

Chapter 2

The Beginning of the Problem

World War Two was drawing to a close. The “blonde beasts” who had triumphed in 1941 were fleeing backwards before the vengeful Red Army coming from the east and the north, and the Allies pushing inexorably from the south and west. The Axis had clearly lost the war. With each retreat, the extent and nature of Nazi crimes became ever clearer and irrefutable. The vast archipelago of concentration camps throughout Europe, in particular the death camps, mainly in Poland, were soon to be liberated, and accounts and photos of their horrors to cover the western media. The Nazis—whose bad conscience seems undeniable—tried to destroy all evidence of the murder of millions of men, women and children, by marching survivors to the west (or in circles) in frightful death marches (see generally Goldhagen 1996: Part V). But it was too late to destroy all the material evidence as the Third Reich collapsed. The emaciated survivors, the mounds of bodies, the gas chambers, the chimneys, the “scientific”, “experimental” blocks were filmed as each camp was liberated and the few desperate survivors were given succour.

What could no longer be denied was the scale of the monstrous world of concentration and labour camps. They were everywhere from Greece and Italy to the USSR. They were next to farms and villages whence they often took their names: Dachau, Ravensbruck. Auschwitz and Treblinka, the greatest death camps of all, were only a short train ride from Warsaw and Cracow. No-one could avoid the truth ... Some camps were enormous, covering several square miles. The guards and commanders often lived in the villages. Farmers ploughed their fields next to the wire and became accustomed to the screams.

The locals all knew about them. Films were made of locals being forced to visit what they had turned their eyes away from. Overnight, nearly all these bystanders became anti-Nazis, who claimed that they had not “really known”; that they had helped the victims where possible. They also were horrified by the crimes of Nazism. There is practically no evidence that the invading forces were taken in by these protestations. If, as the Reich collapsed, former supporters turned on their leaders, the fact remained that they had shouted their support for Nazi Germany in an extraordinary way only 2 years earlier. One of the most poignant stories about the attraction of being *ein Volk* is that of the Jewish girl who confessed later how

much she wanted to belong when she saw great rallies on newsreels at the cinema in the early days of the regime.

The Allied leaders of what was already called the United Nations had to decide what to do with a whole “people” who had backed a regime which had brought such misery to so many millions. They faced the reality of mass revenge by those who had suffered from, or were witnesses to, such suffering. When Soviet troops entered Germany from the east, the old Latin saying *Vae victis* was expressed in mass rapes, looting and summary executions. But it was not only from that quarter that revenge was taken. In France there were perhaps 20,000 summary executions as wild justice was exacted. Jews set up networks of hit squads to kill those who had caused the suffering. As is the way with vengeance, it was often visited on people only indirectly linked to those directly involved. Many of the victims opted for revenge as the only way to obtain justice. This started during the war itself. The open adoption of the *lex talionis* was explicitly stated in east where the savagery of the Nazis against Jews and Slavs was horrifying (see Dean 2000 esp. ch 7; Tec 1993a, b). But it also became a principle of Resistance activity everywhere against Nazism. The main sites where revenge took place show some correspondence with the most horrible of the concentration camps. Nevertheless, throughout Nazi Europe, most countries were wracked by real civil wars in 1943–1946 (cf e.g. Pavone 1991).

Victims’ first desperate attempts to survive were often followed by a decision to avenge the members of their families whom the Nazis and their allies had killed in atrocious ways. This progress is summed up by the memoir of the Kagans of Byelorussia:

The partisans and Germans had switched roles: now the partisans were hunting down Germans. Our spirits were high. We were enthusiastic and vengeful, glad to batter the enemy. Every evening, when we returned to the base, we spoke excitedly and joyfully of the days events. The Germans at this point, were like hunted frightened animals, trying to escape, hiding in the bush, hungry and exhausted. Their resistance grew weaker. These were the wretched remnants of the German army that had wanted to conquer the world. Four German prisoners were brought to our base headquarters, and executed for all to see. We were all overtaken by feelings of rage and resentment (Kagan and Cohen 1998: 91).

Then there was the story of Rassya, who joined a unit near Kiev after her family had been murdered:

Rassya was badly shaken. At first she thought of committing suicide. Later she decided to avenge the murder of her daughter. And now her wish had come true. She had never held a rifle in her hands, but when it was suggested that she join the partisans to do the housework, she firmly refused. “Give me a rifle...Teach me how to use it. I want to kill one fascist. To take my revenge on the enemy; this is the wish of my life” (Porter 1975: 201).

The first Jewish partisan organisations had names like Nekomah (Revenge). When they linked up with Slav partisans especially in the USSR they became generally known as the “avengers of the people”. The partisan oath contained words like: “I, a free son of my people, and one who has seen enough suffering, volunteer, and hereby join the ranks of the Red partisans, the avengers of the people, in order to

vindicate the blood of parents, brothers, sisters and children who have been brutally tortured by the Nazi fascists...”; and in another version “I swear to work a terrible, merciless, and unrelenting revenge upon the enemy for the burning of our cities and villagers, for the murder of our children, and for the torture and atrocities committed against our people. BLOOD FOR BLOOD! DEATH FOR DEATH!” (Porter 1975: 70–71 and *passim*).

Against the position that the German people as a whole were not complicit or responsible, in Poland, as one memoir states, the Good German was never seen. The wartime commitment of direct victims to justice through revenge took violent and bloody forms. Those involved knew that the local population, often the majority, was either with the oppressors or did not care. Jews facing anti-Semitic Slavs or Balts were particularly conscious of that. Jan Gross’ book about the mass Polish participation in the murder of local Jews in Jedwabne is just one of many of the *exposés* which shows a complicity that went well beyond Germans or politically committed people (Gross 2001). Jews regarded all such people as complicit and deserving punishment, not merely the thousands of V-men, the recognised and honoured Nazi informers, or local Fascist organisations whose crimes were often more horrible than those of the Germans. Just as the Hungarian or Lithuanian collaborators systematically killed with axes or by burning alive, so on occasions the avengers replied in similar, though less sadistic, ways. Moreover, there was little acceptance among victims of the notion that justice would be done if only the direct offender were sanctioned, so must all around him down to his children on the principle of an eye for an eye. Even in the west, where the horror had been less general, collaborators were summarily punished in popular actions.

At the end of the war many of the avengers put down their arms but others, mindful of the crimes committed against them, continued the revenge pattern. They were facilitated in this by the absence of secure state power for about 3 years after the end of the war in many parts of Europe. Death camp survivor Simon Wiesenthal vowed vengeance and thenceforth dedicated his life to hunting down Nazi war criminals. What he proposed was to bring to justice in a court the thousands of people who disappeared or fled the avengers. But others, including many Jewish survivors, set up hit squads who administered summary justice and urged Wiesenthal simply to allow them to do it their way (Wiesenthal 1967, 1989). None believed that the page should be turned. One example is the hunting down of a Lithuanian responsible for the massacres of Jews in Riga. He had escaped to Uruguay, where he was found and taken, tried by a field court and executed on the spot (Abrahamson 1985 v1: 119). The policy of certain sections of the Israeli state set up in 1948, notably its secret services, became that of revenge, culminating in the Eichmann trial 15 years after the war, discussed below. They recalled the last words of victims: “Nekome, avenge us”, scrawled on trees, walls and in blood on the cobblestones of the Kovno ghetto.

We have noted how many people wanted massive revenge against Nazism and its collaborators, even those who had not suffered directly. These attitudes continued after the war among Western intellectuals. Wiesenthal’s own internal debate

was published in the first edition of his *Sunflower*. There he tells the story of meeting a dying SS man while Wiesenthal was a concentration camp inmate. The former recounts committing atrocities in the east and asks for Wiesenthal's forgiveness. The latter has the chance to kill him and is tempted to do so, but finally he refuses forgiveness and turns his back. The book contains the views of many other prominent intellectuals about whether he had done the right thing in refusing to forgive. The majority take even stronger positions than does Wiesenthal. Only victims can forgive and forgiveness is mostly rejected as condonation.

It is impossible to calculate reliably how many revenge killings took place in the years after World War Two. Given what figures we have, on a proportionate basis (about 1 in 1000 was killed in France) a low estimate would be in the hundreds of thousands. In other words revenge was ubiquitous. It was also regarded widely as justice. Kielar (1981: 96–97) recounts a telling story, of the former concentration camp victims who had to restrain GIs who wanted to kill every German soldier they saw after first seeing the labour and concentration camps. In most countries of Europe the most hated and most likely to suffer reprisals were the local collaborators. The photographs of French women having their heads shaved for their sexual relations with Germans poignantly recall the feelings in 1945–1946 (e.g. Mountford 1979: 123). Only recently in that country has it been admitted that the delays in the trials of those responsible for the massacre at Oradour sur Glane are partly owed to the fact that among the perpetrators were Alsations enrolled in the German forces. French people had murdered French people.

Recent historiography has insisted that many of these killings were a settling of accounts other than political and involved squabbles about property. Frequently, they were just plain criminal appropriations in the chaotic aftermath of war. While undoubtedly there is some basis in fact to this, the confusion of political with social was very great in the conflicts of a war whose fomenters deliberately confused politics with ethnicity, class and property.

On the other hand, returning state power, which established itself with difficulty in face of the avengers of the people in 1945–1947, clearly felt that the range of those regarded as complicit by their victims and the sort of sanctions applied went too far to be tolerable. Such a breadth of guilt threatened the hegemonic basis of nation-state power. In many countries, notably in Asia, the conquering armies simply immediately put the Japanese and their collaborators back in as police, to the shock and resentment of victim populations.

The leaders of the United Nations were divided. How to assuage the righteous desire for justice? Something had to be done quickly. Since the Magna Carta (1215), justice was required to be prompt and expeditious. Realists like Churchill and Stalin simply mooted mass summary executions of all Nazi leaders and bandied around numbers from 20,000 to 50,000 (Marrus 1997: 22–23). Their view can perhaps be explained because they had directly experienced the scourge of the Swastika, particularly in the Soviet Union, 20 million of whose people had died in the war. But the dissenting view of the United States ultimately prevailed as the official post-war policy.

The Rule of Law

Americans had not experienced the horrors of Nazism directly. Certainly, after the massacre of American prisoners at Malmédy they knew of what war crimes Nazis were capable. But they had not lived under that regime and the camps were far from everyday popular knowledge. Their distance from direct oppression meant that when evidence of the extermination of the Jews was produced to them as early as 1943, the American elite, including Judge Felix Frankfurter, expressed disbelief (Karski 2003; Breitman 1998: 150). But even in the USA, by 1944, the evidence was overwhelming and led to the Morgenthau plan.

Henry Morgenthau then was secretary to the Treasury. Photographs show a man who even looks like an conservative accountant or banker. He came from a distinguished American Jewish family. His father was a famous journalist who had observed and reported on the Armenian genocide 30 years earlier and had also visited Poland to investigate the right-wing Polish government's anti-Semitic activities in 1919. Morgenthau, with his Jewish connections, was well informed of the genocide of the Jews and after a visit to London in 1944, was hostile to official US plans for post-war Germany, which were basically to make peace and to rehabilitate Germany. He therefore sent his counter-plan to his president, F. D. Roosevelt, then at a meeting in Quebec.

Roosevelt already had his doubts about US policy proposals about what should be done with post-war Germany. After speaking with Morgenthau, he wrote:

Too many people here and in England hold the view that the German people as a whole are not responsible for what has taken place – that only a few Nazi leaders are responsible. That unfortunately is not based on fact. The German people as a whole must have it driven home to them that the whole nation has been engaged in a lawless conspiracy against the decencies of modern civilisation (quoted in Simpson 1993: 175–176).

Morgenthau's plan proposed the reduction of the German state to an agricultural entity by the destruction of its industry (see Morgenthau 1945 esp. Appendix: 1–5). The key part of the plan concerned, however, the measures to be applied to German war criminals. These appeared under Head 11. Their substance was that the known leaders should be summarily executed. So here Morgenthau agreed with Stalin and Churchill. Lesser offenders whose guilt was not notorious should be tried and if found guilty of heinous crimes also executed. Significantly, he regarded all Nazi party, SS and Gestapo members as being potentially among such people and to be arrested and imprisoned until tried (see Simpson 1993: 176–177; Taylor 1993: 34).

The numbers to be punished were thus enormous. American state officials pointed out that the minimum covered by the second category was 6 million. That estimate is conservative. Putting together the numbers of the Nazi Party, the Gestapo and the SS in 1944 we reach figures of 8–14 million (Simpson 1993: 178; compare Brustein 1996: 16; Kater 1983: 263). Only if we exclude the semi-obligatory membership of the Nazi Party, which doubled its numbers during the war, and assume that those people did not want to join, can we adhere to the smaller figure. Yet it is clear that Morgenthau and—until he changed his mind—Roosevelt were prepared to punish all

those people. The evidence tends on balance to suggest that the American public favoured Morgenthau's line. Telford Taylor writes:

No doubt it is difficult for many of today's readers to grasp the utter hatred of the SS which its actions had spread throughout the Western world...I remember attending a party in Washington, early in 1945 during a brief home leave, at which the nearly unanimous view of the guests (mostly libertarian New Dealers) was that all members of the SS should be put to death, and I was attacked as "soft on Germany" for expressing a contrary opinion. With such attitudes afloat, it is hardly surprising that at the Treasury, Morgenthau and his staff were proposing the permanent exile of all SS members and their families...My dissent was based on my view that such gargantuan slaughter was unthinkable and that even SS men were not all alike (Taylor 1993: 41–42 and fn i).

The popular demand for revenge became even stronger when the crimes of the Japanese were being discussed. Some Americans surveyed even proposed the extermination of the entire Japanese people.

Opposition to the Morgenthau plan built up and found its leader in US Secretary of Defense Henry Stimson. He had also had a distinguished public career. A Yale and Harvard man whose portrait hung in the Skull and Bones club, Stimson had been a diplomat, governor of the Philippines and held many senior administration jobs. The portrait shows a man who reminds us of Charlton Heston, almost a caricature of an American patrician—a scion of a Protestant ruling class, deeply committed to the virtues of the American Revolution. His campaign to have Morgenthau's plan rejected revealed a protagonist of the values which had made that Revolution great. His private memos reveal its downside, a tad of anti-Semitism and an individualistic parochialism in the face of the appalling realities of the Holocaust. There was much *petite histoire* in the struggle to win over the President but it was pettiest of all in the traditionalism of the solutions that Stimson and his followers proposed.

Focussing on the proposal to summarily execute Nazi leaders, Stimson countered that respect for the rule of law demands that all such individuals be put on trial, given a fair trial and only executed if found guilty. There should be no vengeance and no wild justice.

The United States administration had been preparing for some time to hold trials of Nazi war leaders. It had first proposed this at conferences with the British in London, at St James' Palace, 2 years earlier. This approach accorded with all the traditions of the rule of law that underpinned individual human and social relations in the United States and Western democracies more generally. Stimson had the backing of the powerful public elites and the military hierarchy. They were prepared to accept the argument that the waging of war by the Axis constituted a war crime which was justiciable by death penalties, but not to condone the summary execution of thousands. They argued that Allied soldiers would not be able either physically or morally to kill so many people.

But what were all those complicit in Axis crimes to be charged with? The outlawing of war as an instrument of policy had been proclaimed in the Kellogg-Briand pact in Paris in 1928. Not all states had signed it and it had been breached many times in intervening years. But it was a document that could be used

to allow trials of those regarded as part of a conspiracy which led to war on peaceful nations. Even if it were not accepted as law, it had nevertheless been true since the Hague conferences at the beginning of the twentieth century, that within war certain rules applied with regard to other soldiers, to prisoners and to civilians once war had started. Breaches of those rules against nationals of another state brought sanctions.

This pact was fastened on by Colonel William Chanler as a basis for charging the Nazis. When it was put together with Colonel Murray Bernay's proposal that by using the law of criminal conspiracy the Allies could charge the Nazis with pre-war crimes and also catch the SS and Nazis more generally, Stimson thought he had the model which met the popular desire for justice and continued loyalty to legal traditions. He took it to Roosevelt on October 3, 1944 and the latter—feeling that Morgenthau had “pulled a boner”—endorsed the Stimson solution. The focus on conspiracy to wage war and on war crimes left out crimes against fellow nationals and crimes that were not connected with war crimes, including genocide. The idea of genocide had been around and its categorisation as a crime under international law promoted above all by one man, Raphael Lemkin, since the 1930s, though the term itself was of more recent date. It was clearly the most horrifying aspect of the Nazi regime, yet it was decidedly not the principal focus of the war crimes' trials.

Stimson's campaign to win Roosevelt over to his view focussed on the matter of individual responsibility for the crime of starting the war and of crimes committed within the course of war. The issues of crimes against fellow nationals and of genocide were seen as coda to the main task of bringing Nazi leaders to justice. Gradually, his view prevailed as first Stalin then Churchill were won over to the idea of a big war crimes trial at the end of the war. The plans for the Nuremberg trial of Nazi leaders were laid in this debate. It would be a show-trial with the victorious Allies in Europe, the USSR, the USA, Great Britain and France sitting together as the judges. The Tokyo trials of Japanese leaders would also be show trials, indeed a montage, and the judges included other nations than the major allies. We discuss them below.

The Nuremberg trial of the Nazi leaders showed the almost impossible logistics of applying the rule of law, even when modified to accelerate it and to avoid evidentiary problems, where millions were accomplices in crime. The judges at Nuremberg were competent people—unlike some of those in the Tokyo war trials—and the defence skilled, but overall the trials revealed that even while they greatly extended international law by reference to common sense notions of justice, the whole enterprise was fraught with problems. In the trials of lesser figures in particular, the problems of attaining justice became starkly clear. The Americans had kept the pool of the potentially guilty at roughly what Morgenthau had proposed. So there were still about 6 million Nazis and SS members to be arrested and held for trial (see Taylor 1949: 245–253). But under the Chanler/Bernays/Stimson plan the severity of the punishment meted out to each individual was to rest on the evidence of the extent to which they were involved. This meant a trial for each one. The determination of the guilt of such people fell to courts set up by each of the occupying powers singly. The proposal that German courts be allowed to judge

such crimes was rejected out of hand after negative experiences of such trials in Leipzig after World War One.

These numbers were simply too great for trials of individuals to be satisfactory, no matter what the modified procedures. In the end only 177 leaders and only 5,025 senior followers were ever tried by the Western powers. About 90 % were convicted and about 25 % put to death. Of the rest only 89,000 were tried, 70,000 of them in Eastern European countries. The USSR sentenced only 1 % to death (see Levie 1993: 135–139). This meant that even on the restricted criteria of 1945 practically none of those responsible for the huge Nazi murder machine were ever brought to justice. They simply went free. Indeed, when we examine the sentences of lesser figures and how much they were commuted, it is easy to understand how the millions thirsting for justice felt that they had not obtained it

In his monumental three-volume history of the destruction of the European Jews, Raul Hilberg gives the following indicative figures of the numbers sanctioned by mid-1949 in official trials and other state procedures:

Registrants	13,199,800
Charged	3,445,100
Amnestied with trial	2,489,700
Fines	569,600
Employment restrictions	124,400
Ineligibility for public office	23,100
Property confiscations	25,900
Special labor without imprisonment	30,500
Assignments to labour camps	9,600
Assignees still serving sentence	300

And he adds to the massive figures of those who “got away with it” pages of lists of criminals who rapidly returned to success and prominence, one of whom, Hans Globke, became a member of Adenauer’s government (Hilberg 1985: 1081, 1084–1085; see also 1088 and 1090–1109). This means that the victims saw their oppressors walking around not only free, but also rewarded and protected. Since many were less than 20 years old when they committed the crimes this meant that in the 1970s and 1980s the offenders were only middle-aged. Simon Wiesenthal (1989) recounts that in 1989, just up the road from his home, a man who had performed medical experiments and euthanasia on hapless victims openly practised in a psychiatric clinic. The open presence of oppressors added insult to injury. Not until the 1990s and the trials of Ivan Demanjuk, Paul Touvier, and Karl Priebke (see below) could it be argued that it was all old history and that they were too old to stand trial. In fact, not trying them was itself against the law in most countries which had excluded murder and more particularly crimes against humanity from any statute of limitations.

Germany was certainly a special case. As the most successful totalitarian state it really had succeeded in establishing *ein volk*, *ein reich* and *ein fuhrer* as a lived reality. It is probable that more people were complicit than in other societies that

were not totalitarian. There was strong resistance to Germany in many European countries that were occupied by the Nazis. In some, the numbers of people ready to risk their lives to save Jews or other groups targeted for extermination by the regime was significant (see Chap. 2). Notable were the Netherlands and some Scandinavian countries, as well as Italy and Greece.

Germany's ally Japan was a striking case of a regime that was not totalitarian in the same way as Nazi Germany. While it regarded many of the cultures it invaded as inferior, its drive in the Axis alliance was to establish an Asian co-prosperity sphere. This had marked anti-racist overtones which were clearly recognised when Japanese war criminals were put on trial. Here, and in the trials that followed the war, racism was rather evident in the white nations trying the Japanese.

Japanese cultural expectations of warriors certainly were of the utmost brutality. Indeed, POWs of the Japanese had seven times as much chance of being killed than did POWs of the Nazis (Piccigallo 1979: 209). Appalling atrocities were committed against allied troops and against local resisters in China and the Philippines as well as elsewhere. Nevertheless, there was not the same popular involvement in crimes. There was no archipelago of concentration camps to employ thousands. The *zaibatsu* (Japanese industrialists) were opposed to the regime in various ways. The population, while as devoted to the emperor as the Germans were to Hitler, were not called upon or taught to hate and exterminate whole other groups of people. The Japanese had not practised genocidal policies and popular complicity in massive murder was not an issue. So the numbers to be regarded as complicit in war crimes were many fewer than in Germany.

At the end of the war, the trials of Japanese and their collaborators were based on the Nuremberg model but mainly on only the first two counts: the conspiracy to make war and war crimes. Even then, with many fewer numbers to try, only a few Japanese could be brought to justice. There is debate over whether victor's justice was applied (Roling 1989; Piccigallo 1979; Minear 2001); but even if we concede that most trials of Japanese left something to be desired, only the following numbers were ever tried and convicted despite the fact that many observers thought that the American trials in particular savoured a little of "kangaroo courts". By 1949, 4,200 Japanese had been convicted and 700 executed. Although conviction rates in American and Dutch trial rates were 93 % or more and Piccigallo reports a conviction rate of around 88 % in British trials and 70 % in the Australian trials (Piccigallo 1979: 95–96; 139; 183), hundreds of lesser offenders had already been released by 1949. In 1952 the Clemency and Appeal Board reported that there were only 426 war criminals in the Sugamo prison. Only six served out their sentences (Levie 1993: 183). Most culprits got clean away.

This suggests that even when only the active groups were caught in the net of complicity, there were too many to bring all to trial. Moreover, the experience of 1939–1945 has continued thereafter.

What is striking is that this inadequate conviction rate for the methods of traditional justice ensued even when only the crime of war, war crimes and crimes against humanity linked to war crimes were what were justiciable. The rule for war

crimes was that all those and only those actively involved in war crimes were guilty of an offence. Certainly this was much wider than a rule that makes only those who gave the orders responsible (the rule of *respondeat superior*) and it ended a widespread use of the defence of obedience to orders. But it leaves out many people who were complicit in the crime of genocide, which required a massive bureaucracy with cogs in the wheel to make the murder of millions possible. It is important to identify why traditional legal measures proved impossible where millions were putatively accessories before or after the facts to mass murder, torture and other offences.

The Limits to Law

The key accusation at Nuremberg was that aggressive war on peaceful nations had been waged by the German leaders. They had conspired to wage that war well before it had started. This was a way of justifying retrospectivity in the face of the fact that starting a war itself was not clearly a crime in international law and war had only started in 1939. The concept of criminal conspiracy was central to any project for catching and punishing more than those intentionally involved in particular crimes. In US law it had a particular form whose background premise was that much teamwork is involved in crime and all conspirators should be made equally responsible for the outcomes no matter what they had put into it. This was the form adopted by Article VI of the London Charter, which set up the procedure of the post-war trials. In sum, it was a mechanism adopted to reconcile the existing legal rules with the new problem that the victims expected the Germans as a whole and not just their leaders to be punished.

It rapidly became clear that existing legal mechanisms like the law of criminal conspiracy could not work where millions were involved in the crimes. The key point was made by the French judge, Donnedieu de Vabres. It was not that conspiracy was unknown to European lawyers but that the prosecution could not prove that a group of people had, at a specific time and place, “agreed on definite criminal objectives and the criminal methods they intended to use to attain them” (Bradley Smith 1977: 121–122). Rather the Nazis had improvised. Donnedieu de Vabres held no truck for the German people whom he regarded as more guilty than Hitler himself. His concern was that finding a conspiracy among the leaders to commit a crime against peace would allow the German people as a whole to argue that they had no responsibility for the crimes of their leaders. Faced with his criticism, the court arrived at a compromise based on reading down the ambiguous Article VI of the London Charter. It would limit the notion of conspiracy to the crime against peace only, disregarding it where the counts of war crimes and crimes against humanity were concerned. This had far-reaching consequences. Since crimes against humanity were only justiciable if linked to the charge of war crimes, no crimes against humanity could ever be alleged for the period before 1938. This was because no conspiracy to start a war could be proved for an earlier date. As Bradley

Smith writes in his personal memoir: “Bernay’s basic idea of linking pre-war persecution to wartime atrocities by means of a conspiracy charge was also completely rejected by the Tribunal” (Bradley Smith 1977: 137).

Worse followed. The main virtue of the conspiracy charge was that it allowed all members of criminal organisations to be charged. But what could not be proved for the leaders was doubly difficult to prove for the Nazi Party, the SS and the Gestapo. The groups that made up these organisations had changed so often and rapidly that it was nigh impossible on the evidence available to show that this or that member had joined voluntarily and knowing that he or she was joining a criminal organisation. Again the court, faced with a popular, mainly European, clamour for justice, chose a compromise. It declared an organisation criminal only at or after a certain time, for example, 1 September 1939, when Poland was invaded. Anyone who joined after that date was not knowingly and voluntarily joining in a criminal conspiracy.

So members of the Waffen SS or the SA, whom every French villager knew were worse than soldiers in the Wehrmacht, could not automatically be conspirators because they were not *prima facie* volunteers. Bradley Smith notes the result:

As the judges surely realised, none of the occupation authorities was going to proceed very far with the task of prosecuting 2–3 million cases, in each of which they would have to prove that the defendant was a voluntary and knowledgeable member of a criminal group (Bradley Smith 1977: 164).

Vast numbers of war criminals escaped scot free because a traditional legal solution was impossible.

Nazi supporters, aware that they could escape conviction in immediate post-war years because of the inadequacies of the courts, started to sneer and to attack their former victims again. Wiesenthal, a survivor who had offered his services to the US authorities to track down war criminals at Mauthausen, supported bringing them to trial. Jews would be no better than Nazis if they took summary reprisals. Yet he went to the Americans only after a Polish kapo had hit him after the war because he was a Jew. Leo Cooper, one of the lucky children who had fled to the Soviet Union, recalled his return to his native Poland in these words:

I stretched my head out of the carriage to see the slowly approaching shores. I saw trees and among them, standing near the edge of the bridge, a group of people. They were gesticulating and appeared to be shouting, but their voices could not be heard because of the rattling of the train, the clatter of wheels over the track, and the constant whistling of the steam engine. The carriage in which I was travelling was at the far end of the train so it had taken some time before it reached land. By then I could distinctly see the raised hands of the people and I could also hear their voices:

“Look they are all Jews: the filthy Jews are coming back!”

The shouting was accompanied by the sound of stones thrown at the train. Some fell inside the carriage. Instinctively, I stepped back, and although I wasn’t hit I felt as if every stone was aimed at me. For a short moment everyone in the carriage remained motionless.

“Shut the door!”, someone screamed.

Pushed by two people the door began to slide, and as dimness enveloped the carriage, I suddenly realised that I had re-entered the shadow of the Polish eagle, the domain of black hatred, which I had feared so much, but which I had hoped had gone with end of the war (Cooper 2000: 5).

If this was the treatment of former victims even when individuals wanted to avoid being noticed by the military police, then 3 years later when the Cold War had started and no ally was interested in pursuing justice against possible allies, it became appalling. The attitude of accused at the time of the Auschwitz trial 10 years later was that of arrogant dismissal, resting on a popular complicity that such “witch hunts” should not take place.

Had the unpunished offenders been contrite and self-effacing the sense of injustice in surviving victims might have been less. But frequently they took the opposite attitude, openly boasting of their murders and tortures and showing racist scorn for their victims. This reached horrifying dimensions which the German courts half-tolerated in the Auschwitz trials held in Frankfurt in 1963 and 1965 (see Whitman 2005). At these trials the defence openly pleaded that the German public wanted no more war crimes trials, although those charged were the most horrible of murderers. Hannah Arendt noted about this:

For what the majority think and wish constitutes public opinion even though the public channels of communication - the press, radio and television - may run counter to it. It is the familiar difference between the *pays réel* and the country's public organs, and once this difference has widened into a gap, it constitutes a sign of clear and present danger to the body politic. It is just this kind of public, which can be all pervasive and still only rarely come into the open, that the trial in Frankfurt revealed in its true strength and significance. It was manifest in the behaviour of the defendants - in their laughing, smiling, smirking impertinence towards the prosecution and witnesses, their lack of respect for the court, their “disdainful and threatening” glances toward the public in the rare instances when gasps of horror were heard. Only once does one hear a lonely voice shouting back, Why don't you kill him and get it over with? It is manifest in the behaviour of the lawyers who kept reminding the judges that they must pay no attention to “what one will think of us in the outside world”, implying over and over again that not a German desire for justice but world opinion influenced by the victims' desire for “retribution” and “vengeance” was the true cause of their client's present trouble. Foreign correspondents, but no German reporter so far as I know, were shocked that “those of the accused who live at home are by no means treated as outcasts by their communities”. Naumann reports an incident in which two defendants passed the guard outside the building, greeted him with “happy holidays” and were greeted in return with “happy Easter”. Was this the *vox populi*? (Naumann 1966: xii).

With the populace openly conniving with those charged, the feeling that no justice could be expected unless one wreaked it oneself, must have redoubled. It was thus clear to victims that the failure of the trials to bring about justice statistically was complemented by their failure to inculcate any moral messages. Again and again, observers remarked on the absence of contrition and on the irritation of bystanders asked to identify or help.

It became increasingly difficult even for those committed to bringing criminals to justice, that is, finding them and handing them over to the state authorities for trial, to believe in the efficacy of the court system. Wiesenthal, who had become renowned for his work tracking down SS members from his home in Linz, tells a sorry tale of Austrian anti-Semitism and pro-Nazi attitudes in the post-war years, remarking as an aside that the figures showed more Austrians pro-Nazi and in the SS than other German speakers. His own tired disillusion with the traditional rule of law to which he devoted his life is striking by the end of the 1960s.

Wiesenthal had asked 68 year-old Jacob Brodi to testify at the 1963 trial of a Nazi who had killed Brodi's son before his eyes. Reluctantly, Brodi agreed. During the trial which was going badly (Murer's [the accused] sons thought it was a "great show. They laughed and grimaced"). Brodi told Wiesenthal that he had come to act and took out a pistol vowing to shoot Murer the next day. Wiesenthal finally dissuaded this man who had lost everything and no longer believed in traditional justice by saying that he had to be tried although, like Eichmann, he was dead before he entered the court. When Brodi was not swayed by the argument of making an example of Murer to show the truth to all those people who denied the facts; Wiesenthal told him that he, Wiesenthal, had cried when he heard about his boy's death. Brodi wept on his shoulder and the next day he testified. Yet Murer was acquitted: one witness was confused in her memory of events; the press was with Murer and so was the jury. All Wiesenthal can say about the implications for his own reasoning with "this lonely man" Brodi is this:

I met Jacob Brodi in the lobby of a Vienna hotel a few days after Murer's acquittal. He looked through me as if I hadn't been there. I understood. I may have saved Murer's life. It is not a very pleasant thought, but there was nothing else that I could have done (Wiesenthal 1967: 74–78).

While many, perhaps most, people, agreed that the only solution was to adhere to the rule of law even if most criminals are then destined to escape justice, some did not. In a curious way, Wiesenthal was with them too.

After the Eichmann trial, discussed below, Wiesenthal ruminated: "The Eichmann trial proved the inadequacy of human law. The criminal laws of all civilised nations know the definition of murder. The lawmakers were thinking of the murder of one person, or two, or fifty, or maybe a thousand persons. But the systematic extermination of 6 million people blasts the framework of all law. It is like the explosive force of an H-bomb—something people don't want to think of. Eichmann understood this very well. In Budapest he said to some friends in 1944: 100 dead is a catastrophe. Five million dead is a statistic" (Wiesenthal 1967: 98).

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