

FORGOTTEN TRIALS OF THE HOLOCAUST

INSTRUCTOR'S GUIDE



FORGOTTEN TRIALS

**OF THE
HOLOCAUST**

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In the wake of the Second World War, how were the Allies to respond to the enormous crime of the Holocaust? Even in an ideal world, it would have been impossible to bring all the perpetrators to trial. Nevertheless, an attempt was made to prosecute some. Most people have heard of the Nuremberg trial and the Eichmann trial, though they probably have not heard of the Kharkov Trial—the first trial of Germans for Nazi-era crimes—or even the Dachau Trials, in which war criminals were prosecuted by the American military personnel on the former concentration camp grounds.

This book uncovers ten “forgotten trials” of the Holocaust, selected from the many Nazi trials that have taken place over the course of the last seven decades. It showcases how perpetrators of the Holocaust were dealt with in courtrooms around the world—in the former Soviet Union, the United Kingdom, Israel, France, Poland, the United States and Germany—revealing how different legal systems responded to the horrors of the Holocaust. The book provides a graphic picture of the genocidal campaign against the Jews through eyewitness testimony and incriminating documents and traces how the public memory of the Holocaust was formed over time.

The volume covers a variety of trials—of high-ranking statesmen and minor foot soldiers, of male and female concentration camps guards and even trials in Israel of Jewish Kapos—to provide the first global picture of the laborious efforts to bring perpetrators of the Holocaust to justice. As law professors and litigators, the authors provide distinct insights into these trials.

Introduction

We realize that there are many ways to teach about the Holocaust. We have adopted as our central theme for such courses the subject of Holocaust trials. We have done so for several reasons. First, trials involve confrontation and confrontation creates interest. Second, trials, by definition, are fact-focused, and thus present students with the Holocaust at the ground- or victim- level. Virtually all trials involve victim testimony and while such testimony often presents just a microscopic aspect of the Holocaust as a whole, every student can multiply and is invited to do so when victim testimony is considered. Third, since trials have been held in dozens of countries and under varied legal systems, teaching through trials presents students with an opportunity to learn about different legal systems and to appreciate that their own is not the only way in justice can be administered. Finally, as law professors and law practitioners, we feel it is important for all students to know that the law is not static and that change need not come at a pace measured in centuries. The constraints placed on the Nuremberg prosecutors by concepts of International Criminal Law then in force have largely been removed, creating an entirely new and different body of International Criminal Law, all within the lifetimes of both the victims and the perpetrators.

Teaching the Holocaust is difficult, in part because numbers very readily become abstractions. In an effort to insure that abstractions become reality, one of us (Frank Tuerkheimer) has, since the early 1990s, begun his course with a simple photographic display not connected at all with the Holocaust. He begins by showing students a photograph of the Vietnam Memorial, a single story plaque several hundred feet long containing the names of all 50,000 plus Americans killed in the Vietnam War. He then shows the students a photograph of the Sears Tower in Chicago, now called the Willis Tower. What, he asks, is the connection? He then explains that the Chicago building is 120 stories tall, and if one wanted to erect a memorial to Holocaust murder victims comparable to the Vietnam Memorial, it would take the Sears (Willis) Tower to do it. The enormity of the Holocaust has been shown graphically and, judging by student comments, it has sunk in.

We appreciate that the ten trials in this book, covering the death camps at Auschwitz and Treblinka, and the concentration camps at Dachau, Plaszow and Ravensbrück do not present the entire Holocaust picture of Holocaust trials. Because they have been adequately covered elsewhere, we have not written once more about the International Military Tribunal trial, the main Nuremberg trial, nor about the Eichmann trial. In teaching about Nuremberg, we have resorted to Telford Taylor's book *The Anatomy of the Nuremberg Trials*—and recommend it. As for the Eichmann trial, David Cesarani's *Becoming Eichmann*, Hannah Yablonka's *The State of Israel vs. Adolf Eichmann* and Deborah Lipstadt's *The Eichmann Trial* are excellent sources. Frank Tuerkheimer's lengthy interview of Gabriel Bach, the prosecutor in the case second to Attorney

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General Gideon Hauser, is also a good source: <http://cargocollective.com/eichmannprosecutorinterview>. Conversely, not all of the trials in the book must be assigned as readings; it is up to the instructor as to how many of the ten trials should be read.

While broader context to the Holocaust is provided in some of the readings in the book, to be sure, we recommend a preliminary lecture providing a brief history of anti-Semitism, the background to the Second World War – in particular, the First World War and Weimar Germany – and a synopsis of the war. We never assume that the current generation of students knows much modern European history; to many of them, we discovered, we might as well be talking about ancient Egypt.

Using trials to teach the Holocaust permits crossing the undergraduate/law student boundary. There is easily enough law in the course to categorize the course as a law school course. Students learn about the origins of International Criminal Law and, in a closing lecture, about its changes since the days of Nuremberg. They learn how trial procedures vary from country to country, thereby providing a comparative criminal law component to the course. At the same time, none of this is sufficiently complex to either overwhelm or turn off undergraduate students. Indeed, the level of law involved in this course is light when compared, for example, with undergraduate courses on Constitutional Law. At the University of Wisconsin, the course was taught to classes with both undergraduate juniors, seniors and law students and the mixture presented no problem. At the University of Giessen law school in Germany, the very nature of law training in Germany combines what in the United States would be law students and undergraduates.

To introduce any or all of these chapters to the students, the following questions might be helpful.

What is it about trials that makes them an ideal vehicle for learning about the Holocaust? The answers to this question are varied.

Trials involve two sides where one side tries to show facts that lead to certain results – imprisonment or worse – and the other tries to show that there should not be a conviction or if there is, death or imprisonment are not just. This is an extremely important perspective. As a very general rule, none of the defendants in these trials challenged the underlying facts – there was no denial of the intentional mass murder of Jews – defenses centered on unawareness, following orders, “you did it too”, and coercion. Yet the stakes for these defendants were as high as it can get and virtually all had excellent defense counsel. The absence of any challenge to the underlying facts is an important lesson to be drawn from these trials in an era where the Holocaust and its victims fade into the past and where Holocaust denial – especially in the Age of the Internet – will most likely

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not fade away at all.

We begin our introduction by referring to the Holocaust as a conspiracy to murder European Jewry. Understandably, this criminal lawyer perspective on the Holocaust is not one historians normally take. It does, however, have certain advantages. As the prosecution correctly pointed out in the Eichmann trial, under conspiracy law, any member of the conspiracy is responsible for the conduct of others in the conspiracy, conduct is undertaken in furtherance of the conspiracy. Thus, for example, the mastermind of a drug-importation ring is criminally responsible for the acts of the smuggler bringing the drugs into the United States even though there are several layers of co-conspirators between them and even though they don't know each other or anything about each other. This all-embracing perspective permitted the Eichmann prosecutors to place into evidence facts having no direct connection to Eichmann. But the Eichmann trial alone, focusing as it had to, on Eichmann, deals with other perpetrators only tangentially. The trials we cover in this book get students to the ground level; to the person on the street selling the drugs, to carry our drug-importation conspiracy analogy one step further. Thus all these trials are related. That is why we begin in our introduction with Göring's July 31, 1941 directive to Heydrich, placing him in charge of the "complete solution to the Jewish question."

The trials in the book span the period 1943 to 1999. Is it fair to prosecute a person for events occurring half a century earlier?

While this issue is directly raised in the Fedorenko case where the trial judge in Florida thought it inequitable to prosecute a person who had been a law-abiding citizen for over thirty years, the question permeates all later trials. What is the value of sinking prosecutorial resources into a major effort to deal with facts occurring in the 1940s? Certainly the aging defendants, in their 70s, 80s and 90s, present no danger to society. And does it not invite injustice if the effort is to reconstruct half-century old facts? These questions get us to issues of forgiveness. Are the truth and reconciliation efforts undertaken in South Africa, for example, not the better way to go? One might ask the students how they would feel if they thought a neighbor, a good and seemingly kind neighbor, had been an active participant in the Holocaust.

Most but not all of the trials are based on treaty violations, not specific criminal law statutes. Was it fair to prosecute these defendants for conduct not criminalized in the ordinary process?

While Nuremberg is almost universally lauded, at its time there was considerable opposition to the concept that defendants were being charged with crimes not specifically designated as such under criminal codes. The ex post facto clause of the United States Constitution, for example, would not have permitted such prosecutions in United States courts.

Introduction (*continued*)

This remains an open question. Senator Robert Taft, a prominent Republican and serious presidential candidate in 1952, opposed the Nuremberg trials on these grounds. Perhaps the best answer was given by Justice Robert Jackson, as principal prosecutor of the main Nuremberg trial. The purpose of the ex post facto clause, he explained, is to ensure that persons are on notice that their conduct is prohibited. All of the crimes charged in the trials we cover include the murder of human beings and, as Jackson observed, that murder had been unlawful ever since Cain slew Abel. It should be noted that the ex post facto issue is obviated in the United States as to current crimes by the Genocide Act, 28 U.S.C. §1091, passed in the United States in 1988.

We do not, by these few questions, mean to suggest that these are the only ones that can be asked as an introduction to the course. But we have found them to be a stimulus to students and to establish a foundation for a deeper understanding of the trials that follow and the facts they reveal.

Chapter One

*The Kharkov Trial (December 15-19, 1943)***THE HOLOCAUST IN KHARKOV**

Of all the “forgotten trials of the Holocaust” discussed in this book, the Kharkov trial of 1943 (along with the kapo trials in Israel) best fits the designation of “forgotten.” We have spoken to numerous Holocaust historians to learn that they have never heard of this trial. They are surprised to hear that in December 1943 the Soviets held a trial of Nazi war criminals in the Ukrainian city of Kharkov; that this was the first time that any Allied power held such a trial; and that it was done pursuant to international law, specifically the Moscow Declaration. This trial, therefore, befits the title of Gregory Dawson’s book, *Judgment before Nuremberg: The Holocaust in the Ukraine and the First Nazi War Crimes Trial*, and Dawson labels the Kharkov trial as “the first Nazi war crimes trial.”

But is it correct to label the Kharkov trial as “the first trial of the Holocaust”?

A good argument can be made that it is not since: 1) the word Holocaust did not exist at the time; 2) the genocide of the Jews was not fully known to the Allied powers; and 3) the word “Jew” was never mentioned in the trial. We disagree. So much of the history of the Holocaust has focused on the extermination of the Jews in the industrial slaughterhouses of German-occupied Poland, wrongly ignoring or relegating to a pre-Holocaust period the shooting- by-bullets and burial in mass pits of Jews committed in Soviet territories upon Germany’s invasion of the Soviet Union in June 1941. The Kharkov trial that took place in December 1943 focusing on these events definitely fits the designation as a Holocaust trial.

We highly recommend Father Patrick Desbois’ book, whose scouring of the backwaters of Ukraine has uncovered graves that suggest perhaps 1.5 million Jews were shot in Ukraine alone: *Holocaust by Bullets: A Priest’s Journey to Uncover the Truth Behind the Murder of 1.5 Million Jews*.

THE TRIAL

A good discussion question to explore with students is whether they believe that the trial was conducted fairly. **Was this a Soviet-style “show trial” or were the procedural guarantees usually associated with a fair trial in the West given to the defendants on the dock?**

In discussing the prosecution case, note that a team of medical and legal experts testified about the mass graves they found out at Drobitsky Yar. **Should this expert report be believed?** In that connection, we remind the reader that the Soviets produced a similar report of experts examining the mass graves in the Katyn Forest, falsely concluding that the perpetrators were Germans rather, as was the case, the Soviets. On the other hand, the expert reports provided by the

Chapter One

The Kharkov Trial (continued)

Soviets of mass graves found throughout the Soviet Union provided important evidence introduced in the IMT trial at Nuremberg two years later.

Another good question to ask the students is what they think about the conduct of the defense counsel. Here, defense counsel did not argue with the prosecution's request for a guilty verdict, but only that extenuating circumstances called for a sentence less than death. **Was this a wise trial strategy to take?**

We think so, and feel that the defendants' Soviet counsel acted admirably in this trial.

THE AFTERMATH

We mention the prosecution of Nazi war criminals in the Soviet Union after the war and state that the Soviets convicted approximately 25,000 German and Austrian Nazis, with most of the trials taking place within a few years after the war. Note, however, our accompanying footnote 77: "The figures are estimates." A comprehensive study has yet to be published of the postwar trials of Germans and Austrians in the Soviet Union.

FORMATION OF HOLOCAUST MEMORY IN THE SOVIET UNION

The formation of Holocaust memory in the Soviet Union and the post-Soviet era differs significantly from that of the West. In the Soviet Union and even today, that period is called The Great Patriotic War, and focuses on the atrocities committed against the entire population of the region, and not just the Jews. For that reason, the word "Holocaust" is only a term that began to be used after the fall of the Soviet Union, and is still not as prevalent as in the West. Conferences on the Holocaust abound, but only recently has any serious focus been placed on the Holocaust in the Soviet Union, including a first-ever international conference held in Moscow in December 7-9, 2012: "World War II, Nazi Crimes, and the Holocaust in the USSR" and co-sponsored by the United States Holocaust Memorial Museum. Strangely, the program focused on only one Nazi war crimes trial held in the Soviet Union in 1949, with no discussion of the proceedings in Kharkov.

A longer version of this chapter appears in Bazyler & Gold, "The Judicialization of International Atrocity Crimes: The Kharkov Trial of 1943," *San Diego International Law Journal*, v. 14, p. 77 (Fall, 2012).

Chapter Two

The Trial of Pierre Laval (October 4-9, 1945)

The subtitle to this chapter, “Patriot or Collaborator,” raises the main question the trial of Pierre Laval presents.

Laval believed a government working together with the German occupiers was better for the French people than an exile government, leaving the entirety of France under the rule of German occupiers. **Was Laval right?**

There were approximately 300,000 Jews in France at the beginning of the war. Laval claimed that by cooperating in the deportation of non-French Jews who fled to France from the Nazi occupiers, he saved the lives of French Jewry. **Does this justify collaboration?**

While there were thousands of French Jews among the 75,000 sent to their deaths, the fact remains that the majority of French Jews survived the war. This puts France somewhere between two other countries not occupied initially by the Germans: Denmark and Hungary. In Denmark all but a handful of Jews survived; in Hungary the vast majority of Hungarian Jewry was sent to Auschwitz and murdered, but only after the Germans in March 1944 overthrew the pro-German regime in Budapest and began to occupy Hungary directly.

There is not much to argue about whether the trial was fair: because it deviated significantly from how criminals trials are supposed to be conducted in France, there is little doubt that Laval did not receive a fair trial.

One question that might be considered is the fairness of sentencing Marshall Pétain, the actual head of the Vichy regime to life imprisonment, while executing Laval, his underling. If we assume that the collaborationist government was a criminal venture, since collaborating with the enemy violated French law, normally the higher-up receives the harsher sentence. While Pétain might have been a figurehead, he lent prestige and stability to the Vichy regime that Laval did not.

Did Pétain’s age and contribution to France during the First World War justify the imposition of life imprisonment rather than the death penalty?

The trial itself appears in *Le Procès Laval* which has not been translated into English. It is summarized in J. Kenneth Brody’s *The Trial of Pierre Laval* (Transaction Publishers, 2010).

Chapter Three

The Dachau Trial (November 15-December 13, 1945)

While the death camps certainly resulted in the murder of more people, concentration camps, such as Dachau, in one sense were worse. Those consigned to immediate death at the death camps in German-occupied Poland (Auschwitz-Birkenau, Belzec, Chelmno, Majdanek, Sobibor, and Treblinka) met a quick death; those in camps such as Dachau, Bergen-Belsen, Buchenwald and others died a much more painful death. The films taken at the liberation of Bergen-Belsen and containing graphic images that convey this horror are readily available on YouTube and can be screened for the students.

There is no question that the American soldiers liberating Dachau, motivated by their hideous introduction to the camp by the train with thousands of starved and disease-ridden bodies, took the law into their own hands and summarily executed many of the SS guards they came across. The introduction to the chapter on the Dachau trial summarizes these executions.

What, if any, is the appropriate sanction against those GIs participation in these executions? This question should be asked in the context of the time: the liberating soldiers had been fighting for months, had seen death many times, had seen hideously wounded, but never encountered the horror they found at Dachau.

It is tempting to ask what the students would do if in such a situation. **For those who believe that the GIs who administered summary justice to the SS guards should be prosecuted, should the punishment be the same as for murder? What about the cover-up? Should that be prosecuted as well?**

When we get to the trial itself, one of the first questions might be the quandary faced by the defense lawyers. John Adams represented the British soldiers charged with manslaughter in the Boston Massacre, a case that had to be tried before a Massachusetts jury. This representation dramatically demonstrated the obligation of the lawyer to represent unpopular clients.

How would a student react if told they must represent any one of the defendants on trial in this case? How can one both recognize the absolute right of every defendant to a lawyer and at the same time decline to represent one of these defendants if asked to do so?

In our opinion, one lawyer cannot represent as many as fifteen defendants. For the reasons stated in the text, it is physically impossible to do what is necessary to provide effective representation. There will undoubtedly be some famous case in the news at the time the class is taught which will provide a sharp contrast to the crunch the defense lawyers faced at Dachau.

Chapter Four

The Trial of Amon Göth (August 27 - September 11, 1946)

We chose this trial for a variety of reasons. First, it provides an opportunity to discuss the Holocaust in German-occupied Poland, the largest site of Jewish murder during the Second World War. It also allowed us to focus on the destruction of Poland during the German occupation. Last, while Amon Göth and his brutality are widely known through his representation by actor Ralph Fiennes in the film *Schindler's List*, it is widely unknown that he was tried in Poland after the war.

A good question to ask is whether Göth received a fair trial and then focus on the elements that made the trial fair and those that made it unfair. For example, at Nuremberg, defendants could hire German counsel, something that could not be done for the German defendants in Kharkov, since Germany and the Soviet Union were still at war. At the Eichmann trial, likewise, Israel hired and paid for a German defense team to come to Israel and represent Eichmann. Should the same have been done here?

Compare the work of the Allied-established IMT court with the work of Poland's NTN. This provides a good opportunity to compare prosecution of Nazi war criminals before international tribunals like the IMT and the NMT at Nuremberg with prosecution before domestic tribunals. Which is more preferable and why?

It is ironic that Göth was arrested by the SS and largely unknown that the SS had its own set of courts (the Hauptamt SS-Gericht - SS Court Head Office) to prosecute not only non-German victims but also sometimes their own. There were thirty-eight such courts set up throughout German-occupied Europe, including a court in Auschwitz.

Should the Poles have been allowed to participate as fellow prosecutors in Nuremberg? In light of the massive physical and materials losses that Poland suffered at the hands of the Germans, a good argument can be made that it was unfair to exclude the Poles from the Nuremberg proceedings.

Like with the pre-war German bench and bar, Jews also had a long history of being part of the legal profession in Poland. The most notable is Raphael Lemkin, the Polish-Jewish lawyer who coined the term genocide. Another was Hirsh Lauterpacht, who emigrated to the UK before the war and served as a judge on the International Court of Justice after the war. The least known today is Emil Rappaport, a prominent prewar Polish jurist who was one of Lemkin's mentors; Rappaport was one of the founders of the discipline of international criminal law.

Since the Genocide Convention was adopted by the United Nations in 1948, **an interesting class discussion could focus on why it took so long to prosecute anyone for genocide.**

Chapter Four

The Trial of Amon Göth (continued)

Returning to the actual Göth trial, we suggest soliciting the students' views of the two Polish defense attorneys. Both sought to be relieved as defense counsel and then, when the request was denied, played only a passive role in the case.

Does this take away from the fairness of the trial? How does the conduct of the defense counsel in this trial compare to the conduct of the defense counsel in the Kharkov trial?

Regarding the verdict of death by hanging, given the extensive testimony of witnesses against Göth, could it have been otherwise?

For further reading, we recommend *The Untold Account of His Life, Wartime Activities, and the True Story Behind The List* by David M. Crowe. Also recommended is this very readable autobiography by Mietek Pemper, *The Road to Rescue: The Untold Story of Schindler's List*. For additional material on the Göth trial, translated from Polish, see the website of the Holocaust Education & Archive Research Team (H.E.A.R.T.) at www.holocaustresearchproject.org.

We also recommend the 2006 documentary "Inheritance" profiling Monica Hertwig, Amon Göth's daughter, and her confrontation with her father's past. And in 2013, a German woman whose mother is Monica Hertwig and her father a Nigerian man with whom Monica had a brief affair published a book about her discovery of being Amon Göth's granddaughter. The English language translation becomes available in April 2015: Jennifer Teege, *My Grandfather Would Have Shot Me: A Black Woman Discovers Her Family's Nazi Past* (translated by Carolin Sommer).

Chapter Five

The Ravensbrück Trials in British-occupied Hamburg

(December 5, 1946 - July 18, 1948)

A good place to start this chapter is to compare the trials conducted by the British military with the trial conducted by the American military at Dachau, discussed in Chapter 3.

Which trial was more fair? Who did a better job?

One difference is that the defendants in this case had a German defense counsel, while in Dachau, American military lawyers acted as the attorneys for the defense.

For a discussion of the role of German women perpetrators see the notable Wendy Lower, *Hitler's Furies: German Women in the Nazi Killing Fields*.

A difficult aspect, raised again in the kapo trials in Chapter 7, is the prosecution of the prison-functionaries, initially imprisoned by the Germans but then made kapos, who then exhibited brutality against their fellow prisoners when given a supervisory function. **Was it fair for any of them to receive death sentences?**

The "Aftermath" section presents the little-known and disappointing story of how quickly the British tired of putting Nazi war criminals on trial, and allowed those imprisoned to go free.

Who could have predicted that Winston Churchill, who urged the summary execution of high-ranking Nazis in 1944, would four years later be calling for their release?

Chapter Six

The Einsatzgruppen Trial

(September 15, 1947 - April 10, 1948)

This trial represents the fulcrum between the immediate post-war enthusiasm for vigorous prosecution of Nazi atrocity perpetrators and the aversion to such prosecutions in the first decade of the Cold War. As the chapter makes clear, one of the charges in the case was membership in a criminal organization, a concept created by Murray Bernays, a lawyer in the United States War Department, and implemented in the main Nuremberg trial when the SS, the SD, the Gestapo, the German High Command, the German Cabinet and the SA were charged as criminal groups. The idea, as modified slightly by the IMT, was that once these organizations were found guilty it would be necessary to prove only that a defendant joined the organization and was aware of the illegal actions of the organization. This obviously contemplated a massive and systematic prosecution of those complicit in crimes against the peace, war crimes and crimes against humanity – which never occurred.

The last person convicted under this concept was Einsatzgruppen defendant Matthias Graf, who was sentenced to time served. The sentences imposed by the court on all of the defendants were subsequently lightened – fourteen death sentences were reduced to four – and within about a decade, all defendants other than the four who were executed were released. These released defendants were convicted on the basis of overwhelming evidence of their participation in mass murders unparalleled in the history of trials. **How could their release have happened?** This leads to a discussion of the impact of the Cold War and that perhaps Göring's view ultimately prevailed: the post-war trials were a misfocus since Germany and the West should have been dealing with the Soviet Communist menace.

The instructor should be sure that the major theme of the trial as captured in the chapter – no one had to follow orders – is not lost on the students. One might simply ask: what is the evidence that no one had to follow orders to kill to save one's own life? The chapter alludes to several factual examples that a failure to follow orders did not entail serious consequences.

Finally, some arithmetic. This chapter represents, as far as we know, the only rendition of the Einsatzgruppen trial to include victim testimony, taken in this instance from the Eichmann trial held fifteen years later. Students, in reading the Yoselewska testimony, should be asked to multiply the scenario it presents by about 150,000 to get a full picture of the extent of mass murder committed by these defendants.

The following is recommended as additional reading: Hilary Earl's *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law and History*. The Ben Ferencz website is also highly informative: <http://www.benferencz.org/stories/4.html>.

Chapter Seven

The Kapo Trials in Israel

The terms the “gray zone” coined by Primo Levy and “choiceless choices” by Lawrence Langer have entered the vocabulary of describing the Jewish experience in the Holocaust. Putting the student into the daily life of the lager necessarily begs the question that each student must ask himself/herself: **What would I have done if becoming a kapo often meant choosing between the possibility of life and almost certain death?** But becoming a kapo did not necessarily mean becoming a cruel kapo. Authority meant power, and with that power, for many of the kapos led to abuse of fellow prisoners.

One of us (Michael Bazylar) was provided a handwritten note written to Toni Green, the widow of Jack Green, a Holocaust survivor and former kapo from Poland who died in 1981. The note was written upon Jack’s death, reading, in part:

“Dear Tonka! Sorry we could not attend the funeral of Jack who I loved and respect[ed]. Being with Jack in two concentration camps I feel that I knew Jack better than others. Watching day by day how he treated the boys as a CAPO. We should of have more CAPOS like Jack and we would have more survivors. As a CAPO he used his love, his kindness but never his power. When the Gestapo was around his mouth was his power, that’s all. Jack risked his life that others should live. Let his soul rest in peace and let the Mitzvah [good deeds] he did be counted by God..”

For law students, a fascinating discussion would be to focus on the criminal law defense of duress, sometimes called the defense of necessity or coercion. When duress first emerged as a defense in 19th-century English common law, it did not apply to most crimes. Since then, the common law in most Anglo-American jurisdictions has evolved to recognize duress as a complete defense to all crimes except murder (and possibly treason).

The dissent by Frank Tuerkheimer presents an excellent opportunity to discuss whether and how the law should have dealt with the cruel kapos. During this discussion, it should be remembered that we are discussing law and not morality.

For further reading, see Orna Ben-Naftali & Yogev Tuval, “Punishing International Crimes Committed by the Persecuted: The Kapo Trials in Israel,” *J. Int’l Crim. Justice.*, v.4, p. 128 (March 2006); Michael J. Bazylar and Julia Y. Scheppach, “The Strange and Curious History of the Law Used to Prosecute Adolf Eichmann,” 34 *Loyola L.A. Int’l & Comp. L. Rev.* 417 (2012).

Last, we highly recommend viewing “The Last of the Unjust,” Claude Lanzmann’s 2012 documentary on Benjamin Murmelstein, the last Jewish leader of the Terezin [Theresienstadt] ghetto, appointed to the post by his German overlords. Murmelstein was reviled after the war by many survivors.

Chapter Eight

The Frankfurt Auschwitz Trial

(December 20, 1963 - August 19, 1965)

Auschwitz, of course, is the main symbol of the Holocaust even though more Jews were murdered by the Einsatzgruppen. Treblinka was nearly as lethal but functioned only as a human slaughterhouse. Only those Jews who assisted in the killing process were spared at Treblinka, while Auschwitz had far more survivors.

To give students a sense of the drama of the trial and a taste of the psychological stress involved for the survivor witnesses, the instructor should role-play.

Be an Israeli citizen who survived Auschwitz and came to Palestine/Israel in the late 1940s and began a new life after the Holocaust. This person has avoided anything German and is traumatized at the thought of landing in Frankfurt and suddenly finding him/herself in Germany. He/she also has enormous feelings of guilt about surviving by cooperating with the administrators of the camp. The instructor can vary the emotional content of this component of the role-play:

was the potential witness' role at Auschwitz a function removed from the dead, such as cleaning latrines, or something far more gruesome, such as extracting gold from the teeth of gassed victims?

The role-playing should include the difficulty of being chosen at the ramp to live while the rest of the family was gassed – an experience virtually every Auschwitz survivor had. See, for example, the summarized testimony of Mauritius Berner at pp. 239-240. The students' assignment is to convince the Auschwitz survivor to come to Germany and testify. By forcing the students to convince the witness, the class will have a much better understanding of the horror of Auschwitz.

The role of Fritz Bauer should also be brought out. Bauer, a Jew, was briefly detained in a concentration camp in the 1930s and then left Germany and spent the balance of the war in Denmark and Sweden. After the war he was selected as chief prosecutor for the state of Hesse – a major German entity that includes the important city of Frankfurt. ***Did Bauer do the right thing, as an official of the German government, to advise the Israeli Intelligence Agency to by-pass the normal channels in capturing Eichmann and then bringing him to Jerusalem?***

Mauritius Berner was a survivor who saw his wife and three daughters disappear in the line to the gas chambers. The defendant Victor Capesius, whom he knew as a traveling salesman for I. G. Farben, lied to Berner, saying he would see his family in an hour after they showered. In addition to his role at the selection ramp, Capesius stole some of the gold taken from the mouths of murdered Jews. He was found guilty as an accomplice to murder and, although he could have been sentenced to life imprisonment, he was sentenced to nine year's imprisonment. After his release, Capesius lived another fourteen years. Berner has returned to Israel and has learned that Capesius received a very light sentence. Play the role of Berner who complains that it wasn't worth it: traveling to Germany and then reliving his time at Auschwitz and the murder of his wife and children; and then learning that Capesius' sentence was probably the same

Chapter Eight

The Frankfurt Auschwitz Trial (continued)

as for someone who robbed a grocery store.

Some suggested responses to Berner's complaint:

- What happened at Auschwitz is now a public record and that matters more than any particular sentence. The international press attended the trial so it was not only the German public that was educated but the international community as well. Berner was an important player in this public education role.
- He, Berner, was able to confront Capesius, not as a prisoner totally subject to Capesius' whim, but as an accuser to whom Capesius could do no harm.
- While the judge who imposed the sentence was completely insensitive to what he was doing, the prosecutors, also Germans, were totally committed to dealing as harshly as possible with the defendants and there must be some measure of satisfaction in knowing that there are Germans so inclined.

The following is recommended as background reading. Devin Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History and the Limits of Law* and Rebecca Whitmann, *Beyond Justice: The Auschwitz Trial*. We also recommend viewing the documentary "Verdict on Auschwitz: The Frankfurt Auschwitz Trial 1963-1965," which came out in 2007, and is available on DVD. At three hours it is too long to screen in class, but portions can be screened. A two-minute snippet is available on YouTube.

Chapter Nine

The Fedorenko Denaturalization Trial

(August 14, 1977 - December 23, 1984)

One perspective: Was Judge Roettger totally biased against the Government in its efforts to denaturalize and then deport Fedorenko?

Judge Roettger was dismissive if not insulting to survivor witnesses. While he credited the testimony of at least one survivor and found that Fedorenko's total denials were not credible, he nevertheless felt that because Fedorenko had lived a lawful and quiet life in the United States for over 25 years (just one parking ticket) he should be left alone. **Can this position be justified?**

Another perspective: Judge Roettger noted that the government spared no expense in its prosecution – several lawyers at counsel table, daily transcripts of testimony, witnesses flown in from Israel – while Fedorenko had no resources other than his lawyer and was as much a non-entity and underdog as a person could be. **Can one muster for sympathy for Fedorenko and an understanding of Judge Roettger's position?**

THE ESCAPE

It is not unusual to ask, as Judge Roettger did, how could so many have let themselves be murdered by so few and not resist? The chapter provides one answer: the almost unimaginable effect of being jammed into a box car for days without food, water, or toilet facilities with other suffering people. But the larger question remains and to the extent that the Warsaw Uprising tends to be the focus of Jewish resistance, the escape from Treblinka is something that should be addressed. The case almost invites the discussion since the first government witness was Eugun Turkowski, the mechanic who made the key to the ammunition room, providing the escapees with weapons. Of the three carbon monoxide camps, Treblinka, Sobibor and Belzec, Jews orchestrated the escape from Treblinka and were instrumental in the escape from Sobibor. They also orchestrated the unsuccessful October 1944 revolt at Auschwitz that led to the demolition of one of the crematoria but no successful escapes. Turkowski's testimony and Judge Roettger's questions invite a discussion of this aspect of the Holocaust.

The following is recommended as background reading. Aside from the case itself, at the trial, intermediate appellate level and before the Supreme Court, see Witold Christowski's *Extermination Camp Treblinka*. This book provides considerable detail on the Treblinka revolt and escape.

DENATURALIZATION AND SOCIAL SECURITY

There has been some concern expressed over the fact that some naturalized citizens have been permitted to return to their countries of origin without going through the denaturalization process, giving up their right to return to the United States. What they gain in this arrangement, however, is the right to collect a

Chapter Nine

The Fedorenko Denaturalization Trial (continued)

Social Security pension from the U.S. government and in some of the poorer countries to which they return, this permits them to live very comfortably with funds paid out of the United States Treasury. On its face, this is disturbing. **But is it really?**

The Wiesenthal Center grades various countries from A to F based on their efforts to deal with Second World War perpetrators of crimes against humanity and genocide. Germany and the United States have consistently received the highest grade – A – while other countries receive grades as low as F (or X if they fail to submit data). In this context, the Office of Special Investigations (OSI), which has deported over one hundred perpetrators and prevented hundreds of others from entering the United States is principally responsible for the A grade the Wiesenthal Center regularly gives to the United States.

As the Fedorenko chapter makes clear, the burden on the government in a denaturalization case is extremely high: just short of the reasonable doubt standard applicable to criminal cases.

What is the government to do in a case where the witnesses it needs are few and shaky in their testimony and the alleged perpetrator agrees to leave, Social Security rights intact?

If the underlying purpose of OSI is to rid the United States of persons involved in crimes against humanity and genocide so that they are not part of the polity that comprises the United States, is it a mistake to reach what is essentially a plea agreement with the alleged perpetrator – you leave permanently but you retain your ability to collect Social Security?

This question can be made personal to the students: either now, or in a short period of time, they will be paying into the Social Security Trust Fund.

How do they feel that some of that money permits alleged perpetrators to live in comfort somewhere in Europe? What if the alternative is a lost denaturalization case, resulting in the alleged perpetrator living next door to them?

Chapter Ten

The Sawoniuk Trial in London (February 8 - April 1, 1999)

A good discussion for this chapter is to compare the prosecution efforts of the various English-speaking countries to where Nazis fled after the war. This chapter discusses prosecution of Nazis in the United Kingdom and Chapter 9 (the Fedorenko trial) does the same for the United States.

Canada: It is estimated that between 2,000 and 5,000 war criminals emigrated there after the Second World War, but not a single Nazi has ever been successfully prosecuted. In 1987, Canada passed an amendment to its Criminal Code allowing for the prosecution of suspected Nazi war criminals in Canada for crimes committed elsewhere – akin to what the UK did under the War Crimes Act. See Canada Criminal Code § 7(3.71), as amended. The first prosecution was of Imre Finta, a Nazi collaborator from the Ukraine, but Finta was acquitted after a six-month jury trial, and the acquittal was upheld on appeal by the Supreme Court of Canada. This led Canadian authorities to refocus its efforts from prosecution to revocation of citizenship and deportation – using the U.S. model, yet also without much success.

As of this writing (January 2015), there is only one active prosecution going on in Canada, against ninety-one year old Helmut Oberlander. The case presents interesting facts. Oberlander is an ethnic German (Volkdeutch) whose ancestors settled in the Ukraine over two centuries ago. Because of his language skills, he was conscripted at age 17 following Nazi Germany's invasion of the Ukraine as an interpreter for Einsatzkommando [Special Detachment] 10a ("EK 10a"), a Nazi death squad. German wartime records show that EK 10a was part of Einsatzgruppe D, headed by the infamous Otto Ohlendorff (see Chapter 6) A field report sent in April 1942 to Berlin states that Einsatzgruppe D "executed" 91,678 persons. In the summer of 1942, EK 10a was issued a poison gas van to now carry out mass murders. Oberlander does not dispute that he served as a member of EK 10a, but maintains that, as an interpreter in the unit, he never participated in any killings. No evidence has been produced that Oberlander personally participated in the mass murders or, as a general matter, that interpreters in these Nazi death squads also actually killed individuals.

After the war, Oberlander emigrated to Canada, and since 1995 the Canadian authorities have been seeking his extradition for failure to reveal his wartime membership in EK 10a. To date, these efforts have been unsuccessful. In September 2012, the Canadian federal cabinet issued its latest deportation order, which Oberlander is now appealing through Canadian courts. After Ivan Demjanjuk's successful conviction in Germany in 2011, German prosecutors also began seeking to have Oberlander tried in Germany as an accomplice to the murders committed by EK 10a. In doing so, they aimed to take the precedent emanating from the Demjanjuk conviction one step further. In the Demjanjuk trial, the Munich District Court specifically noted that Demjanjuk was a guard at a Nazi extermination center in Poland, and that all guards participated in the

Chapter Ten

The Sawoniuk Trial in London (continued)

murder process. Not so for interpreters of Nazi death squads operating in the Soviet Union. While Oberlander, through his translation skills, enabled EK 10a to carry out their murderous duties, such enabling nevertheless is different from actual killing. Bernie Farber, former executive director of the Canadian Jewish Congress, disagrees: "It matters not if he was a translator or a cook – they were all part of the pirate ship and they helped oil the wheels of genocide..."

Should Obelander, the interpreter (or, for that matter, a German who worked as a cook at Auschwitz,) be prosecuted as an accomplice to murder committed in the "pirate ship of genocide"? This question can provide an interesting class discussion. See also the Conclusion section discussion of Oscar Gröning.

Australia: In 1987, the Australian government established a unit to investigate alleged Second World War criminals who fled to Australia after the war, similar to the UK. The unit would present evidence to the Director of Public Prosecutions to bring such individuals to justice "on the same basis as an ordinary criminal trial." In 1992, the unit was shut down after failing to produce a single successful prosecution.

For discussion, see David Fraser's *Daviborsch's Cart: Narrating the Holocaust in Australian War Crimes Trials*.

Conclusion

Since we do not know which trials in the book have been selected for the course, it is difficult to be specific with respect to a suggested wrap-up discussion. But as a general matter, the following might be questions to ask once all the trials assigned have been discussed.

What do these trials have in common?

- a. No denial of the underlying facts
- b. Incredibly dedicated and hard working prosecutors
- c. Committed defense lawyers

Do you feel, after reading these trials, that justice was done?

- a. In some cases: Sawoniuk, Fedorenko, Einsatzgruppen (the four executed and the release of Matthias Graf) Göth, Kapo trials, generally.
- b. Not in others: remaining Einsatzgruppen defendants, major defendants in Frankfurt Auschwitz trial.

What is a better alternative?

- a. Truth and Reconciliation Commissions?
- b. Move on, conclude that trying to do justice is futile.
- c. Do nothing?

Last, an update. After the book was published, charges against former Auschwitz guard Hans Lipschis were dropped on the grounds that he was unfit to stand trial due to illness. And in December 2014, a German court in Cologne acquitted a former SS member, identified only as Werner C., of participating in the infamous Oradour-sur-Glane massacre in France, when 642 civilians were massacred by the SS on June 10, 1944 in reprisal for a French resistance operation. The prosecution proved that the 89 year-old defendant was present in the French village as part of the SS unit involved in the massacre; however, the court nevertheless did not convict on the ground that there was insufficient evidence to connect the defendant to the murders.

In December 2014, a court in the northern German city of Lüneburg announced that after reviewing the prosecution's case and the health of the accused, it will allow the trial of 93-year old Oskar Gröning, a former SS officer. At Auschwitz, Gröning stood guard as incoming freight trains unloaded arriving Jews. His other duties included counting money and other possessions, of dead Jews who were

Conclusion *(continued)*

gassed, and shipping the loot back to Germany. For this role Gröning has been dubbed “The Bookkeeper from Auschwitz.”

Gröning is expected to be charged with 300,000 counts of accessory to murder. The charge is based on the two-month period between May and July 1944, when an estimated 137 trains arrived at Auschwitz, mostly from Hungary, and carrying 425,000 people. At least 300,000 were murdered immediately. In a September 2014 statement, the court explained: “The accused knew that, as part of the selection process, those not chosen for work and told they were going to the showers were really going to the gas chambers where they would be put to death in an agonizing manner.”

What makes Gröning’s case interesting is that he is that rare breed of Germans from that era who have admitted their Nazi past. In 2005 he voluntarily came forward and openly revealed to the media his role at Auschwitz. See Spiegel story, *supra*; and BBC documentary *Auschwitz: “Inside the Nazi State”* (available on Netflix, with clips on YouTube). In his various appearances, Gröning contends that he did so to combat the lies of Holocaust deniers with the truth of a German who was there. Here is part of what he has said:

“On one night in January 1943 I saw for the first time how the Jews were actually gassed. These cries I have ringing in my ears to this day... Every night and every day I remember it for the nightmare that it was.... I saw [an] SS soldier grab the [crying] baby by the legs. He smashed the baby’s head against the iron side of the truck until it was silent.... It was in 1942 that my SS chiefs ordered me there. I was an official in the prisoner’s possession administration which basically involved removing the money, jewels and other valuables from the inmates, registering it and sending it back to Berlin.”

See Allan Hall’s “Former SS Officer, 93, Will Stand Trial for Mass Murder of 300,000 in Holocaust,” (London) *Express*, Dec. 16, 2014. No doubt, this is important eyewitness testimony by an unimpeachable source that Holocaust deniers cannot discredit.

Gröning maintains that his guilt is moral and not criminal: “This guilt will never leave me. I can only plead for forgiveness and pray for atonement.”

Should Gröning be prosecuted?

CHAPTER 9