl on the ground that the Royal Warrant, which only covered war crimes, did not extend to crimes by Germans against co-belligerent nationals. The prosecution agreed that only crimes by Germans on allied nationals were justiciable as war crimes, but argued that evidence of general persecution in the Belsen camp was admissible to prove such crimes had indeed been carried out against allied citizens, whether or not the evidence included acts of persecution targeting German

or Axis nationals. The British military tribunal agreed with the prosecution and admitted the evidence of the Hungarian girl's murder.³⁹

We know that the organizers of the Dachau 'parent' case were influenced by the British Belsen trial, particularly its insistence that the Belsen defendants participated in a 'common plan' to commit war crimes at Belsen and Auschwitz. As the American Deputy Theatre Judge Advocate wrote in his review of the Dachau trial, the Belsen case invited emulation by US war crimes planners because it 'was the first instance of a mass trial for war crimes committed by persons acting in concert'.⁴⁰ As we have seen, the Americans at Dachau also followed the British in admitting evidence into the trial record of crimes by Germans against German and co-belligerent victims. Such crimes were not technically war crimes, as the defence counsel correctly argued, because they lacked the diversity of nationality required under the laws of war. This notwithstanding, in both trials, evidence of these crimes was allowed in order to prove the defendants' involvement in a common plan to commit war crimes on allied victims. The tribunals' rulings in the Belsen and Dachau trials stand in stark contrast with the approach taken in the Hadamar case, in which evidence of crimes committed against German or Axis victims was excluded from the record altogether on grounds of relevance.

Later US army trials of concentration camp defendants followed the pattern established in the Dachau parent case and the British Belsen trial. Summarizing this approach in 1948, the Deputy Judge Advocate for War Crimes – European Command, Lt Col C.E. Straight, reported:

In arriving at the conclusion that it was appropriate to consider [acts of violence by German defendants on German nationals] ... in determining the degree of participation of the accused in the execution of the common design, it was pointed out that the charge and particulars alleged participation in the execution of a common design and not disassociated acts of violence against German nationals and that evidence showing that participants tortured, beat or killed German inmates demonstrated the character of their participation and established that they, through example by such acts, encouraged others to commit similar acts of cruelty against inmates without regard

to nationality, thus maintaining and furthering the overall objectives of the operation.⁴¹

The American and British military courts' willingness to consider evidence of atrocities committed by Germans on their co-nationals was consistent with the position outlined in 1947 by the French judge at the Nuremberg International Military Tribunal, Donnedieu de Vabres. He considered the issue in reference to the question of whether pre-war atrocities of the Nazi state against German nationals should be charged as crimes against humanity against German malefactors. For de Vabres, these pre-1939 acts were chargeable because they facilitated the commission of war crimes and crimes against peace:

The principal impact of this question [of charging atrocities on German civilians as crimes against humanity] is on the intermediate period between the seizure of power by the Nazis and the outbreak of the war, during which the brutalities of the SA, the creation of the Gestapo, and the institution of concentration camps subjected the adversaries of Nazism (Jews, communists, and social democrats) to cruelties and atrocities which, later on and in considerably increased degree, affected individuals of other nationalities. Is it not evident that the elimination by Nazism of internal elements hostile to it was a prelude to aggressive war? Therefore does there not exist, between the crimes against humanity which preceded or followed the seizure of power and the crime against peace, the relation and connection required by Article 6 [of the International Military Tribunal Charter]?⁴²

De Vabre's receptiveness to charging pre-war atrocities notwithstanding, US military lawyers remained sceptical that such acts could be charged under then existing international law. In a memorandum for the US Judge Advocate from January 1945, the Acting Chief of the War Plans Division, Willard Cowles, rejected including pre-war atrocities in the forthcoming indictment of German war criminals. For Cowles, pre-war persecution of German Jews and other groups was designed 'to attract people to Hitler's *domestic program*', and not as the first step in 'a conspiracy to dominate the world by illegal methods of warfare' (*italics in the original*). To charge the Germans for such acts would amount to a violation of German national sovereignty, opening the door to the 'defense

that the treatment of a nation's subjects are matters which fall within the "exclusive domestic jurisdiction" of a State'. Cowles did concede, however, that pre-war plans drawn by the Nazis for the persecution of civilians *after the war began* might be actionable under the law of armed conflict if related to German efforts to wage aggressive warfare.⁴³

The US army courts, as we have seen, tended to adopt the principle of the Belsen and Dachau cases that evidence of crimes by Germans against German or Axis nationals was admissible to prove the element of participation in a common design to commit war crimes against allied and UN nationals. In view of this tendency, the refusal of the Hadamar military commission to consider such evidence is telling. It suggests that the position of the Hadamar commission was retrograde in its adherence to the traditional view that acts of violence inflicted by nation states on their own citizens were beyond the reach of international criminal law as war crimes. Sovereign immunity for crimes committed against one's own nationals was the accepted doctrine until 1945 – a doctrine that, as we have seen, underpinned the early views of the US State Department and British Foreign Office that such crimes could not be punished in British and American courts. Sovereign immunity had shielded both Turkish perpetrators of the Armenian genocide and German war criminals from international prosecution after the First World War. Its continued vitality in the minds of American and British war crimes planners during the Second World War alarmed the exile governments and Jewish groups, who feared that, as it had done after the Great War, sovereign immunity might once more insulate appalling German crimes from punishment.

As it turns out, sovereign immunity as an absolute shield to the criminal liability of state actors was to be swept away in the post-war years. The slow death-in-life of sovereign immunity occurred in graduated phases. The first is seen, albeit as a dim flicker, in the Dachau trials' assertion that German against German atrocities could be treated as evidence of a common design to commit war crimes. The second emerged in the trials under Control Council Law No. 10, which charged German defendants with attacks on civilians (through the offence of 'crimes against humanity'), whether or not their actions were related to aggressive warfare. The third appears in a number of post-war conventions and international criminal trials, including the Genocide Convention of

9 December 1948, Chapter 7 of the UN Charter (providing for international military intervention against countries if necessary to preserve or restore international peace), and the case of Dusko Tadic tried in 1996 by the International Tribunal for Yugoslavia (holding that international customary law also applied to so-called 'internal conflicts'). Chip by chip, international humanitarian law has eroded the massive glacier of sovereign immunity, and while that glacier is still capable of chilling international prosecution, its dominance since 1945 has been repeatedly and successfully called into question. As early as 1945, however, the Americans had achieved an uneasy truce between traditional sovereign immunity and the need to fulfil their wartime promises to punish Nazi crimes. If some of the military trials, like the Hadamar case, expressed a fading paradigm, others anticipated a new one – a model based not on sovereign immunity, but on sovereign accountability. In the wartime correspondence of allied government officials, exile governments, and advocates for the victims of German crimes, as well as in the post-war jurisprudence of British and US military trials, lay the seeds of this remarkable change.

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NOTES

1. *Akten zur Deutschen Auswärtigen Politik, 1918–45*, Series D, 1937–45, Vol. 7 (Baden-Baden: Impremerie Nationale, 1950), p.172, excerpted in Michael Wildt, *Generation des Unbedingten: Das Führungskorps des Reichssicherheitshauptamtes* (Hamburg: Hamburger Edition HIS Verlagsges. mbH, 2003), p.420. On the ferocious war of extermination waged against Polish POWs and civilians in the first year of the Second World War, see Alexander Rossino, *Hitler Strikes Poland: Blitzkrieg, Ideology, and Atrocity* (Lawrence, KS: University Press of Kansas, 2003).
2. Wildt, *Generation*, pp.439ff. The extermination of the Polish intelligentsia and reprisal shootings against Polish civilians interlaced with yet another genocidal policy in occupied Poland: the policy of 'ethnic consolidation' (*völkische Flurbereinigung*) set forth in an agreement of 9 September 1939 between the army's Quartermaster General, Eduard Wagner, and the Chief of the Reich Security Main Office, Reinhard Heydrich. According to its terms, Polish Jews, clerics, intellectuals and the nobility were to be liquidated. This ominous *Flurbereinigung* would not be carried out by the army, but by the shock troops of Nazi racialist ideology, the SS and Security Police.

3. These mass reprisals against civilians in Greece and Yugoslavia became the object of an American trial at Nuremberg against twelve German army commanders (*US v. List et al.*, Case No. 7).
4. Wildt, *Generation*, pp.524–6, 664–8; Telford Taylor, 'The Nuremberg War Crimes Trial', *International Conciliation*, 450 (April 1949), pp.320ff.
5. US Department of State, *Foreign Relations of the United States: Diplomatic Papers 1941*, Vol. 1 (Washington, DC: Government Printing Office, 1960), pp.445ff.
6. *Ibid.*
7. In October 1942, the USSR issued a belated reply to the St James Declaration. The Soviet statement consisted of three parts: (1) An international court should subject the Nazi leadership to criminal prosecution; (2) lower-ranking German war criminals should be tried in national criminal courts; and (3) the USSR was willing to cooperate in surrendering and extraditing war crimes suspects. One year later, ostensibly at the initiative of the Soviets, the USA, Great Britain and the USSR issued the Moscow Declaration, which, *inter alia*, provided that war crimes suspects would be returned to the scenes of their alleged crimes for trial by the newly reconstituted governments. See the National Archives, Kew (London), FO 370/2899. See also Wolfgang Form, 'Planung und Durchführung west-alliiertes Kriegsverbrecherprozesse nach dem Zweiten Weltkrieg', in Thomas von Winter and Volker Mittendorf (eds), *Perspektiven der politischen Soziologie im Wandel von Gesellschaft und Staatlichkeit* (Wiesbaden: Verlag für Sozialwissenschaften, 2008), pp.233–53, 236.
8. See, for example, the letter from Dutch Ambassador Loudon, Luxembourg Minister Le Gallais, and Yugoslav Minister Potitch to Cordell Hull, 30 July 1942, in US Department of State, *Foreign Relations of the United States: Diplomatic Papers 1942*, Vol. 1, pp.46–7.
9. Gerhard Weinberg, *A World at Arms: A Global History of World War II* (Cambridge: Cambridge University Press, 1994), p.303.
10. US Department of State, *Foreign Relations of the US, Diplomatic Papers 1942*, Vol. 1, pp.48–50. On the history of the UN War Crimes Commission, see UN War Crimes Commission, *History of the UN War Crimes Commission and the Development of the Laws of War* (London: His Majesty's Stationery Office, 1948); United Nations Information Organization [hereafter UNIO], 'War Crimes and the Punishment of War Criminals', Information Paper No.1 (London, 1945) in RMW Kempner Collection, pp.9–10; Memorandum for the Assistant Secretary of War, Subject: The United Nations War Crimes Commission, 24 October 1944, National Archives Records Administration [hereafter NARA], RG 153, Entry 1026, Directives-1.
11. The Soviets did not participate in the UN War Crimes Commission because they demanded representation within it for each of the Soviet Socialist Republics. Such demands were unacceptable for the other participating countries.
12. US Department of State, *Foreign Relations of the US, Diplomatic Papers 1942*, Vol. 1, pp.58–9.
13. Statement by the President, 7 October 1942, NARA, RG 107, Entry 74A, Box 5.
14. Declaration Advocating Punishment of Axis War Criminals for Crimes Against the Jews, NARA, RG 107, Entry 74A, Box 5; *Foreign Relations of the US, 1942*, Vol. 1, pp.66–8.
15. Cable from the Department of State to Ambassador Winant for H.C. Pell, London, England (undated), NARA, RG 107, Entry 74A, Box 5, German War Crimes.
16. The British persuaded the Americans to drop the reference to execution in 'gas chambers', on the grounds of 'insufficient evidence' for their existence. See US Department of State, *Foreign Relations of the US, Diplomatic Papers 1943*, Vol. 1, pp.416–17.
17. Cable from the Secretary of State to the US Ambassador in the USSR, 27 August 1943, in US Department of State, *Foreign Relations of the US, Diplomatic Papers 1943*, Vol. 1, p.416.
18. See, for example, Roosevelt's statements of 23 March 1944, 30 March 1944 and 15 July 1944, summarized in the Cable from the Department of State to Ambassador Winant for H.C. Pell, London, England, NARA, RG 107, Entry 74A, Box 5, German War Crimes.
19. See Department of State, press release no. 462: 1 November 1943, NARA, RG 107, Entry 74A, Box 5, German War Crimes.
20. Michael S. Bryant, 'Punishing the Excess: Sadism, Bureaucratized Atrocity, and the US

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21. See the exchanges between the US Department of State and Herbert Pell, the American representative to the UN War Crimes Commission, in 'Discussions Regarding Procedures and Scope of the UN Commission for the Investigation of War Crimes', in US Department of State, *Foreign Relations of the US, Diplomatic Papers 1944*, Vol. 1, pp.1265ff.
22. *Ibid.*, p.1287.
23. Memorandum for Mr Stettinius from J.W. Pehle of the War Refugee Board, 28 August 1944, NARA, RG 107, Entry 74A, Box 5, German War Crimes. On the War Refugee Board generally, see the entry in the US Holocaust Memorial Museum's *Holocaust Encyclopedia*, available at <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007409>.
24. NARA, RG 107, Entry 74A, Box 5, German War Crimes, 27 October 1944, 1.
25. *Ibid.*, attachment, 1f.
26. *Ibid.*, attachment, 3.
27. *Ibid.*, attachment, 6.
28. *Ibid.*, letter of 27 October 1944, pp.2f.
29. *Ibid.*, attachment, p.2.
30. Wolfgang Form, 'Justizpolitische Aspekte west-alliiertes Kriegsverbrecherprozesse 1942–1950', in Ludwig Eiber and Robert Sigel (eds), *Dachauer Prozesse: NS-Verbrechen vor amerikanischen Militärgerichten in Dachau 1945–1948* (Göttingen: Wallstein Verlag, 2007), pp.41–66.
31. Hersch Lauterpacht, Foreword, in George Brand (ed.), *War Crimes Trials, Vol. 7: The Velpke Baby Home Trial* (London, Edinburgh and Glasgow: William Hodge and Company, 1950), p.xiii.
32. The International Military Tribunal and national trials under Control Council Law No. 10, by contrast, prosecuted an array of offences organized under the three broad charges of Crimes against Peace, War Crimes, and Crimes against Humanity. The latter pertained to offences committed against civilian populations – a charge denied to the military courts of the USA and Great Britain.
33. NARA, RG 338, Microfilm Collection M 1078, Roll 1, p.572.
34. See, for example, the Army JAG (Judge Advocate General) correspondence on the Hadamar killings in *ibid.*, pp.652, 665.
35. NARA, RG 338, Microfilm Collection M 1078, Roll 2, pp.35, 51, 54.
36. On the history, proceedings and aftermath of the US Dachau parent case, see Holger Lessing, *Der erste Dachau Prozeß (1945/46)* (Baden-Baden: Nomos Verlagsgesellschaft, 1993); Michael Bryant, 'Die US-amerikanischen Militärgerichtsprozesse gegen SS-Personal, Ärzte und Kapos des KZ Dachau 1945–1948', in Eiber and Sigel (eds), *Dachauer Prozesse: NS-Verbrechen vor amerikanischen Militärgerichten in Dachau 1945–1948*, pp.109–25.
37. *US v. Martin Weiss et al* (Dachau Parent Case), NARA, RG 338, Microfilm Collection M 1174. See also the summary of the Dachau parent case in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 2 (Buffalo, NY: William S. Hein & Co., 1997), pp.8–9. The military government court's ruling on the defence motion was upheld on appeal: see *Review and Recommendation of the Theater Judge Advocate for War Crimes*, March 1946, NARA, RG 549, Microfilm Collection M 1217, Roll 3, p.161.
38. Israel Gutman (ed.), *Encyclopedia of the Holocaust*, 1st edn (New York: Macmillan, 1990), Volume 1, s.v. 'Bergen-Belsen', by Shmuel Krakowski.
39. The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals, Vol. 1: The Belsen Trial* (London: His Majesty's Stationery Office, 1947), pp.150–1. Neither prosecution nor defence counsel in the Belsen case argued that crimes by Germans against German or co-belligerent nationals were chargeable as war crimes under the Royal Warrant. Such crimes, which would later be charged against Nazi defendants as 'crimes against humanity', were beyond the jurisdiction of the Royal Warrant – and, indeed, beyond the reach of traditional definitions of actionable crimes of war.
40. Review and Recommendation of the Deputy Theater Judge Advocate, March 1946, NARA, RG 549, Microfilm Collection M 1217, Roll 3 (*US v. Martin Gottfried Weiss et al.*).
41. Report of the Deputy Judge Advocate for War Crimes – European Command, June 1944

- to July 1948, NARA, RG 549, Entry A-2236, Box 13 (citing *US v. Schmitz et al.*, March 1948, Case no. 000-50-5-33; for case files, see NARA, RG 549, Entry A1-2238, Boxes 415-416).
42. Donnedieu de Vabres, 'The Judgement of Nuremberg and the Principle of Legality of Offences and Penalties', July 1947, US Holocaust Memorial Museum Archives, Robert M.W. Kempner Papers, Box 142, Folder F3: International Law 1945-55, p.13.
43. Memorandum for The Judge Advocate, Subject: War Crimes as Related to the Preparation, Launching, and Opening of Hostilities without Previous Warning, 3 January 1945, US Holocaust Memorial Museum Archives, Robert M. Kempner Papers, Box 142, Folder F3, pp.27-8. Cowles's position is a statement par excellence of the traditional doctrine of sovereign immunity in domestic affairs. Interestingly, the International Military Tribunal at Nuremberg adopted Cowles's view negating the criminal liability of Nazi perpetrators under international law for pre-war acts of persecution on German nationals, pace the sympathetic views of Judge de Vabres.

Nameless Victims: Nazi Human Experiments on Russians in the Second World War: Statistics, Stories and Stereotypes

NICHOLA HUNT

On 3 January 1946, the *Soviet Weekly*, an English-language newspaper published by the Soviet Embassy in London, ran a report covering the trial of ten German servicemen in the Russian city of Smolensk, a trial that was reported as creating a 'deep impression across the Soviet Union'. With moral condemnation, the reporter outlined the catalogue of offences that the defendants were accused of committing against the Soviet people in the area. There were reports that on 19 June 1942 the entire population of the Verkhnie Sadki district of Smolensk had been killed, whilst civilians in surrounding districts were incarcerated, among them the elderly and children, in Prisoner of War camps, and Red Army prisoners massacred. There was also a focus on the crimes committed in German Military Hospital No. 551, stationed in the area from September 1941 to April 1943; the report noted: 'Untried biological and chemical preparations were first tested on Soviet war prisoners, and as a rule, those subjected to these experiments were exterminated.'

The Military Hospital was a location for medical experiments that had a military justification; here Soviets who were unfortunate enough to fall into German hands were used as testing material for the agents of war developed for use against their own country. Accusations against the defendants concerning activities in the hospital would cover a plethora of abuses which were presented