Introduction

The Holocaust: a conspiracy to murder eleven million people that succeeded in killing six million of them.¹ Unlike most conspiracies, which operate in secret to avoid detection and subsequent prosecution by the state, this one operated above ground, and not just with the state’s awareness, but with the state as the driving force. There is no clearer evidence of this conspiracy to murder the Jews of Europe than Reich Marshal Hermann Göring’s directive to Reinhard Heydrich, head of the Reich Main Security Office (RSHA), dated July 31, 1941:

I hereby charge you with making all necessary preparations in regard to organizational and financial matters for bringing about a complete solution to the Jewish question in the German sphere of influence in Europe. Wherever other governmental agencies are involved, these are to cooperate with you. I charge you furthermore to send me, before long, an overall plan concerning the organizational, factual and material measures necessary for the accomplishment of the desired solution of the Jewish question.²

This directive came with the rapid advance of the German military into the Soviet Union after its June 1941 invasion, bringing the vast majority of European Jewry under German control.

The conspirators wasted no time. In short order, the four separate groups of the Nazi security organization—the SS—known as the Einsatzgruppen followed the German Army eastward and proceeded to annihilate close to one million Soviet Jews in less than one year.³ The
Germans reported these murders with chilling accuracy in regular reports from the field. From killing by shooting, to asphyxiation in mobile vans where the carbon monoxide exhaust was pumped into the trucks loaded with Jewish victims, to the more elaborate killing process in the death camps, the conspiracy continued unhindered. Even as the tide of the war turned against the Germans—when the Soviets pushed the German military westward after the Battle of Stalingrad in early 1943 and American and British troops landed at Normandy in June 1944—the killings continued. The German invasion of Hungary on March 9, 1944, then subjected Hungarian Jewry, the last large Jewish community standing in Europe, to the “desired solution”—annihilation. In the ensuing ten months, more than four hundred thousand Hungarian Jews were sent to their deaths at Auschwitz, where 80 percent were gassed upon arrival. The brutality and sheer inhumanity of German excesses could not be swept under the rug of the peace that ended the war in Europe in May 1945.

At the war’s end, how were the Allies to respond to this enormous crime? Even in an ideal world, it would have been impossible to bring all the perpetrators to trial. There were too many; as the massive task of rebuilding began, they blended into the background of a Europe devastated by war. In too many cases, the witnesses had been killed. Nevertheless, an attempt was made to prosecute some of the perpetrators.

The first major trial after the war took place at Nuremberg before the International Military Tribunal (IMT) between November 1945 and October 1946. Judges from the United States, the United Kingdom, France, and the Soviet Union presided. The prosecutors had organized their evidence under difficult circumstances in postwar Germany, with its wrecked transportation and communications systems. They reviewed hundreds of thousands of documents. They synthesized different legal systems and the differing approaches of the four Allied powers, and the end product was made available in four languages: English, French, Russian, and German. While the prosecutors made mistakes, these are minor when one considers the amazing amount of organization that went into preparing for the trial with such limited time, and in incredibly taxing conditions. Under the circumstances, their ability to put together such a massive case as effectively as they did must rate as one of the great accomplishments in the history of criminal trials.
The focus of the IMT trial, however, was not the Jewish genocide—the crime that later came to be known as the Holocaust—for several reasons. First, the principal concern of the prosecutors at Nuremberg was the charge of crimes against the peace, defined in the Nuremberg Charter as “the planning, preparation, initiation, or waging of wars of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” After the carnage of the Second World War, initiated by Germany’s invasion of Poland in September 1939, the drafters of the Nuremberg Charter felt that all steps should be taken to unambiguously affirm that the waging of aggressive war was an international crime, for which political and military leaders were not immune from prosecution. In his opening address, Justice Robert H. Jackson would refer to crimes against peace as the “supreme crime.”

Second, at the time that the prosecutors were putting together their evidence for the IMT trial they were only beginning to appreciate the extent of the conspiracy to exterminate European Jewry. For example, it is instructive that Justice Jackson made no reference to Auschwitz in his opening address. In his memoir of the Nuremberg trials, Jackson’s assistant and successor, Telford Taylor, recalls that he knew nothing of the mass extermination of the Jews when he arrived at Nuremberg. While it was the legal actors who first unearthed the conspiracy, as they were combing through the vast depository of undestroyed Nazi documents to find legally admissible evidence of criminality, even they did not fully comprehend at the time what they had discovered. The term “genocide” had not yet entered the criminal vocabulary and the “Holocaust” would not take hold as the term referring specifically to the extermination of six million Jews by the Germans until two decades later.

Finally, none of the defendants at the first Nuremberg trial had hands-on responsibility for the Holocaust. Hitler and Himmler were dead; Eichmann was still at large; Reinhard Heydrich, the person directed by Hermann Göring to implement the Final Solution, had been assassinated; and his successor, Ernst Kaltenbrunner, while an IMT defendant, left the job of administering the plan to murder Europe’s Jews to his subordinates, Heinrich Mueller, Adolf Eichmann, and others. While Göring may have formally initiated the plan for the Final Solution with his directive of July 31, 1941, the bulk of Göring’s responsibilities fell
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under the other Nuremberg charges—crimes against the peace and war crimes—and those were understandably the focus of the case against him. When it finally came time to cross-examine Göring about the conspiracy to exterminate the Jews, he simply denied knowledge of its full scope.

To be sure, the prosecutors were quick learners, and so the conspiracy to exterminate the Jews did comprise part of the case that the prosecutors put on at Nuremberg. Count One of the indictment (titled “The Common Plan or Conspiracy”) speaks of the conspirators’ “program of relentless persecution of the Jews, designed to exterminate them” and concludes: “[I]t is conservatively estimated that 5,700,000 have disappeared, most of them deliberately put to death by the Nazi conspirators. Only remnants of the Jewish population of Europe remain.”

At trial, the prosecutors presented considerable evidence about the mass murder of the Jews. SS General Otto Ohlendorf testified that, as a commander of an Einsatzgruppen unit, his instructions to his men were to “liquidate” all Jews they encountered, and he acknowledged responsibility for the murder of ninety thousand Jews in Ukraine. (His trial is discussed in chapter 6.) Rudolf Höss, commandant of Auschwitz, testified as to the killing of two million Jews at Auschwitz, a number since reduced to about one million Jews.

And in their summations, both the French and British prosecutors spoke about the mass murder of the Jews. Chief British prosecutor Hartley Shawcross personalized the killing process by reading from the affidavit of German engineer Hermann Graebe, who witnessed the mass execution of the Jews of Dubno, Ukraine by an Einsatzkommando killing squad. Shawcross read Graebe’s account, which focused on the mass extermination of the Jews, in open court:

On October 5, 1942, when I visited the building office at Dubno, my foreman told me that in the vicinity of the site Jews from Dubno had been shot in three large pits, each about 30 meters long and 3 meters deep. About 1,500 persons had been killed daily. All the 5,000 Jews who had still been living in Dubno before the pogrom were to be liquidated. As the shooting had taken place in his presence, he was still much upset. Thereupon, I drove to the site accompanied by my foreman and saw near it great mounds of earth, about 30 meters long and 2 meters high.
Several trucks stood in front of the mounds. Armed Ukrainian militia drove the people off the trucks under the supervision of an SS man. The militiamen acted as guards on the trucks and drove them to and from the pit. All these people had the regulation yellow patches on the front and back of their clothes, and thus could be recognized as Jews. My foreman and I went directly to the pits. Nobody bothered us. Now I heard rifle shots in quick succession from behind one of the earth mounds. The people who had got off the trucks—men, women, and children of all ages—had to undress upon the orders of an SS man, who carried a riding or dog whip. They had to put down their clothes in fixed places, sorted according to shoes, top clothing, and underclothing. I saw a heap of shoes of about 800 to 1,000 pairs, great piles of underlinen and clothing. Without screaming or weeping, these people undressed, stood around in family groups, kissed each other, said farewells, and waited for a sign from another SS man, who stood near the pit, also with a whip in his hand. During the fifteen minutes that I stood near I heard no complaint or plea for mercy. I watched a family of about eight persons, a man and a woman both about fifty with their children of about one, eight and ten, and two grown-up daughters of about twenty to twenty-nine. An old woman with snow-white hair was holding the one-year-old child in her arms and singing to it and tickling it. The child was cooing with delight. The couple were looking on with tears in their eyes. The father was holding the hand of a boy about ten years old and speaking to him softly; the boy was fighting his tears. The father pointed to the sky, stroked his head, and seemed to explain something to him. At that moment the SS man at the pit shouted something to his comrade. The latter counted off about twenty persons and instructed them to go behind the earth mound. Among them was the family, which I have mentioned. I well remember a girl, slim and with black hair, who, as she passed close to me pointed to herself and said “Twenty-three [years old].” I walked around the mound and found myself confronted by a tremendous grave. People were closely wedged together and lying on top of each other so that only their heads were visible. Nearly all had blood running over their shoulders from their heads. Some of the people shot were still moving. Some were lifting their arms and turning their heads to show that they were still alive. The pit was already two-thirds full. I estimated that it already contained about 1,000 people.
It was not until fifteen years later at the Eichmann trial that the same scenario was testified to, but this time from the victim’s perspective.

The Eichmann trial in 1961–62 in Jerusalem is generally seen as the “other” Holocaust trial, if not the major Holocaust trial. Although grounded on the same legal principles that came out of Nuremberg, the formal charge against Eichmann was not the commission of “crimes against humanity” but, specifically, “crimes against the Jewish people.” Since Gideon Hausner, the Israeli attorney general, aimed to show the full scope of mass murder of the Jews, he called a Holocaust survivor from each country where Jews were murdered. Eichmann, of course, was not personally present or even directly involved in the acts that the witnesses testified to, and so much of the live testimony dealt with events with which Eichmann had little or no connection. Because the charge alleged that Eichmann, together with others, agreed to the murder of Europe’s Jews, under basic principles of conspiracy law, the conduct of others in furtherance of the underlying criminal agreement became admissible against Eichmann.

These two trials—at Nuremberg in 1945–46 and Jerusalem in 1961–62—though by far the best known, were not the only trials in which the major focus, or even a significant portion of the trial, was the mass murder of the Jews. Over the last seventy years, tens of thousands of individuals who were part of the German regime and their local collaborators in the occupied countries have been prosecuted for crimes committed during the years of German rule of occupied Europe. In somewhat sporadic and unorganized fashion, many of these trials dealt either directly or indirectly with the genocide of the Jews. A close look at some of these other Holocaust trials tells us a great deal about the implementation of the conspiracy to murder European Jewry and how various justice systems have tried to address it. While some of these trials are well known to scholars, they have been overshadowed by the Nuremberg and Eichmann trials. Because they have faded from public memory, we call them “forgotten trials of the Holocaust.”

The ten trials discussed in this book have taken place over the last seventy years in a range of countries. While separate books have been written on some of these trials, this book is the first to provide an overarching, global picture of the various efforts to prosecute those responsible for the murder of Jews under Hitler’s plan, both high-ranking
statesmen and minor foot soldiers involved in one of the momentous crimes in human history. The ten specific snapshots provided here illustrate how both international law and various domestic legal systems have dealt with Nazi-era perpetrators. Legal historian David Fraser speaks of the “shadow and gloom of legal and historical forgetfulness” that has been cast over the judicial processes used to handle Nazi war crimes. This volume is meant to undo some of that forgetfulness.

The ten trials covered, albeit a small fraction of the multitude of the prosecutions of Nazi-era perpetrators, were chosen for this book because they are representative of the various types of prosecutions of war criminals and collaborators. In reviewing these trials, we look at the prosecution’s case, defenses, the ultimate verdicts, and the legitimacy of the verdicts and sentences.

Can one ever hope for justice in these cases? For the murderer of hundreds or thousands of individuals—and many of the defendants discussed in this volume fit that description—even the ultimate punishment of death may seem unsatisfactory, both to the immediate survivors and to society at large. To use the terms “Holocaust” and “justice” in the same phrase itself appears incongruous. As Holocaust historian Michael Berenbaum has commented: “In one sense, the entire quest for justice in the aftermath of genocide is futile, because you cannot punish all the killers, and the punishment itself is incommensurate with the nature of the crime.”

In choosing the trials analyzed here, we have tried to present a vertical picture of the detailed operation of the conspiracy to murder that (1) Hitler, Himmler, and Göring initiated, (2) Eichmann coordinated, and (3) many hundreds of thousands of Germans, Austrians, and others implemented. We have thus selected trials involving concentration camp commandants, guards, and prisoner-functionaries (known in concentration camp slang as *kapos*) that assisted in the murder process. Also, we have selected cases prosecuted under different legal systems so that, by virtue of comparison, something can be learned about the varied legal responses to the enormity of crimes committed during the Nazi era in Europe.

Chapter 1: The Kharkov Trial of 1943: The First Trial of the Holocaust?

The very first trial held of Germans for Nazi-era crimes took place in December 1943, before the war was over, in the newly Soviet-liberated
Ukrainian city of Kharkov. The three-day trial took place as the war was still raging and the Red Army was pushing westward. The defendants consisted of three Nazi personnel and a Russian collaborator. Almost all of their victims were Jews but the word “Jew” was never uttered during the trial. This chapter examines why.

Chapter 2: The Trial of Pierre Laval: Criminal Collaborator or Patriot? The Laval trial in Paris in October 1945 involved the collaborationist prime minister of Vichy France responsible for the deportation of seventy-five thousand Jews from France to the death camps in Poland. Laval’s defense rested entirely on his claim that he ended up saving the lives of most of French Jewry, albeit at the expense of some French Jews and almost all non-French Jews who were in France at the time. Did that justify the collaboration he openly acknowledged?

Chapter 3: The Dachau Trial under U.S. Army Jurisdiction. Dachau, located in Germany, was the first of Hitler’s concentration camps and among the last to be liberated. Soon after its liberation on April 29, 1945, American military authorities began prosecuting Dachau camp personnel on the very grounds of the former camp. The U.S. Army conducted trials of 1,672 alleged war criminals. These trials, brought under the U.S. military justice system, continued from 1945 to 1948.

Among the diversity of inmates at Dachau, Jewish inmates were singled out for the harshest treatment, pursuant to the euphemistic German term “special handling.” Jews lived under the worst conditions, received the least food, and constituted a clear plurality of the many thousands murdered at Dachau through starvation and disease. Their death rate was the highest of any of Dachau’s sizable population groups. This chapter focuses on the trial of forty Dachau administrators that took place in November–December 1945, concurrently with the major trial in Nuremberg.

Chapter 4: The Trial of Amon Göth in Postwar Poland: Poland’s “Nuremberg.” We then turn to the trial of Amon Göth, the brutal commandant of the Płaszów concentration camp on the outskirts of Kraków, whose deeds would have been forgotten were it not for Steven Spielberg’s film Schindler’s List. Göth’s trial spanned a two-week period in August–September 1946 before the Supreme National Tribunal of Poland. It was one of seven trials conducted by this special Polish court for German war criminals, which applied both local Polish law and
international law principles. In the Göth trial, and the other six trials conducted by this court, the Poles modeled their proceedings on the Nuremberg trial in session at the same time.

A notable feature of the trial was the use of the term “genocide” (in Polish, ludobójstwo) to describe the crimes Göth committed. This was one of the first uses of the term “genocide,” coined just a few years earlier in 1944 by Raphael Lemkin, a Jewish refugee from German-occupied Poland living in the United States.

Chapter 5: The Hamburg Ravensbrück Trials in British-Occupied Germany: Women as Perpetrators, Women as Victims. Having covered trials under Soviet, French, Polish, and U.S. military law, we turn to British military law and a series of trials conducted between December 1946 and July 1948 in the British-occupied zone of Germany. The seven trials, known as the Hamburg Ravensbrück trials, involved personnel from the Ravensbrück concentration camp, the largest penal complex ever constructed for women.

Because of the unique status of Ravensbrück in the multitude of camps the Nazis established, the trials at Ravensbrück also demonstrate another element of the Holocaust: the roles of women not only as victims, but also as perpetrators. Generally speaking, the perpetration of the Holocaust was an all-male affair. The macho mentality and ideology of the Third Reich placed German men as the planners and implementers of the glorious future that would create the Thousand Year Reich for all German people. Nevertheless, some German women were part of the SS, and provided the necessary female staff at the concentration and labor camps where female victims were held.

Other trials featured women as defendants. The female brutes put on the dock at these trials had a celebrity quality to them, typical of other female defendants throughout time who have been charged with ghastly murders. Hence, the female perpetrators at the other trials went by such colorful monikers as the “Bitch of Belsen” or the “Stomping Mare.” None of the women on trial at Hamburg enjoyed such notorious celebrity status, though the depravities of some of the female Ravensbrück staff equaled those of the better-known German female war criminals.

Chapter 6: The Einsatzgruppen Trial at Nuremberg: Did Anyone Have to Follow Orders to Kill? The Einsatzgruppen trial is one of the twelve
subsequent Nuremberg trials conducted just by the Americans. This trial was a latecomer to the post-IMT trials with the discovery in 1947 in war-ravaged Berlin of “smoking gun” evidence that implicated Einsatzzgruppen commanders in the murders of more than one million Jews and others in German-occupied Soviet territory. The Graebe affidavit describes these mass murders in detail. By such means, the Einsatzzgruppen squads murdered men, women, and children one by one, bullet by bullet, town by town, and city by city. These massive killings elevated the scale of German atrocities to totally new levels. To present the fullest picture, we have included a victim’s perspective on one such horrific instance of mass murder.

Because the Einsatzzgruppen commanders claimed to have followed orders from Berlin, this trial also illuminated the defense of “following orders” in far more depth than the IMT proceeding. More information was available to the Einsatzzgruppen prosecutors in 1947 than was available in the cramped period in 1945 and the inception of the IMT trial. In addition, the chief trial judge, Michael Musmanno, was firmly committed to getting all facts, and a considerable portion of the trial was devoted to determining whether there was any factual basis to the claim that SS men had to kill in order to save their own lives.

Chapter 7: The Jewish Kapo Trials in Israel: Is There a Place for the Law in the Gray Zone? The next chapter examines one of the most morally and legally difficult set of trials arising out of the Second World War in general and the Holocaust in particular: those in which the defendants were Jewish kapos charged with committing crimes against other Jews. The primary focus here is on the various trials of such former kapos held between 1951 and 1964 in the new State of Israel. These individuals were tried under the same Israeli law as applied to Eichmann in 1961. However, the first Israeli Knesset (parliament) enacted the so-called Nazi and Nazi Collaborators Law not to bring to account Germans who might find themselves within the borders of Israel after the war—seen as a ridiculous impossibility at the time of the law’s enactment in 1950—but Jews who became part of the machinery of death in the camps (Lagers), and then survived the Lagers and became citizens of the new State of Israel. This chapter explores the legal and moral issues unique to this hybrid class of prisoner-functionary who occupied the “gray zone” between master and slave in the camps.
Chapter 8: The Frankfurt Auschwitz Trial: The Germans Trying Germans under German Law. The next trial deals with how Germans themselves prosecuted their own nationals for German criminality, specifically those Germans who were part of the most profound symbol of the Holocaust: Auschwitz. The Frankfurt Auschwitz trial, which took place over twenty months between December 1963 and August 1965, was a highly dedicated effort by West German prosecutors to charge Germans operating the Auschwitz death camp under German criminal law. Defendants at Nuremberg, Eichmann in Jerusalem, and others often raised arguments that they were being tried under *ex post facto* laws. This claim could not be raised here. Nevertheless, the use of the German Penal Code of 1871 to deal with Nazi criminality, before a post-war German judiciary, whose origins were largely in the Nazi era, had its own set of problems.

Chapter 9: The Trial of Feodor Fedorenko: Treblinka Relived in a Florida Courtroom. None of the trials discussed up to this point was brought in the United States. Any U.S. prosecution of Holocaust-era crimes would run afoul of the *ex post facto* clause of the U.S. Constitution, which precludes any such proceeding. However, criminal trials are not the only vehicle by which persons in the U.S. can be charged for their participation in the Holocaust. After the war, the United States, as well as other countries, became a haven not only for Holocaust victims, but also for perpetrators who became citizens. In such a case, the legal route taken with such persons is first to denaturalize and then to expel them from the U.S. The usual basis for denaturalization is that the person made a false statement in an entry application to the United States. Concealing one’s role as a guard at a concentration camp by misstating one’s activities during the war is such a false statement. Since the mid-1970s over one hundred naturalized Americans have been stripped of their citizenship for participating in the murder of Jews in German-occupied Europe and then hiding their role when immigrating to the United States.

A Ukrainian in the Red Army captured by the Germans in 1941, Feodor Fedorenko was trained as a concentration camp guard and then posted as a guard to the Treblinka extermination camp in 1942. Between July 1942 and October 1943, approximately 900,000 men, women, and children were murdered there—almost all Jews. In *United
States v. Feodor Fedorenko, brought in 1978 in Fort Lauderdale, the U.S. Justice Department sought to denaturalize Fedorenko on the basis of his role at Treblinka. Ultimately, the case was heard by the U.S. Supreme Court. In 1984, Fedorenko became the first and only war criminal to be deported from the United States to the Soviet Union, where he stood trial for his crimes.

Chapter 10: The Trial of Anthony Sawoniuk at the Old Bailey: The Holocaust in the British Courtroom. The trial of Anthony Sawoniuk took place in the Central Criminal Court (the “Old Bailey”) in London between February and April 1999. Like Fedorenko, Sawoniuk was a collaborator from Eastern Europe who began a new life after the war in a new country, in this case England. In the 1980s, the British rejected the Americans’ choice to simply denaturalize and then deport Nazi-era perpetrators and instead decided to prosecute them for their crimes directly. To do so, Parliament enacted the War Crimes Act 1991, a novel law that established criminal jurisdiction in England for conduct committed by a naturalized British citizen who committed crimes in German-occupied Europe. Sawoniuk’s hidden past was exposed after the passage of the law, and he was arrested and subsequently tried at the Old Bailey for multiple murders of Jews he allegedly committed in 1942 while a policeman in German-occupied Belarussia. As a result, Sawoniuk attained the dubious distinction of being the only person to be tried for Nazi-era crimes on English soil.

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As this overview makes clear, the trials discussed in this book are each distinctive—in the issues with which they contended, in the legal contexts in which they were prosecuted, and in the way in which the genocide was presented. Yet taken together we can see the progressive formation of public memory of the Holocaust in courtrooms throughout the world. In the 1943 Kharkov trial, Jews were not an explicit focal point, though almost all of the victims were Jewish. By the 1999 Sawoniuk trial in London, the entire focus was on the murder of Jews. Each trial explored here presents a landmark in apprehending the dimensions of the Jewish genocide. Indeed, these trials reveal the significant role the legal process has played in the formation of an understanding of the Holocaust even as they illuminate how understanding of the Holocaust shifted over time.
It is difficult to contemplate the murder of six million people. Thus it should not be surprising that efforts to prosecute the perpetrators of so many murders are also far from perfect. Nevertheless, each such effort represents part of the human endeavor to reach for justice. This book is dedicated to the many who labored at not forgetting and attempted to bring some measure of justice to those bearing responsibility for genocide and other mass atrocities.