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WHEN JUDGES BECOME HISTORIANS: REWRITING AKTION REINHARDT IN THE NUREMBERG TRIALS (1945-1949)

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Summary

Since the trials conducted in the aftermath of the Second World War, modern international criminal tribunals have alleged to be able to write historical accounts. However, are courts really able to write qualitative historiography? It is an issue that has puzzled historians and social scientists alike for decades. This thesis sheds new light on this old question and takes a critical look at the theory that alleges the incompatibility of the tasks of the historian and the tasks of the different actors in the courtroom.

This theory is tested by examining the trials that have formed the basis of the idea of the incompatibility of law and history: the International Military Tribunal of Nuremberg (1945-1946) and the Nuremberg Military Trials (1946-1948). More particularly, a reconstruction is made of the picture created by the trials of *Aktion Reinhardt*, a relatively unknown episode of the Holocaust.

The examination of these trials shows that a distorted and limited picture of *Aktion Reinhardt* was created at Nuremberg. Some of the factors that have contributed to this limited view were caused by mere circumstance, such as tensions between the prosecution teams, post-war chaos and personal ambitions of the key-players. Yet, most of the problems that have contributed to the distorted image of the *Aktion* were caused by factors that are inherent to the legal process, such as the legal framework created by the London Charter and Control Council n°10, the impact of criminal punishment on the truth-finding process and the requirements of assessing criminal responsibility. These findings suggest that history-writing by international criminal tribunals and trials will always be inherently flawed. This holds potentially grave consequences. Not only does it set the door open for historical revisionism, but it also endangers the creation of collective memory of the victims and of society as a whole.

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John Donne's saying 'no man is an island', was never more appropriately used then upon describing the creation of this thesis. It is therefore only natural to devote a few words to the people who were invaluable to its successful completion.

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List of abbreviations

CCL n° 10	Control Council Law n° 10
CROWCASS	Central Registry of War Criminals and Security Suspects
CSCID	Combined Services Detailed Interrogation Centre
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal
NMT	Nuremberg Military Tribunals
OCCPAC	Office of the Chief Counsel for the Prosecution of Axis Criminality
OCCWCC	Office of the Chief-of-Counsel for War Crimes
OMGUS	Office of Military Government United States
OSS	Office of Strategic Services
SHAEF	Supreme Headquarters, Allied Expeditionary Forces
USFET	Unites States Forces, European Theater
UNWCC	United Nations War Crimes Commission
WVHA	Wirtschaftsverwaltungshauptamt

1. Introduction

1. A thought-provoking headline of an article in the October 13th 2011 Belgian newspaper, 'De Morgen' reads: '*1 in 2 Belgians finds that Nazism holds interesting ideas*'.[1] Upon further examination, the article tells the reader that research has shown that a large segment of the Belgian population holds the opinion that the Nazi solutions for economic revival hold a certain legitimacy. More worrying even is that more than half of the interviewees below the age of twenty-five are even unaware of anti-Semitism being part of Nazi ideology.

2. The idea that anti-Semitism can be separated from the core of Nazi ideology is not new. Indeed, it is an interpretation that can be brought back to the trials that took place in the aftermath of World War II in Nuremberg. While there may be several different factors that explain why a large group of interviewees are unaware of the central place anti-Semitism held within Nazism, it might also be an indication that the Nuremberg historiography is still alive and kicking today.

3. The trials of Nuremberg represent the first major war crimes trials conducted in the history of international criminal law. They have had a lasting impact on international criminal procedure and the development of crimes against peace, war crimes and crimes against humanity. Despite the fact that the essential aim of international criminal courts is to render judgment on the guilt or innocence of the accused, international criminal tribunals must also judge history, as many of the events involving international crimes are rooted in conflicts spanning decades. Contemporary international criminal tribunals even claim that they are capable of providing a historical record of the past.[2] While the prosecutors at Nuremberg have never made such bold statements, their implicit aim was nonetheless to provide a re-education of the German population through judicial re-education.[3] Indeed, in the Yalta memorandum of January 22nd 1945, the aim to write history is expressly

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[1] www.demorgen.be/dm/nl/992/Wetenschap/article/detail/1333014/2011/10/13/1-Belg-op-2-vindt-dat-nazisme-interessante-ideeen-bevat.dhtml.

[2] See for an extensive discussion of this claim in modern tribunals: R.A. WILSON, *Writing History in International Criminal Trials*, Cambridge, Cambridge University Press, 2011, 257.

[3] D. BLOXHAM, *Genocide on Trial. War Crimes Trials and the Formation of Holocaust History and Memory*, 2001, 2-13.

highlighted by US Secretary of War, Henry S. Stimson: '*Condemnation of these criminals after a trial, moreover, would command maximum public support and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality*'.[4]

4. The question of whether courts are equipped for this task, has preoccupied historians, lawyers and sociologists alike for decades. As judges are – most often – not historians, their approach to history is inevitably different from that of a historian. In light of the claims to history-writing that courts make, the following question inevitably rises: Can courts, in view of these differences, write qualitative historical accounts? The greatest and most problematic difference between the tasks of the two professions lies in the 'end-product' of respectively the historian and the judge. The historian writes a monograph, which is subsequently subjected to the critique of an academic society of historians, resulting in a never-ending rewriting of historical accounts. The judge, however, renders a judgment that is meant to be final. The risk therefore exists, because of the authority awarded to the judge, that the judge will unintentionally create a 'canon' of history, believed by society to be 'the historical truth'.

2. Methodology

2.1. One Incompatibility Theory to rule them all?

5. Following the professionalization of historical and legal science in the second half of the 19th century, historians increasingly commented on legal affairs, while at the same time, the use of historical arguments in courtrooms became an established practice.[5] This resulted in an abundance of literature in the 20th century commenting on the difficult relationship between law and history in the courtroom.[6] Recently,

[4] Paragraph V Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General of January 9th 1945, http://avalon.law.yale.edu/imt/jack01.asp.
[5] V. PETROVIC, *Historians as Expert Witnesses in the Age of Extremes*, unpublished doctoral thesis of Central European University Budapest, 2009, 74.
[6] See margin nr. 9.

attempts have been made to theorize this literature into a coherent body, applicable to practical cases.

6. Richard Wilson has devoted a work to history-writing in the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court[7], in which he divides the literature concerning the ability of courts to construct qualitative accounts into two main categories and four further sub-categories.[8] The first main category is defined as the 'Justice not History'-approach, which argues that the main task of courts is to administer justice. They should therefore refrain from engaging in history. The second main category is the 'Poverty of Legal Histories'-approach, which Wilson further divides into four sub-categories.

7. The first sub-category, the 'Law is an Ass'-approach, proclaims courts' inability to do history, because of the inevitable oversimplification of history due to legal conventions.[9] The second sub-category, the 'Partiality Thesis', states that courts are too selective and limited in scope, to capture the complexity of history.[10] The 'Boring History'-approach, as a third sub-category, says that trials are overly complex and therefore present a history that is too detailed and practical.[11] Last, but not least, comes the 'Incompatibility Theory', the fourth sub-category, which says that courts are not able to construct adequate historical accounts because of the different modus operandi between history and law.

8. While the division of existing literature into two main categories has its explanatory value, it might also unintentionally add to the confusion. What the arguments of the different authors boil down to is the incompatibility of history and law in court. The first main category, the 'Justice not History'-approach is really nothing more than the radical conclusion that courts should not engage in history,

[7] Hereafter respectively ICTY, ICTR and ICC.
[8] R.A. WILSON, *Writing History in International Criminal Trials*, 1-23; R.A. WILSON, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia', *Hum. Rts. Q.* 2005, 908-912.
[9] R. GOLSAN, *The Papon Affair: Memory and Justice on Trial*, London, Routledge, 2000, 279.
[10] M. MARRUS and R. PAXTON, *Vichy France and the Jews*, Stanford, Stanford University Press, 1995, 432.
[11] M. OSIEL, *Mass Atrocity, Collective Memory and the Law*, New Brunswick, Transaction Publishers, 1997, 317.

following arguments of the second main category, the 'Poverty of Legal Histories'-approach. As an example of the 'Justice not History'-approach, Wilson highlights the critique of Hannah Arendt on the Eichmann trial, in which she attacks the central place which the construction of the Holocaust took in the strategy of the prosecution, reducing the entire history of the Jewish people to that point in time.[12] She concludes that: '*The purpose of the trial is to render judgment and nothing else*'.[13] One of the other points she makes, is that 'genocide' as an historical event, is too complex to be captured by the legal concept of 'genocide' as it was defined in the Genocide Convention of 1948, which according to Wilson's categories corresponds with the 'Law is an Ass'-approach.[14]

9. The 'Incompatibility Theory', first used by Wilson as one of the sub-categories in his classification, features again in the work of Vladimir Petrovic, who uses the theory as a scarlet thread throughout his historiographical analysis of the historian as expert witness. However, he never really explains the different components of the theory: '(...) *the exact gist of the incompatibility theory is hard to explain, yet is easy to spot*'.[15] Why is it so difficult to put a finger on the components of the 'Incompatibility Theory'? One reason is undoubtedly the level of fragmentation across different disciplines. Sociologists talk about the incompatibility between history and law in terms of its effects on collective memory.[16] Historians draw attention to the difficulty of fitting historical context within judicial categories.[17]

10. These discussions do not only take place when talking about international criminal trials. They also feature in the context of domestic war crimes trials, legal discussions involving the American Civil Rights Movement, women's rights, tort law,

[12] R.A. WILSON, 'Judging History', 911.
[13] H. ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Harmondsworth, Penguin Books, 1985, 19.
[14] H. ARENDT, *Eichmann in Jerusalem,* 16.
[15] V. PETROVIC, *Historians as Expert Witnesses in the Age of Extremes*, 16.
[16] M. OSIEL, *Mass Atrocity, Collective Memory and the Law*, 321; J. SAVELSBERG, 'Law and Collective Memory', *Ann. Rev. L. Soc. Sc.* 2007, 189-211.
[17] H. ROUSSO, *The Vichy Syndrome: History and Memory in France since 1944*, Cambridge Mass., Harvard University Press, 1991, 384; D. BLOXHAM, *Genocide on Trial,* 273; L. DOUGLAS, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, New Haven, Yale University Press, 2001, 336.

etc.[18] On the American continent, the focus lies more on the incompatibility of law and history when historians act as expert witnesses within the common law system.[19] The discussions about law and history, within domestic trials concerning Nazi war crimes, took place primarily on the European continent within the context of civil cases, as illustrated by the literature surrounding the Papon and Touvier trials in France.[20]

11. An all-encompassing theory on the incompatibility of law and history in criminal court cases would have to situate itself at an abstract level in order to respect all the disciplines involved, without at the same time falling into the trap of neglecting different procedural legal systems. One possible way to proceed is to call in the help of yet another discipline, namely philosophy, in order to find where, at an abstract level, the differences lie between the methodology of history and the methodology of law in the courtroom.

2.2. Towards a new Theory of Incompatibility

2.2.1. Paul Ricoeur's Historiographical Operation

12. The French philosopher, Paul Ricoeur, was neither a historian nor a lawyer, yet he has devoted a large part of his work to understanding history and the historiographical method. His interest in history is directly related to his concept of narrative, in which historicity is central, or, in other words: for Ricoeur it is thanks to history that we can grasp a full awareness of human being-in-time.[21] In that sense

[18] W. WIECEK, 'Clio as hostage: The United States Supreme Court and the uses of history', *Cal. W. L. Rev.*1987, 227-269; P. MCRARY, 'Keeping the court honest: the role of historians as expert witnesses in Southern voting cases', *S.U.L. Rev.* 1989, 101-129; R. MILKMAN, 'Women's history and the Sears case', *Fem. Stud.* 1986, 375-400.
[19] M. KOUSSER, 'Are Expert Witnesses Whores? A Reflection on Objectivity in Scholarship and Expert Witnessing', *The Public Historian* 1984, 5-19; H.K. ROTHMAN, 'Historian vs Historian: Interpreting the Past in the Courtroom', *The Public Historian* 1993, 39-53.
[20] R. GOLSAN, 'Papon: The Good, the Bad and the Ugly', *SubStance* 2000, 139-152; N. WOOD, 'Memory on Trial in Contemporary France: the Case of Maurice Papon', *History & Memory* 1999, 41-76; J. MERCHANT, 'History, memory and justice: the Touvier trial in France', *J. Crim. Just.* 1995, 425-438.
[21] P. RICOEUR, *Time and narrative*, Vol. III, Chicago, Chicago University Press, 1990, 241.

historiography is just another way of achieving this awareness, much like fiction or other types of representation.[22]

13. Ricoeur has dedicated a sub-chapter in his work 'Memory, History, Forgetting' to a comparison of the historian and the judge.[23] Indeed, at first glance, the two professions seem very similar. They can both be considered as 'third parties' with respect to the social actions perpetrated by others. This implies that the historian and the judge take a vow of impartiality. On the part of the historian, this vow of impartiality is an aspect of the 'contract of truth' that the historian makes with his readers. It is his ambition to research the past as objectively as possible, which distinguishes his writings from fiction. The judge must also conduct a search for the truth. In order to do this he must adhere to the principle of rendering an impartial and independent verdict.

14. However, a closer examination of the methodology of the historian and the rationale of the courtroom, paints a less rosy picture. The tasks a historian performs indeed to some extent run similar to the tasks that legal actors – not merely the judge – perform in a courtroom, yet some major differences occur. Ricoeur describes the work of the historian as a Historiographical Operation, which consists of three constitutive phases.[24]

15. The first phase is the documentary phase, during which the historian must venture into the archives and consult documents retaining historical testimonies.[25] In order to uphold the contract of truth, he must test the authenticity of the documents, by applying a rigorous critique designed to detect any hidden falsehoods. The judge is also concerned with evidence and the critical examination of witnesses. However, the similarity between the historian and the judge during the documentary phase, can only go this far. The context during which the gathering and examination of sources

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[22] D. STONE, 'Paul Ricoeur, Hayden White and Holocaust historiography', in J. STUCKRATH and J. ZBINDEN (eds), *Metageschichte: Hayden White und Paul Ricoeur: Dargestellte Wirklichkeit in der europäischen Kultur im Kontext van Husserl, Weber, Auerbach und Gombrich*, Baden-Baden, Nomos Verlagsgesellshaft, 1997, 255.

[23] P. RICOEUR, *Memory, history, forgetting*, Chicago, Chicago University Press, 2004, 314.

[24] P. RICOEUR, *Memory, history, forgetting*, 133.

[25] P. RICOEUR, *Memory, history, forgetting*, 146.

happens, is radically different.[26] The trial judge is not in charge of the preliminary investigation during which the collection of evidence happens. He has no control over what evidence is presented in the courtroom and what evidence is left out, as in criminal proceedings, this falls within the discretion of the investigative judge or the public prosecution. His influence on the preliminary investigation is very limited.

16. The divergence of the context in which evidence is gathered poses a major problem, which is made explicit during the second phase of the Historiographical Operation, namely the search for explanation and understanding.[27] Ricoeur explicitly stresses that the three phases of the Historiographical Operation do not occur consecutively. The documentary phase, the phase of explanation and understanding and the representation phase occur simultaneously as much as they may follow each other chronologically. During the phase of explanation and understanding, the historian deconstructs the mass of documents and puts them into a coherent and meaningful series.[28] For example, through ordering all economic, religious and political phenomena together, the historian tries to obtain a deeper understanding of causal relationships between historical facts. The historian will, where possible, establish models to test these interpretative devices.

17. What Ricoeur forgets is that courts will also apply models. The prosecution, in preparing its case, will select the facts and the available evidence in order for them to fit the definition of criminal actions as written down in statutes. When the prosecution is confronted with historical sources, the prosecutor will select those documents that are favourable to his strategy of conviction. On the other side of the court-spectrum, the defence will perform the same exercise and will try to explain the events in a way that will exonerate the accused. Consequently, the judge will have to base his decision on the incomplete version of events presented by both parties.

18. The third phase of the Historiographical Operation consists of historical representation in which the writing task of the historian is central.[29] Representation

[26] P. RICOEUR, *Memory, history, forgetting*, 316.
[27] P. RICOEUR, *Memory, history, forgetting*, 182.
[28] F. DOSSE, 'Ricoeur and history: the Ricoeurian moment of historiographical work' in S. DAVIDSON (ed.), *Ricoeur across the disciplines*, London, Continuum, 2010, 68.
[29] P. RICOEUR, *Memory, history, forgetting*, 234.

does not solely imply the action of writing on a discursive level, but involves a 'standing for'.[30] Ricoeur's concept of standing for is closely linked to the contract of truth the historian engages himself in: he must represent characters and situations, before they are included in a story, as truthfully as possible.[31] The judge also has an important final writing task, namely the redaction of the verdict. He must take into account the context in which the facts took place and decide whether the actions of the accused fit the legal definition of the crime for which he stands trial. However, when the judge receives two competing versions of history, one from the prosecutor and one from the defence, these versions are both already compromised by the one-sided choice of historical evidence. The end-result of the written judgment will inevitably be contaminated by an impoverished view of history as well. The judge must choose: either he sides himself with the version of the prosecution or the version of the defence, or he will select those arguments of both sides that represent his own conviction about the guilt or innocence of the accused. In other words: he will select those aspects of historical context that are relevant for deciding the case.

2.2.2. The never-ending work of the historian vs. the finality of the judgment

19. The final difference between the historian and the legal actors in the courtroom does not relate to their respective tasks. It is more related to history as a science.

20. Ricoeur finds that the historian's practice is in constant tension between an always incomplete objectivity and the inescapable subjectivity of a historian's methodology.[32] Firstly, this inescapable subjectivity is already present during the first phase of the Historiographical Operation: the historian must choose an object of study. This implies a 'judgment of importance' on the weight of certain events. Secondly, history is dependent in varying degrees upon causality. In order to explain and understand historical events, these events must be placed into an order that constitutes a causal model. Thirdly, subjectivity is that of the 'historical distance', which separates the self from the other. The historian must try to explain in

[30] F. DOSSE, 'Ricoeur and history: the Ricoeurian moment of historiographical work', 68.
[31] F. DOSSE, 'Ricoeur and history: the Ricoeurian moment of historiographical work', 68.
[32] P. RICOEUR, *History and truth*, Evanston, Northwestern University Press, 1977, 22-26.

contemporary terms what has happened in the past. This equation between the present and the past is impossible, so the only option for the historian is to project himself into the past. This ‘historical imagination’, as a form of subjectivity, is paradoxically enough, a tool for arriving at objectivity.[33] The final element of subjectivity can be found in the nature of historical science itself, as Ricoeur says: ‘*what history ultimately tries to explain and understand is men*’.[34] The historian has a desire for an encounter with past human experience and will try to make the values of men from the past come forth without becoming apologetic.

21. The necessary correlate of historical objectivity is therefore historical subjectivity.[35] An important consequence of this is that historical science is always open to new interpretations and readings. The final written work of the historian will be subjected to the critical appraisal of an academic society and of the interested public.[36] There is never one final version of history. The search for establishing what has really happened, due to the inherent historical subjectivity, is a never-ending process.

22. The difference with the rationale of court room proceedings could not be greater. The final character of a legal verdict is of crucial importance to judicial proceedings. This is illustrated by the adagium ‘non bis in idem’.[37] A judge must decide and render judgment, the contents of which mark a judicial truth. The risk therefore exists that the poorly reconstructed and impoverished version of historical context in which criminal acts are set, are in the final judgment elevated to the rank of ‘historical truth’. After the verdict has been made final, it is not to be questioned anymore.

[33] F. DOSSE, ‘Ricoeur and history: the Ricoeurian moment of historiographical work’, 70.
[34] P. RICOEUR, *History and truth*, 28.
[35] P. RICOEUR, *History and truth*, 29.
[36] F. DOSSE, ‘Ricoeur and history: the Ricoeurian moment of historiographical work’, 70.
[37] P. RICOEUR, *Memory, history, forgetting*, 316.

2.3. Testing the Theory of Incompatibility

23. An analysis of the methodology of the historian and the methodology of legal actors in the courtroom has shown that, at least on an abstract level, the risk of a distorted version of history leaving the courtroom is real. Is this also true in reality?

24. This thesis will not look into how recent international criminal tribunals, such as the ICTY, ICTR or the ICC, use law and history in the courtroom. It will rather look at a series of events that have been constituent to the development of the idea of incompatibility of law and history: the trials of Nuremberg. Much literature has been devoted to how prosecutorial paradigms at Nuremberg contributed to the idea that only Hitler and the German people were responsible for the outbreak of World War II.[38] This allowed the Allied forces to believe that once the leading figures of the Nazi regime had been punished, they would be able to wash their hands in innocence and forget their own wartime behaviour.[39] The conspiracy charge laid against the Nazi leadership was also of direct influence on the 'intentionalist school' within World War II historiography.[40] Less has been written on how the Nuremberg trials have portrayed the atrocities committed against national, religious and other distinct groups. Donald Bloxham has devoted a first general account about the influence of Nuremberg on popular conceptions of the Holocaust.[41] The author presents a historian's perspective of the trials paying much attention to the contextual limitations suffered by the prosecution.

25. One particular aspect of the persecution of the Jews has not yet been studied in detail, in terms of Nuremberg historiography: *Aktion Reinhardt*, a specific Nazi operation directed primarily at the Jews living in the *Generalgouvernement*, the Nazi administrative district comprised the greater half of Poland.[42] In light of the Theory of Incompatibility outlined above, each phase of the Historiographical Operation will be

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[38] E. HABERER, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes', *Hol. & Gen. Stud.* 2005, 487-519.
[39] C. BROWNING, *Doodgewone mannen: een vergeten hoofdstuk uit de jodenvervolging*, Amsterdam, Arbeidspers, 1993, 260.
[40] E. HABERER, 'History and Justice', 494; S. KAILITZ, 'Der 'Historikerstreit' und die Politische Deutungskultur der Bundesrepublik Deutschland', *Germ. Stud. Rev.* 2009, 279-302.
[41] D. BLOXHAM, *Genocide on Trial*, xi.
[42] Apart from a small chapter, without awarding much attention to legal considerations, in: D. BLOXHAM, *Genocide on Trial,* 116.

applied to the courtroom proceedings dealing with *Aktion Reinhardt*. The main research question is therefore: Were the Nuremberg trials able to construct a qualitative account of *Aktion Reinhardt*? While a historian's work can never claim perfection, the word 'qualitative' is used here merely as a term to describe an historical account created by criminal courts that has not been tainted by the problems outlined in the Theory of Incompatibility. Ample literature has been devoted to the philosophical question of whether it is at all possible to write about genocide.[43] This discussion, however, will not feature in this thesis.

26. The 'Nuremberg trials' is a generic term used for a set of criminal proceedings enforced by the Allies against Nazi officials in the city of Nuremberg in Germany in the aftermath of World War II. The most well-known tribunal is the International Military Tribunal of Nuremberg, which featured the 'Trial of the Major War Criminals' of 1945-1946.[44] Less commonly known, and significantly less studied, are the subsequent trials conducted separately by each of the Allied forces in Germany. One of these, are the trials of the Nuremberg Military Tribunals, organised by the United States from 1946-1948.[45] Unlike, the IMT which had the character of an international trial, the NMT had, what is today called, a hybrid form, as its jurisdiction was territorially limited to prosecutions in Germany, yet at the same time it applied international law.[46] Elements of *Aktion Reinhardt* feature both in several cases before the IMT and the NMT and will be subsequently dealt with in this research. In the IMT, the case of Hans Frank will be further investigated, as he was *Generalgouverneur* in the area where the camps of the *Aktion* were located. In the NMT, the Medical Case and the Pohl Case will be discussed. The Medical Case dealt in part with the Nazi euthanasia program, the forerunner of the *Aktion*. The Pohl Case was conducted against former officials of the *Wirtschafts-Verwaltungshauptamt*, which was the SS-department dealing with the economic aspects of the *Aktion*.

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[43] See for example: H. ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil,* 312; S. FRIEDLÄNDER (ed.), *Probing the Limits of Representation: Nazism and the Final Solution*, Cambridge Mass, Harvard University Press, 1992, 407.
[44] Hereafter IMT
[45] Hereafter NMT.
[46] K.J. HELLER, *The International Military Tribunals and the Origins of International Criminal Law*, Oxford, Oxford University Press, 2011, 107.

27. The genesis of the IMT and the NMT trials themselves will only feature in this thesis in so far and to the extent that the discussion leading up to the creation of the trials was relevant for the relationship between history and law.

28. First, a brief outline will be given of *Aktion Reinhardt* and the evidentiary difficulties it presented for the Nuremberg trials. The newly defined Theory of Incompatibility will then be applied to the featured cases, first within the context of the IMT and then within the context of the NMT. Therefore the section of this thesis dealing with each Tribunal is divided into the documentary phase, the phase of understanding and explanation and the final phase of representation. Primary sources used, are the legal texts of the Moscow Declaration, the London Charter and Control Council Law n°10, along with several other secondary legal documents which constitute the legal framework through which the events of *Aktion Reinhardt* were viewed. Extensive use has been made of the court transcripts of the tribunals, bundled in the famous Nuremberg Blue and Green Series, which besides court transcripts, also contain the bulk of the documentary evidence produced at the trials.[47] This will shed light on the evidence selected and the exact strategy of the prosecution to secure a conviction.

3. The evidentiary difficulties of *Aktion Reinhardt*

3.1. *Aktion Reinhardt*

29. The term "*Aktion Reinhardt*" is the Nazi code name for the systematic killing of the Jewish population in the area of the *Generalgouvernement* between November 1941 and November 1943.[48] Approximately two million Jews perished during the

[47] 'Blue Series': *The Trial of German major war criminals: proceedings of the International military tribunal sitting at Nurenberg, Germany*, London, His Majesty's Stationery Office, 1946, Vol I-XXII; 'Green Series': *Trials of war criminals before the Nuernberg Military Tribunals under Control Council no. 10*, Washington D.C., US GPO, 1949, Vol. I-V.

[48] See for a detailed account: Y. ARAD, *Belzec, Sobibor, Treblinka: the Operation Reinhard Death Camps*, Bloomington, Indiana University Press, 1987, 14-16. There are different styles of writing for *Aktion Reinhardt*. The most commonly used style is adopted in this thesis.

Aktion.[49] For this purpose three main extermination centres were constructed: Belzec, Sobibor and Treblinka.[50] Transports by rail brought the inhabitants of the Jewish ghetto's to the camps where, upon arrival, the victims were asked to hand over their belongings, undress and enter the 'shower chambers' where they were killed by carbon monoxide gas.[51] From the arriving victims a number of 'workers' would be selected, comprising the 'Jewish work commando' in charge of the disposal of the deceased.[52] Following several attempts at staging an uprising in Sobibor and Treblinka in 1943, "*Aktion Erntefest*" was set up, which was aimed at killing all remaining Jews in the *Generalgouvernement* in just two days (November 3rd and 4th 1943). This marked the end of *Aktion Reinhardt*.[53]

30. *SS-Brigadeführer* Odilo Globocnik, a personal friend of Himmler's, was appointed by the latter as head of the *Aktion*. The necessary know-how for the swift killing of such a large number of people by carbon monoxide gas, was provided by the personnel of the previously established euthanasia programmes ("*T-4 Aktion*"), which had been created for the killing of the mentally and terminally ill.[54] After the conclusion of the euthanasia programmes, *Polizei-Kriminalkommissar* Christian Wirth and his T-4 personnel were promoted to the ranks of the SS and transferred to the *Generalgouvernement* to assist in the extermination process.[55]

31. An important aspect of *Aktion Reinhardt* was the economic exploitation and the expropriation of the Jews. The SS administration office "*Wirtschafts-Verwaltungshauptamt*" (WVHA), under the guidance of Oswald Pohl was in charge

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[49] P. BLACK, 'Foot Soldiers of the Final Solution: The Trawniki Training Camp and Operation Reinhard', *Holocaust & Genocide Stud.* 2011, 2.

[50] It is argued that in 1943 the camps of Majdanek and Auschwitz were also used to carry out *Aktion Reinhardt*: P. BLACK, 'Foot Soldiers of the Final Solution', 3. Despite the possible inclusion of these camps, the camps of Belzec, Sobibor and Treblinka should still be considered as 'exceptional' and therefore separate from Majdanek and Auschwitz, as they were solely constructed for the purpose of extermination, whereas Majdanek and Auschwitz were also labor camps.

[51] Y. ARAD, *Belzec, Sobibor, Treblinka*, 119-125.

[52] Y. ARAD, *Belzec, Sobibor, Treblinka*, 53-57.

[53] Y. ARAD, *Belzec, Sobibor, Treblinka*, 365.

[54] B. MUSIAL, 'Ursprünge der "Aktion Reinhardt". Planung des Massenmordes an den Juden im Generalgouvernement', in B. MUSIAL, *'Aktion Reinhardt': Der Völkermord an den Juden im Generalgouvernement 1941-1944*, Osnabrück, Fibre Verlag, 2004, 49.

[55] H. FRIEDLÄNDER, 'Die Entwicklung der Mordtechnik. Von der "Euthanasie" zu den Vernichtungslagern der "Endlösung", in H. ULRICH, K. ORTH and C. DIECKMANN (eds.), *Die Nationalsozialistischen Konzentrationslager. Entwicklung und Struktur*, Göttingen, Wallstein, 1998, 494.

of the economic administration of the concentration camps, the co-ordination of Jewish labour and the expropriation action.[56] For this purpose, the personal items of the Jews were sorted according to a central registry in the *Reinhardt* camps and then sent to the city of Lublin, the headquarters of the *Aktion*, where the valuables would be re-used for industry or sent to the *Reichsbank*. It is estimated that *Aktion Reinhardt* engendered approximately 178 million German *Reichsmark* worth of Jewish property.

32. *Aktion Reinhardt* was from its outset thoroughly covered by a veil of secrecy. The location of the camps in the far east of Poland was chosen specifically for its remoteness and its distance from the Western occupied countries.[57] The documents relevant to the *Aktion* have scarcely survived the war, as orders were given to have them destroyed immediately. This can be concluded from a letter, marked "top secret", written in May 1943 by Globocnik to Himmler regarding the economic aspects of the *Aktion*: '*There is one additional factor to be added to the total accounting of "Reinhardt" which is that the vouchers dealing with it must be destroyed as soon as possible after the data have already been destroyed by all other works concerned in this matter'*.[58] The taking of photographs of the camps was also strictly forbidden.

33. The containment of any knowledge of *Aktion Reinhardt* did not stop with the destruction of documentary material. The SS went to incredible lengths to cover up their mass murder in what was called *Sonderaktion 1005,* which took place between mid-1942 until the end of 1943.[59] Prisoners from the Jewish work commandos were ordered to exhume mass graves and burn the corpses. The left-over shards of bone were grounded and scattered in the surrounding area. The camps themselves were completely dismantled. Finally, the killing sites themselves were then built over with farms inhabited by former Ukranian campguards and their families.[60]

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[56] Y. ARAD, *Belzec, Sobibor, Treblinka*, 154-165.
[57] Y. ARAD, *Belzec, Sobibor, Treblinka*, 14-23; B. MUSIAL, 'Ursprünge der "Aktion Reinhardt". Planung des Massenmordes an den Juden im Generalgouvernement', 49-53.
[58] Nuremberg Document PS-4024.
[59] Y. ARAD, *Belzec, Sobibor, Treblinka*, 170-180.
[60] Y. ARAD, *Belzec, Sobibor, Treblinka*, 170-180.

34. The morbid success of its implementation meant that witnesses to the *Aktion* were hard to find. There were only two survivors from Belzec, thirty inmates survived Sobibor and sixty-seven managed to escape from Treblinka.[61]

3.2. Allied knowledge of *Aktion Reinhardt*

35. When considering the evidentiary difficulties surrounding *Aktion Reinhardt*, it may seem next to impossible for the Allies to paint a realistic picture of Jewish mass murder in the *Generalgouvernment*. Yet, from 1941 onwards there was a steady flow of information to the British and the American governments concerning the Holocaust and *Aktion Reinhardt*. [62]

36. In the early months of 1942 the British government received indirect information through Jewish newspapers about general plans within the highest circles of the Nazi administration to solve the 'Jewish question'.[63] More direct sources were available in the summer of 1942 through three German informants, of whom Gerhart Riegner, a German businessman, was the most credible.[64] His telegram, sent to Sidney Silberman, member of the British Parliament, provided information on the key role the camps of Eastern Europe would play in the final solution.[65]

37. A telegram of June 1943, sent by Abraham Stupp to the World Jewish Congress, contained information gained from Jewish refugees.[66] It was subject to wartime censorship regulations and therefore ended up in the records of the British foreign office. It described in detail the number of people deported from Lublin, Cracow and Warsaw to Treblinka.[67] It said that the victims were taken to 'bath houses' where they would either be suffocated or killed by poisonous gas.

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[61] D. BLOXHAM, *Genocide on Trial*, 111.
[62] See for a detailed account, with integral inclusion of reports: R. RASHKE, *Escape from Sobibor*, Illinois, University of Illinois Press, 1995, 391; R. BREITMAN, *Official Secrets: What the Nazis planned, what the British and Americans knew*, New York, Hill and Wang, 1998, 107-118.
[63] R. BREITMAN, *Official Secrets*, 108.
[64] R. RASHKE, *Escape from Sobibor*, 84.
[65] R. RASHKE, *Escape from Sobibor*, 85.
[66] D. BLOXHAM, *Genocide on Trial*, 116-117; D. ENGEL, *Facing a Holocaust: The Polish Government-in-exile and the Jews 1943-1945*, Chapel Hill and London, University of North Carolina Press, 1993, 84.
[67] D. ENGEL, *Facing a Holocaust*, 84.

38. The SS, including the WVHA, used the complicated Enigma coding machine in their inter-departmental communication.[68] By December 1940, the British had succeeded in breaking at least one of the Enigma keys and were from then on able to pick up bits and pieces of information about the SS extermination machine until the end of the war.[69] In January 1943, two partially intercepted radio messages were sent by *SS-Sturmbannführe*r Hermann Höfle (deputy to Globocnik), firstly to *SS-Obersturmbannführer* Adolf Eichmann and secondly, to *SS-Obersturmbannführer* Franz Heim.[70] The telegrams provide a sum of total victims of *Aktion Reinhardt* for the year 1942 per camp. However, the telegram does not provide the full names of the camps, but rather the first letter of each camp followed by the number of victims.[71]

39. In 1939, several British intelligence agencies decided to create the Combined Services Detailed Interrogation Centre (CSCID) for the interrogation of German prisoners of war.[72] A remarkably accurate account of *Aktion Reinhardt* and its connection with the euthanasia programs was provided by army medical orderly, Fritz Bleich, in April 1945.[73] He gave a detailed account of the killing operations by previous staff of the euthanasia centres in Belzec, Sobibor and Treblinka. He even provided a detailed description of Christian Wirth, describing him as particularly brutal and cruel towards women and children.

40. The American government did not particularly focus its intelligence operations on German atrocities until its status of neutrality ended in December 1941. However, American reporters in Germany were remarkably well informed about deportations to concentration and extermination camps and published regular reports in the American press.[74]

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[68] R. BREITMAN, *Official Secrets*, 113.
[69] R. BREITMAN, *Official Secrets,* 113.
[70] P. WITTE and S. TYAS, 'A New Document on the Deportation and Murder of Jews during "Einsatz Reinhardt" 1942', *Holocaust & Genocide Stud.* 2001, 469-470.
[71] P. WITTE and S. TYAS, 'A New Document on the Deportation and Murder of Jews', 496.
[72] S. TYAS, 'Allied Intelligence Agencies and the Holocaust: Information Acquired from German Prisoners of War', *Holocaust & Genocide Stud.* 2008, 1.
[73] S. TYAS, 'Allied Intelligence Agencies', 4.
[74] R. BREITMAN, *Official Secrets*, 122.

41. From 1942 onwards, the US Office of Strategic Services (OSS), received reports about mass killings in Auschwitz. In August 1943, a report was received, concerning an 'annihilating institute', namely Treblinka.[75] It contained a testimony from David Milgrom, who had spent two weeks in Treblinka in the Jewish Work Commando in 1942 sorting clothes and valuables, after which he managed to escape. Although the sorting area and the gas chambers were separated from each other by a carefully placed fence, Milgrom received first-hand information about the killing process from two Jewish boys who temporarily crossed to the sorting area.[76] He reported in detail on the use of gas chambers and on the existence of the Jewish Work Commando that had to remove the bodies.

42. The most compelling testimony came from Jan Karski, a member of the Polish Underground, working as a courier for the Polish government-in-exile, who had infiltrated in the Warsaw ghetto on two separate occasions and who had managed to gain access to the transit camp of Belzec, Izabica Lubelska, in 1942 dressed as a Ukranian guard.[77] Appalled by what he had witnessed, he met several British officials upon his return, yet his account did not seem to stir the necessary interventions on the side of the Allies. He finally succeeded in arranging a meeting with President Roosevelt himself in the summer of 1943, when *Aktion Reinhardt* was already finished.[78]

43. None of this information was ever used in the IMT or the NMT. As we will see in the next chapter, different circumstances and strategic decisions on the part of intelligence agencies and of the Office of the Chief Counsel for the Prosecution of Axis Criminality (OCCPAC) led to this absence.

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[75] R. BREITMAN, *U.S. Intelligence and the Nazis*, Cambridge, Cambridge University Press, 2005, 50.
[76] R. BREITMAN, *U.S. Intelligence and the Nazis*, 51.
[77] R. RASHKE, *Escape from Sobibor*, 83.
[78] R. RASHKE, *Escape from Sobibor*, 85.

4. The IMT

4.1. The documentary phase

44. Despite the high level of secrecy that surrounded *Aktion Reinhardt*, the allies held the necessary pieces in their hands to put the puzzle together from late 1941 onwards. However, when the choice was made to organise an international tribunal for the trying of war criminals, this information needed to reach OCCPAC before it could be used in a legal context. Several mechanisms and strategic choices prevented the bulk of information from getting to the right place.

4.1.1. The proliferation of investigative bodies

45. The sole international body responsible for the investigation of war crimes was the United Nations War Crimes Commission (UNWCC), established on October 20th 1943, following a Declaration on October 7th 1943 by the United States and the United Kingdom.[79] It was created under the pressure of the nine governments-in-exile. They had grown increasingly dissatisfied with the Allied ineptness to provide a powerful answer following the constant reports of German atrocities.[80] So far, the Allied response had been limited to the issuance of a number of Declarations of warning. The Polish and Czech governments-in-exile, however, urged for outright retaliation. The establishment of the UNWCC was therefore seen as an unwelcome though necessary compromise.

46. The American and British governments had a disproportionately large influence over the jurisdiction of the UNWCC, as the Soviets refused to join the newly created body.[81] On October 15th 1942, the Soviet Union issued a unilateral

[79] UNITED NATIONS WAR CRIMES COMMISSION, *History of the United Nations War Crimes Commission*, London, His Majesty's Stationery Office, 1948, 113; W.R. HARRIS, *Tyranny on Trial: the Evidence at Nuremberg*, Dallas, Southern Methodist University Press, 1958, 4.

[80] A.J. KOCHAVI, 'The British Foreign Office versus the United Nations War Crimes Commission during the Second World War', *Holocaust & Genocide Stud.* 1994, 28.

[81] The Soviets refused to join as a form of protest against the rejection of Britain to open a second front in Europe to alleviate pressure on the Soviet armies A.J. KOCHAVI, 'The British Foreign Office', 30.

declaration urging the extradition and punishment of Nazi criminals, followed by the establishment of their own Soviet war crimes investigative agency.[82]

47. The UNWCC's responsibilities were severely limited, leaving it reduced to play a mere passive role in the investigative process. National bodies conducted the actual investigations and gathered the majority of evidence from their armed forces and their refugees.[83] When a case was considered to be complete by a national body, it would be sent for consideration to the UNWCC.[84] The UNWCC was therefore entirely dependent on the co-operation of the participating countries. It was the task of the UNWCC to consider whether the submitted complaints constituted war crimes and, if so, to compile lists of suspected war criminals which were then distributed amongst the advancing Allied forces.[85] One can imagine that this was a time-consuming and labour-intensive working-method. Sadly, the UNWCC was deliberately understaffed.[86] It also suffered from the United Kingdom's and the United States' reluctance to define a war crimes policy.[87] Indeed, it was not until the late summer of 1944 that the Allies seriously discussed the creation of a clearly outlined war crimes agenda.[88] Up until the spring of 1945, the Allied position towards the creation of an international war crimes tribunal remained ambiguous, to say the least.

48. Evidence gathering was further complicated by the proliferation of national war crimes bodies that operated under no clear central guidance. Initial confusion over which bodies were to carry out the prosecutorial tasks led to a loss of valuable time that was needed to correctly assess the gathered evidence. In the United States alone there were at least seven different bodies that had the jurisdiction to investigate war crimes.[89] Most of the gathered evidence was collected by the advancing armies in

[82] W.R. HARRIS, *Tyranny on Trial: the Evidence at Nuremberg*, 4.
[83] UNITED NATIONS WAR CRIMES COMMISSION, *History*, 139; M.E. BATHURST, 'The United Nations War Crimes Commission', *Am. J. Int'l L.* 1945, 569.
[84] UNITED NATIONS WAR CRIMES COMMISSION, *History*, 139.
[85] UNITED NATIONS WAR CRIMES COMMISSION, *History*, 476; W.F. FRATCHER, 'American Organisation for Prosecution of German War Criminals', *Mo. L. Rev.* 1948, 50.
[86] A.J. KOCHAVI, *Prelude to Nuremberg: : Allied War Crimes Policy and the Question of Punishment, Chapel Hill*, University of North Carolina Press, 1998, 92-94.
[87] S. ARONSON, 'Preparations for the Nuremberg Trial: The OSS, Charles Dwork, and the Holocaust', *Holocaust & Genocide Stud.* 1998, 129.
[88] S. ARONSON, 'Preparations for the Nuremberg Trial', 260.
[89] S. ARONSON, 'Preparations for the Nuremberg Trial', 260.

the field and found in the most unlikely places.[90] However, even in the field, the tasks of procuring evidence and prosecutorial material was carried out by different organs.

49. The principal and most dedicated body seems to have been the Supreme Headquarters, Allied Expeditionary Forces (SHAEF), responsible for the supervision of the advancing American and British forces.[91] It had a specific German Country Unit, with a legal division that was responsible for the planning of the trial and the punishment of war criminals. Initially it focused entirely on the trial by military commission of members of the German armed forces.[92] As the war situation became static, they also broadened their scope to other possible war criminals. In order to do so, the SHAEF authorities had set up the Central Registry of War Criminals and Security Suspects (CROWCASS) in early 1945 to facilitate prosecution.[93] This Central Registry was to create fingerprint records of all suspected war criminals and prisoners of war and to subsequently publish lists of all apprehended persons. However, the Central Registry became swamped with apprehension reports, was forced to give up this task and from then on merely focused on the publication of lists of apprehended criminals. SHAEF was dissolved and changed into the United States Forces, European Theatre (UFSET) in the summer of 1945. It had its own War Crimes Branch attached to the Office of the Theatre Judge Advocate where a considerably large documentation centre was set up. At the same time, war crimes investigation teams were sent out across Western Germany to interview witnesses and gather documentary material.[94]

50. The Yalta Conference of February 1945 had provided for the division of Germany into four zones of occupation.[95] The central authority was to be the four-power Allied Control Authority, its supreme organ being the Allied Control Council composed of four commanders-in-chief of the occupying powers.[96] The United States

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[90] S. ARONSON, 'Preparations for the Nuremberg Trial', 260.
[91] UNITED NATIONS WAR CRIMES COMMISSION, *History*, 348; W.F. FRATCHER, 'American Organisation', 50.
[92] W.F. FRATCHER, 'American Organisation', 51.
[93] UNITED NATIONS WAR CRIMES COMMISSION, *History*, 353.
[94] W.F. FRATCHER, 'American Organisation', 54.
[95] Agreement reached at the Crimea (Yalta) Conference between President Roosevelt, Prime Minister Churchill and Generalissimo Stalin of February 11 1945 (hereafter Yalta Declaration), in *A Decade of American Foreign Policy: Basic Documents, 1941-49*, Washington, Government Printing Office, 1950.
[96] W.F. FRATCHER, 'American Organisation', 52.

Group was the Office of Military Government for Germany (OMGUS). It had yet another legal division responsible for war crimes concerning violations of military government law.[97]

51. Furthermore, the continuity of running investigations was jeopardised because of the frequent transfer of authority and personnel due to wartime chaos.[98] The reliance on national war crimes bodies meant that states could carry out their own national agendas in supplying evidentiary material. It also meant that much of the evidence described in the previous section was purposefully not made available to the prosecution.

52. National interest considerations are clearly present in the case of the United Kingdom and the United States. The United States' OSS played a significant role in the location of evidence (e.g. the documents of the German Foreign Office) for the IMT. However, the OSS also attempted to shield *SS-Obergruppenführer* Karl Wolff, an intimate friend of Globocnik, who also had detailed knowledge of *Aktion Reinhardt*, from prosecution.[99] As highlighted above, the British Combined Services Detailed Interrogation Centre (CSCID) had also come across important information with regard to *Aktion Reinhardt*.[100] It was however set up to focus on Nazi crimes against Allied military personnel and not on crimes perpetrated against Jewish civilians.[101] Furthermore, the British were reluctant to disclose their intelligence methods in light of increasing international tensions with the Soviet Union. They therefore chose to keep these reports secret instead of passing them on to the prosecutorial authorities.[102]

53. Once the decision was made to appoint Robert H. Jackson as the U.S. Chief Prosecutor for the United Nations, the Office of the Chief Counsel for the Prosecution of Axis Criminality (OCCPAC) was set up. Its purpose was to gather evidence from

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[97] W.F. FRATCHER, 'American Organisation', 64.
[98] UNITED NATIONS WAR CRIMES COMMISSION, *History*, 135.
[99] M. SALTER, 'Intelligence Agencies and War Crimes Prosecution. Allen Dulles's Involvement in Witness Testimony at Nuremberg', *J. Int'l Crim. Just.* 2004, 831; K. VON LINGEN, 'Conspiracy of Silence: How the 'Old Boys' of American Intelligence Shielded SS General Karl Wolff from Prosecution', *Holocaust & Genocide Stud.* 2008, 76.
[100] See margin nr. 39.
[101] S. TYAS, 'Allied Intelligence Agencies', 3.
[102] S. TYAS, 'Allied Intelligence Agencies', 15-16.

all the national war crimes investigation units according to the joint strategy of the four power Allied prosecutors.[103] The Office was comprised of attorneys from the US Public Prosecutor's Office, support personnel from federal agencies and private sector attorneys. It functioned in collaboration with its Soviet, British and French counterparts, each headed by its own Chief Counsel.[104] The information concerning the Holocaust in Eastern Europe, and therefore also *Aktion Reinhardt,* that eventually reached the prosecution seems to have been provided mostly by the SHAEF and the advancing Red Army.[105]

4.1.2. Hesitation to formulate a war crimes trial policy

54. As highlighted above, the hesitation of the allied powers to design a war crimes policy, led to inefficient evidence gathering.[106] It also led to a loss of valuable time that was needed to assess the mass of documentation that the advancing armies managed to procure.

55. This hesitation was caused by several different circumstances. One of these was of course the well-known difference of opinion that existed amongst the Allies on the issue of how to deal with the Nazi leadership once Germany would be defeated. It was not until April 1945, a mind-boggling mere five months before the beginning of the proceedings at the IMT, that the decision was finally taken by all four powers to conduct an international trial.

56. The United Kingdom felt strongly against judicial action against Germany's ex-leaders and favoured summary execution instead.[107] In the American camp, similar voices could be heard, among whom that of Henry Morgenthau, Jr., drafter of the famous 'Morgenthau Plan', which provided for the total dismantlement of the

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[103] Executive Order 9547: Providing for Representation of the United States in Preparing and Prosecuting Charges of Atrocities and War Against the Leaders of the European Axis Powers and Their Principal Agents and Accessories, May 2 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*.
[104] Article 14 Charter of London of the International Military Tribunal of August 8 1945.
[105] R. WOLFE, 'Flaws in the Nuremberg Legacy: An Impediment to International War Crimes Tribunals' Prosecution of Crimes Against Humanity', *Holocaust & Genocide Stud.* 1998, 446.
[106] See margin nr. 48.
[107] A.J. KOCHAVI, 'The British Foreign Office', 30-31; B. SMITH, *The Road to Nuremberg*, New York, Basic Books, 1981, 25.

German economy and the execution of the Nazi leadership.[108] Strong opponents of the 'Morgenthau Plan' were Secretary of State, Cordell Hull, and Secretary of War, Henry Stimson.[109] The Soviets were similarly divided.[110] Foreign Minister, Molotov, had already in 1942 expressed the view that the Nazi ringleaders were to be brought to justice. In the course of these deliberations on whether or not to prosecute, several Allied Declarations were nonetheless broadcast from 1942 onwards, as a strategy of psychological warfare.[111] They also indicated the supposed intention of the Allies to hold Germans responsible for their wartime behaviour. As we have seen, this string of Declarations had raised expectations with the governments-in-exile, leading the Allies to grudgingly create the United Nations War Crimes Commission.[112] The Yalta of February 4th to 11th 1945 had provided for the capture and punishment of all war criminals and left the question of the trial of the major criminals to deliberation by the Foreign Secretaries.[113] At the Moscow Conference of October 1945, the United States, the United Kingdom, the Soviet Union and China agreed the Moscow Declaration of November 1st 1945.[114] It provided for a post-war trial of the Nazi leadership.

57. The Moscow Declaration also held a first tentative hint at a war crimes policy, even before the actual decision of holding a trial was made.[115] It provided that the members of the Nazi party who had been responsible for or had taken a consenting part in atrocities would be sent back to the countries in which they had committed the crimes so that they could be judged according to the laws of the liberated countries.[116] To that end, lists of war criminals would be compiled by the invaded countries. Importantly, the Declaration concluded by stating: '*The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the*

[108] B. SMITH, *The Road to Nuremberg*, 20-45.
[109] A.J. KOCHAVI, *Prelude to Nuremberg*, 80-86.
[110] A.J. KOCHAVI, *Prelude to Nuremberg*, 65.
[111] T. TAYLOR, *Anatomy of the Nuremberg Trials: A Personal Memoir*, Boston, Little Brown, 1992, 26
[112] See margin nr. 45.
[113] Yalta Declaration.
[114] Statement of Moscow on Atrocities by President Roosevelt, Prime Minister Churchill and Premier Stalin of November 1st 1945 (hereafter Moscow Declaration).
[115] T. TAYLOR, *Anatomy of the Nuremberg Trials,* 27.
[116] Moscow Declaration.

government of the Allies'.[117] This last sentence referred to the possibility of setting up an international trial for the Nazi leadership.

58. The trial plan only gained momentum after April 12th 1945 when President Franklin Roosevelt died.[118] The newly elected President Harry Truman proved to be the knight in shining armour for all those in favour of subjecting the Nazis to a judicial process, as he wanted an agreement on all its specifics as soon as possible.[119] By then the French had also given their approval to the idea of an international trial.[120] The British found it therefore increasingly difficult to hold their ground, especially since President Truman had appointed Robert H. Jackson, a Justice at the Supreme Court, as chief prosecutor for the Americans on May 2nd 1945.[121] On August 8th 1945 the London Agreement was signed providing for the establishment of an international military tribunal, the annex of which contained the London Charter.[122]

59. What many historians tend to forget is another important legal dilemma the Allies faced, which might also explain the continuous foot-dragging the Allies displayed in the creation of a war crimes trial policy.[123] At the meeting in Moscow in 1943 the United Kingdom, the Soviet Union and the United States were still unsure over what the international status of Germany would be after the war. The freedom of the Allied powers to address Germany's responsibility for war crimes would be seriously restricted if Germany would retain some measure of its international personality. In that case, the Hague Conventions' limitations of belligerent occupation would apply. It was only in the course of 1944 that the unconditional surrender of Germany became a viable option.[124]

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[117] Moscow Declaration.
[118] A. TUSA and J. TUSA, *The Nuremberg Trial*, London, Macmillan, 1984, 66.
[119] A. TUSA and J. TUSA, *The Nuremberg Trial*, 66.
[120] G. GINSBURGS, 'The Nuremberg Trial: Background', in G. GINSBURGS and V.N. KUDRIATSEV, *The Nuremberg Trial and International Law*, London, Nijhoff, 1990, 35.
[121] Executive Order 9547 Providing for Representation of the United States in Preparing and Prosecuting Charges of Atrocities and War Crimes Against the Leaders of the European Axis Powers and Their Principal Agents and Accessories of May 2 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials.*
[122] Agreement of London for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945.
[123] G. GINSBURGS, 'The Nuremberg Trial: Background', 36.
[124] G. GINSBURGS, 'The Nuremberg Trial: Background', 36.

4.1.3. Ambiguity towards the Jewish community

60. It is difficult to assess in what way the personal feelings of certain individuals responsible for the investigation and prosecution of war crimes and crimes against humanity have contributed to the lack of attention that was given to the evidence surrounding *Aktion Reinhardt*. It is certainly true that the attitudes of some individuals within the war crimes investigative organisations and the Office of the Prosecution ranged from less favourable to outright anti-Semitic.[125]

61. The hesitation on the part of the Allies to formulate a coherent war crimes policy, which as we have seen, had a significant impact on the evidence gathering process, was partly due to reluctance to specifically deal with crimes against Jews. On the one hand, the atrocities committed against the Jewish community could not be ignored. On the other hand, an overt recognition of their suffering would only fuel Hitler's polemic that the Allies were mere vehicles in a Jewish conspiracy.[126] More particularly, the British feared that enthusiastic support for the Jewish case would disrupt relations with the Arab community in British Palestine.[127]

62. Yet, while the above-mentioned reasons are mostly related to national and allied policy, some authors suggest that an underlying current, influencing the neglect of crimes against Jews, was the prevailing liberal, assimilationist idea that focusing on one particular ethnic group was not desirable, let alone fair.[128] More generally, it was felt that the Jewish community was quite simply overreacting. These thoughts were not entirely absent with Robert Jackson, who immediately after his assignment saw himself confronted with a formidable Jewish lobby under the leadership of Jacob Robinson, representative of the Jewish World Congress.[129] Robinson argued with Jackson for the specific creation of a 'Jewish case', entirely devoted to the atrocities committed against the Jewish people. When his fish didn't fry, he tried instead to convince Jackson to include a Jewish 'amicus curia', also to no avail. Jackson

[125] Some of the remarks made by US Secretary of War, Henry L. Stimson may be deemed as such: D. BLOXHAM, *Genocide on Trial*, 66.
[126] S. ARONSON, 'Preparations for the Nuremberg Trial', 260.
[127] S. ARONSON, 'Preparations for the Nuremberg Trial', 260.
[128] D. BLOXHAM, *Genocide on Trial*, 67.
[129] S. ARONSON, 'Preparations for the Nuremberg Trial', 266.

explained that by giving the Jews a specific forum, other groups might also want specific representation.[130] Jackson also wished to avoid a potential discussion on which ethnic group or religion had suffered the most under the Nazi regime.

4.1.4. The substantive legal framework: focus on conspiracy to wage war

62. Once the decision to install judicial proceedings against the Nazi leadership was made, the Allied powers still had to agree on the charges, the procedure and on which defendants to indict. An international conference was organised in London from June 26th until August 8th 1945 to negotiate the drafting of an international agreement. The results of the London Conference were the London Agreement and the Charter of London of 8th August 1945 signed by the United States, the United Kingdom, the Soviet Union and France and acceded to by eleven other states.

63. The United States favoured the drafting of an inter-allied treaty that would define the mandate of the tribunal, the procedure and the legal principles it was to apply.[131] Designing a bill of indictment that the French, Soviets, British and Americans could all four agree on, proved quite a challenge. The Allies disagreed on almost everything, which again led to valuable loss of time. From the very onset, it was the American delegation and especially Robert Jackson who steered the creation of the London Charter. The Americans were set on including a 'new' controversial count, that of crimes against peace.[132] While the debate surrounding the definition of crimes against peace is a highly interesting one, for the purpose of this thesis, only the crimes that are relevant for the prosecution of the crimes committed during *Aktion Reinhardt* will be looked at.

64. Before going into the details of the charge of crimes against humanity, the legal problem of connecting these crimes to the actions of the Nazi leaders must be discussed. It proved to be a hazardous judicial exercise in a number of ways. First

[130] S. ARONSON, 'Preparations for the Nuremberg Trial', 267.
[131] G. GINSBURGS, 'The Nuremberg Trial: Background', 30.
[132] A. TUSA and J. TUSA, *The Nuremberg Trial*, 86; G. GINSBURGS, 'The Nuremberg Trial: Background', 30.

came the question of jurisdiction, which could be either personal or territorial.[133] The Nazi leaders could only be tried, in light of international criminal law, for the offenses committed against nationals or citizens of one of the Allies, in which case they could be held accountable by the Allied power in question.[134] If the act had been committed on the territory itself of one of the Allied powers, the perpetrator could be held accountable by that power as well. A solution therefore had to be found which would allow jurisdiction over the Nazi leaders with regard to crimes that had been committed by their henchmen in allied territories and for crimes committed against German nationals.[135]

65. It would eventually be the Americans, and more particularly, the US War Department under the guidance of Secretary of War Stimson, that would try to entangle the judicial web, albeit not entirely successfully. Stimson had asked his Assistant Secretary, John McCloy, to draft the charges against the defendants and the procedural rights of the accused.[136] This task was further directed to Colonal Murray C. Bernays, a New York lawyer and Army General Staff Officer. Bernays is considered one of the champions of the Jewish cause as he was sensitive to the Jewish plight and therefore tried to find a legal way to include the crimes committed against the Jews in the period from 1933 onwards.[137] In order to do so he advised to use the charge of 'criminal conspiracy', a legal notion known only in Anglo-American law and frequently used in anti-trust suits.[138]

66. The conspiracy charge, as created by Bernays, had two objectives. Firstly, it would allow a criminal conviction of major Nazi organisations, such as the SS, the SA and the Gestapo.[139] This would potentially solve the issue of bringing the major Nazi criminals to trial, as proof of their membership alone would suffice and their

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[133] E. ZOLLER, 'International Criminal Responsibility of Individuals for International Crimes', in G. GINSBURGS and V.N. KUDRIATSEV, *The Nuremberg Trial and International Law*, 103.
[134] E. ZOLLER, 'International Criminal Responsibility of Individuals for International Crimes', 105.
[135] E. ZOLLER, 'International Criminal Responsibility of Individuals for International Crimes', 108.
[136] J. F. MURPHY, 'International Criminal Procedure Law', in G. GINSBURGS and V.N. KUDRIATSEV, *The Nuremberg Trial and International Law*, 63.
[137] T. TAYLOR, *The Anatomy of the Nuremberg Trials,* 37.
[138] Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials.*
[139] S. POMORSKI, 'Conspiracy and Criminal Organization', in G. GINSBURGS and V.N. KUDRIATSEV, *The Nuremberg Trial and International Law*, 216.

positions of leadership of these organisations would also allow them to stand trial for any major offenses committed by their subordinates.[140] The idea was to prosecute the major leaders of these organisations as representatives in the IMT and then hold subsequent trials where the other members could be tried. Secondly, the crimes committed before the war could then be considered as 'preparatory conduct' within the 'conspiracy to commit wartime atrocities'.[141]

67. While in theory the idea of laying a criminal conspiracy at the feet of the Nazi leadership may have seemed appealing and original, it had significant drawbacks as well. One of these was the fact that as a legal concept it was entirely unfamiliar to continental judges, who would also form a part of the bench of the envisioned international tribunal.[142] Any miscomprehension of what the concept entailed on their part could be fatal for a prosecutorial strategy. It also did not answer the issue of jurisdiction.[143] There was no precedent in international law for charging the state, as represented by the Nazi leaders, with crimes committed against its own nationals. The idea of trying organisations was equally unknown both to the national legal systems of the Allies as well as to international law.

68. Consequently, Bernays' plan was all but torpedoed by Assistant Attorney General Herbert Wechsler under pressure of the Soviets and the French.[144] Especially, the Soviets seem to have feared accusations for trying to impose *ex post factum* law on Germany by criminalizing domestic acts committed against their nationals.[145] A modified version of the plan was approved by Attorney General Francis Biddle on January 21st 1945, which completely overturned Bernays' ideas of linking the conspiracy charge with crimes against humanity.[146] The dual capacity of the crime still persisted. Firstly, Article 6 London Charter imposed liability on conspirators for acts committed by subordinates as originally planned. Secondly, conspiracy was

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[140] A. TUSA and J. TUSA, *The Nuremberg Trial*, 57.
[141] S. ARONSON, 'Preparations for the Nuremberg Trial', 263.
[142] S. POMORSKI, 'Conspiracy and Criminal Organization', 219.
[143] S. ARONSON, 'Preparations for the Nuremberg Trial', 264.
[144] Memorandum for the Attorney General, December 29 1944, in B. SMITH, *The American to Nuremberg: the Documentary Record, 1944-1945*, Stanford, Hoover Institution Press, 1982, 76.
[145] Comments and Proposals of Soviet Delegation on American Draft, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials;* S. POMORSKI, 'Conspiracy and Criminal Organization', 220.
[146] T. TAYLOR, *The Anatomy of the Nuremberg Trials*, 76.

conceived of as an independent anticipatory crime, but with one major differentiation from Bernays' plan: the conspiracy charge could now only be applied to the crime of waging an aggressive war and not to war crimes or crimes against humanity.[147] While before, it might have been possible to prove that pre-war atrocities were a part of a criminal conspiracy to commit greater atrocities during the war, it was difficult now to sustain that they were part of a conspiracy to launch an aggressive war.[148] As anticipated, the prosecution of organisations also proved a hard pill to swallow for the Soviets and the French. It took another six weeks before the Soviets were ready to accept the American draft.[149] The revised version of Bernays' plan was thus adopted in the London Charter.

69. One way to include crimes committed against German Jews into the scope of jurisdiction was to broaden the scope of war crimes to 'crimes against humanity'.[150] Crimes against humanity were eventually placed in a separate and new category as defined in Article 6(c) of the Charter: '*murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, whether before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated'*.[151] While the general principles of crimes against humanity have a history that started long before World War II, they had never been articulated as a set of norms separate from the laws and customs of war.[152] Therefore, in order to avoid accusations of violating the principle of *nullum crimen sine lege*, crimes against humanity required a link to the other two sets of crimes articulated in Article 6(a) and (b) London Charter, namely war crimes and crimes against peace. This so-called war-connecting link or nexus-requirement, was needed to qualify some of the domestic crimes committed by the Nazis as international crimes.[153] While crimes against

[147] S. POMORSKI, 'Conspiracy and Criminal Organization', 220.
[148] T. TAYLOR, *The Anatomy of the Nuremberg Trials*, 76.
[149] S. POMORSKI, 'Conspiracy and Criminal Organization', 220.
[150] E. SCHWELB, 'Crimes Against Humanity', *British Yearbook of International Law* 1946, 180.
[151] Article 6(3) London Charter.
[152] E. SCHWELB, 'Crimes Against Humanity', 189.
[153] C. BASSOUNI, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge, Cambridge University Press, 2011, 130. The legal basis for such an expansion was the existing conventions and other international instruments, customary international law, and general

humanity as such were not limited to the years following 1939, de facto, however, they were, due to the nexus-requirement.[154] As the anti-Jewish campaign had started well before 1939, this restriction could potentially have an equally restrictive impact on how the structure of the concentration camp system was perceived at the IMT.

70. It is clear from the definition that war crimes and crimes against humanity overlap, as crimes committed against the civilian population of the occupied countries are punishable under both sets of crime.[155] Indeed, the distinction between the two was not very clear and the discussions during the IMT concerning war crimes and crimes against humanity tended to confuse the two.[156] The essential difference between war crimes and crimes against humanity seems to have been that whereas war crimes were committed against nationals of another state, crimes against humanity were committed against nationals of the same state as that of the perpetrator. This is clear from the reference to 'any' civilian population, meaning that even crimes committed against a country's own population were included.[157] The reference to 'population' also seemed to suggest that crimes against humanity were committed on a somewhat larger scale than war crimes.[158]

4.1.5. Legal procedure: focus on documentary evidence

70. At the London Conference, the issue of procedural rules was relatively undisputed. It was not to be a trial by jury, yet one where four judges, one from each Allied power, would have to pass judgment.[159] However, disagreement existed about the specific roles of the judge and the prosecution.[160] The Soviets and the French, following the line of the inquisitorial model, preferred an active truth-seeking judge who would decide on which witnesses to call and which documents to put in

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principles of law. The most important are the Hague Conventions of 1899 and 1907 and the Allied Declarations made during the war.

[154] R.S. CLARK, 'Crimes Against Humanity', in G. GINSBURGS and V.N. KUDRIATSEV, *The Nuremberg Trial and International Law*, 195; J. ROBINSON, 'International Military Tribunal and the Holocaust – Some Legal Reflections', *Is. L. Rev.* 1972, 8.

[155] E. SCHWELB , 'Crimes Against Humanity', 196.

[156] See margin nr. 106.

[157] C. BASSIOUNI, *Crimes Against Humanity*, 131-135; R. CRYER (ed.), *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2007, 188.

[158] R.S. CLARK, 'Crimes Against Humanity', 196; R. CRYER (ed.), *An Introduction to International Criminal Law and Procedure*, 188.

[159] Article 2 London Charter.

[160] Minutes of the London Conference, Session of August 2 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*.

evidence. It was decided, however, that in general the common law adversarial model would prevail where the parties would have to 'present' their case.[161] Such a system left large discretionary powers for the parties to choose which evidence to present. It also provided for the direct examination and cross-examination of witnesses.[162] The defendants could testify themselves, under oath, after which they would also be subjected to cross-examination.

71. Article 14 London Charter provided for a committee of Chief Prosecutors to be set up to choose the defendants to be brought to trial, to approve the indictment and to draft the rules or procedure which had to be approved by the judges.[163] The London Charter had opted for a flexible approach with regard to evidence. Article 19 of the Charter provided: "*The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value*".[164] This meant that there were no strict exclusionary rules of evidence, such as hearsay evidence, contrary to what is practiced in Common Law criminal procedure.[165] There were no provisions concerning the burden of proof either. It was therefore unclear whether proof beyond reasonable doubt was at all needed.[166] Unlike Control Council Law n°10, the instrument that provided the NMT with its subject-jurisdiction, the London Charter never established which different modes of participation were needed to establish criminal responsibility.[167] Apart from the provision that '*participating in the formulation or execution of a common plan or conspiracy*' was criminal, the Charter remained silent in that regard.[168] To establish criminal responsibility the defendant therefore had to have knowingly committed a crime as specified in the indictment.[169]

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[161] C. SAFFERLING, *International Criminal Procedure*, Oxford, Oxford University Press, 2012, 15.
[162] J. F. MURPHY, 'International Criminal Procedure', 71.
[163] Article 13 and 14 London Charter.
[164] Article 19 London Charter.
[165] F. BIDDLE, 'The Nurnberg Trial', *Va. L. Rev.* 1947, 682.
[166] It was not further elaborated upon by the Tribunal. Rather, they left this issue open for the NMT. F. BIDDLE, 'The Nurnberg Trial', 683; M. SALTER, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg*, London, Routledge, 2007, 20.
[167] See 106.
[168] Article 6(a) London Charter.
[169] E. ZOLLER, 'International Criminal Responsibility of Individuals for International Crimes', 108.

72. While there may not have been strict rules in the Charter concerning evidence, the nature of the charges identified in the Charter had a significant impact on the choice of evidence by OCCPAC in two important ways. Firstly, with regard to the conspiracy charge, a peculiar thing happened: the indictment did not only speak of a conspiracy to commit crimes against peace, but also of a conspiracy to commit war crimes and crimes against humanity, despite the fact that the London Charter provided no jurisdiction for the crime of conspiracy with regard to Article 6(b) and (c).[170] This is said to have been a deliberate tactic of Jackson, who angered by continental pressure to modify the conspiracy charge, had taken matters into his own hand.[171] Since the American prosecution team was responsible for developing the conspiracy charge, he must have felt at liberty to give his own interpretation to the Charter. Therefore, Jackson's trial tactic was aimed at proving that crimes against humanity fitted within the greater conspiracy to launch an aggressive war.[172] In the American phase of the trial, proving the connection became more important than appraising the evidence concerning crimes against humanity itself.[173]

73. Furthermore, Jackson considered witness testimony was too unreliable and too emotionally laden to illustrate the required connection.[174] A strict policy was therefore adopted by Jackson to focus on documentary evidence in order to secure a sound basis for a conviction.[175] The reliance on documentary material seems to have also been based on the somewhat naïve belief that it would be a guarantee for truth. Thomas J. Dodd, executive trial counsel for OCCPAC summarised this conviction as follows: "*It was to be principally a documentary case. That decision, never regretted by any member of this staff, was, I believe, one of great strategical and tactical importance. It was, however, more than a decision of trial strategy or of trial tactics, for it made secure the complete truth of the trial, as a landmark in the progress of mankind*".[176]

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[170] Indictment International Military Tribunal The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics against Goering et al., *The Trial of German major war criminals: proceedings of the International military tribunal sitting at Nurenberg, Germany*, Vol I. (Hereafter Indictment Goering et al.).
[171] S. POMORSKI, 'Conspiracy and Criminal Organization', 227; B. SMITH, *The Road to Nuremberg*, 66.
[172] D. BLOXHAM, *Genocide on Trial*, 62; A.J. KOCHAVI, *Prelude to Nuremberg*, 226.
[173] F. BIDDLE, 'The Nurnberg Trial', 683.
[174] M. SALTER, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg*, 409.
[175] T. J. DODD, 'The Nurnberg Trials', *J. Crim. L. & Criminology* 1946-1947, 362.
[176] T. J. DODD, 'The Nurnberg Trials', 362.

74. Apart from the obvious difficulties a case like *Aktion Reinhardt* presented, where the large number of documents required by the prosecution was absent, the reliance on documentary proof brought with it some practical difficulties as well. The documents had to be translated for the judges and the defence, which very soon proved to be physically impossible.[177] The Tribunal therefore ruled that only the portion of the document that was actually read in court would be part of the Record. Through a process of simultaneous translation a lot of time was saved.[178] The great drawback of this new method was, however, that long recitals of documents followed, making proceedings tedious and difficult to follow.[179] This added to the unpopularity of the idea of conducting further war crimes trials after the Nuremberg trials.[180] As whole portions of documents were excluded, it also meant that their full significance did not surface.

75. Furthermore, as the focus lay on the conspiracy charge and the charge of crimes against peace, the featured crimes against humanity were reduced to what Jackson called 'representative examples'.[181] A telling illustration of how Jackson perceived this conspiracy charge can be found in his Report to President Truman: '*Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world.*'[182] The war crimes bodies of the United Nations were even asked to provide three 'typical' examples to the Office of the Prosecution of crimes against humanity they had investigated. A report written by Telford Taylor, assistant to Jackson, also clearly speaks of what the specific strategy for crimes against humanity was: '*they were too easy to prove; in fact we will be in constant danger of being swamped by such*

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[177] F. BIDDLE, 'The Nurnberg Trial', 683; T. J. DODD, 'The Nurnberg Trials', 362.
[178] J. A. APPLEMAN, *Military Tribunals and International Crimes*, Indianapolis, Bobbs-Merill, 1954, 346.
[179] T. TAYLOR, *The Anatomy of the Nuremberg Trials*, 243.
[180] See margin nr. 194.
[181] M. MARRUS, 'The Holocaust at Nuremberg', *Yad Vashem Stud*. 1998, 8; A. TUSA and J. TUSA, *The Nuremberg Trial*, 73; D. BLOXHAM, *Genocide on trial*, 63.
[182] *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*.

evidence'.[183] It was therefore advised by Taylor to merely prove that the atrocities were directed, encouraged, and assented to by the Axis leaders.[184] Therefore, ironically enough, the conspiracy charge that had initially been designed by Bernays to deal with Jewish suffering would prove detrimental to the Jewish cause. Exactly what the impact of these restrictions of evidence was on how *Aktion Reinhardt* was represented in the IMT will be discussed in the subsequent section.[185]

76. The same idea of representativeness applied to the choice of defendants as well, which as we have seen, was a task awarded to the Chief Prosecutors.[186] The only guideline the Charter provided in this respect was – in line with the Moscow Declaration – the prosecution of war criminals whose offenses had no particular geographical location.[187] The defendants had to be chosen, according to Jackson, on the basis of how representative their actions were for the organisations they wished to declare criminal.[188] Eventually twenty-four people were charged and six criminal organisations.[189]

77. It is clear from the above analysis that the process of evidence gathering for the IMT was challenging. The hesitation to create a war crimes policy and the proliferation of investigative bodies jeopardised the availability of evidence concerning *Aktion Reinhardt* from reaching OCCPAC. Equally, did the legal framework of the conspiracy charge and crimes against humanity and the emphasis on documentary materials risk the thorough representation of the *Aktion*.

4.2. The phase of explanation and understanding

78. The defendant that had the most obvious connection to *Aktion Reinhardt* in the IMT was Hans Frank, Hitler's crown jurist, and, more importantly, former

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[183] T. TAYLOR, 'An approach to the preparation of the prosecution of axis criminality', June 1945 in SMITH, B.F., *The American Road to Nuremberg. The Documentary Record 1944-1945*, 87.
[184] T. TAYLOR, 'An approach to the preparation of the prosecution of axis criminality', 87.
[185] See margin nr. 86-87.
[186] See margin nr. 79.
[187] Article 1 London Charter; Moscow Declaration.
[188] J. F. MURPHY, 'International Criminal Procedure', 70.
[189] Indictment Goering et al., *The Trial of German major war criminals*, 65.

Generalgouverneur of Poland.[190] Frank was a typical 'desk perpetrator', never himself pulling the trigger, yet administratively assisting the smooth running of the killing operations in the *Generalgouvernement*. It was no coincidence that his nickname was 'The Jew butcher of Cracow'.[191] When Hitler's regime was disintegrating in the spring of 1945, he fled with his entourage to *Haus Bergfrieden* in Bavaria where he was caught on May 4th 1945 by the US 7th Army.[192]

4.2.1. The Case of Hans Frank

79. As highlighted above, there was no separate Jewish case before the IMT. Rather, the story of the Holocaust was scattered across the four different counts and the twenty-four defendants. The presentation of evidence was divided amongst the Chief Prosecutors. Jackson and his team were responsible for the presentation of the evidence relating to the charge of participation in a common plan or conspiracy for the accomplishment of a crime against peace.[193] The British were to present the evidence for the charge of planning, initiating and waging wars of aggression and other crimes against peace.[194] The Soviet and the French presented the evidence for war crimes and crimes against humanity committed on their respective territories. The case of Hans Frank would therefore feature most prominently in the Soviet phase of the IMT.

4.2.1.1. 'Concentration camp' Treblinka

80. Significantly more attention was given to crimes against peace and the conspiracy charge, so the American phase of the IMT lasted significantly longer than that of the British, French or Soviet phase. Part of the explanation is of course the nexus-requirement of Article 6(c) London Charter, which meant that before crimes against humanity could be proven, crimes against peace and war crimes had to be

[190] D. BLOXHAM, *Genocide on Trial*, 120.
[191] M. HOUSDEN, *Hans Frank: Lebensraum and the Holocaust*, New York, Palgrave Macmillan, 2003, 219.
[192] M. HOUSDEN, *Hans Frank*, 219.
[193] S. POMORSKI, 'Conspiracy and Criminal Organization', 227; B. SMITH, *The Road to Nuremberg*, 66.
[194] B. SMITH, *The Road to Nuremberg*, 66.

established.[195] This is clear from the British Chief Prosecutor, Sir Hartley Shawcross's closing address: '*So the crimes against the Jews, insofar as it is a Crime against Humanity, is one which we indict because of its association with the Crime against Peace*'.[196]

81. Hans Frank's time in captivity was characterised by his contradictory behaviour. On the one hand, he was much obliging to the Office of the Prosecution, as he voluntarily handed over his 11.367 page diary, making it one of the principal sources featured in the IMT for the reconstruction of the Nazi chain of command.[197] On the other hand, unfortunately, he had first removed the most incriminating passages concerning the concentration camp system and had also burnt the official documentation from his office in Cracow.[198] In prison he claimed to have had a profound religious experience, making him repent his Nazi past. Whether it was feigned or not is not entirely clear today, but it did make him – as we shall see - one of the more talkative defendants.[199]

82. Frank was not charged with crimes against peace, as he had not been part of the military circle that had planned the war. However, he was nonetheless charged with count one, the crime of conspiracy, as the American Prosecution argued that he had actively promoted the coming to power of the Nazi leadership through his legal activities.[200] More importantly, he was charged with war crimes and crimes against humanity.[201] On October 18th 1945 Robert Jackson gave his legendary opening speech, followed by the presentation of the evidence concerning the conspiracy charge.[202] As it was conceived by the Prosecution that crimes against humanity had been merely a by-product of the conspiracy to wage an aggressive war, the emphasis during the first half of the trial was put on establishing the chain of Nazi command and the planning of the war. Nevertheless, Frank's name featured on many occasions, mostly in his capacity of crown jurist.

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[195] E. SCHWELB, 'Crimes Against Humanity', 139.
[196] Nuremberg Trial Proceedings, Vol. 19, *The Trial of German major war criminals*, 528
[197] M. HOUSDEN, *Hans Frank*, 219.
[198] M. HOUSDEN, *Hans Frank*, 217.
[199] See margin nr. 93.
[200] Indictment Goering et al., *The Trial of German major war criminals*, 71.
[201] Indictment Goering et al., *The Trial of German major war criminals*, 71.
[202] Nuremberg Trial Proceedings, Vol. I, *The Trial of German major war criminals*, 98-155

83. The portion of the American phase of the trial that dealt with crimes against humanity was not very extensive, as their chief task was presenting the evidence for the conspiracy charge. The point was merely to show that prior to the war crimes against humanity had been committed as a step on the path towards an aggressive war. Therefore, only representative examples of atrocities were given.[203] The result was a rather tangled and rummaged account of the pre-war Holocaust. As the London Charter provided no guidance as to what the substantive elements of the conspiracy charge actually were, it is consequently also very hard to determine exactly where the American case was heading. The point seems to have been to establish the knowing participation of the defendants in a large-scale plan to commit crimes against humanity as a step towards the larger conspiracy to launch the war. On December 13th 1945, the American Prosecution presented the 'Case on Concentration Camps' and the 'Case on Persecution of Jews' in the context of the conspiracy charge.[204] Some hints of the responsibility of Frank in the crimes of *Aktion Reinhardt* surfaced.

84. First of all, Frank was connected to one of the camps of *Aktion Reinhardt*. It featured in a somewhat generalised account given by Major Walsh of the concentration camps situated in the area under Frank's leadership. Very importantly, Treblinka was mentioned as one of those camps, albeit falsely identified as a 'concentration camp'.[205] He quoted from a report provided by the Polish War Crimes Commission, which also wrongly alleged that the Jews were killed in Treblinka by steam instead of carbon monoxide gas.[206] This report seems to have been the principal and only documentary source relating to Treblinka as an extermination camp used at the IMT. No other camps of *Aktion Reinhardt* were mentioned by any of the prosecutorial powers as similar evidence was either not available or simply not used in the context of presenting representative examples.

85. Secondly, several key passages from Frank's diary referring to the policy of annihilation of the Jewish population in the area were cited.[207] Important in this

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[203] See margin nr. 75.
[204] Nuremberg Trial Proceedings, Vol. III, *The Trial of German major war criminals*, 566.
[205] Nuremberg Trial Proceedings, Vol. III, *The Trial of German major war criminals*, 566.
[206] Nuremberg Document 3311-PS, Exhibit USA-29.
[207] Nuremberg Document 2233(d)-PS, Exhibit Number USA-281.

respect is the initial statement of the individual responsibility of Hans Frank by Lieutenant Colonel, William H. Baldwin, who was Assistant Trial Counsel for the United States, on January 10th 1945.[208] The most telling statement was a reference to Frank's diary, where he, according to Baldwin: '*admits that in a period of 4 years' time up to 3,400,000 persons from that area have been annihilated pursuant to an official policy and for no crime, but only because of having been born a Jew'*.[209] As we have seen, the largest portion of these 3,400,000 persons cited here, included the victims of *Aktion Reinhardt*, something Frank was undoubtedly aware of. Indeed, Frank's deputy, Josef Bühler, was present at the Wannsee Conference as the *Generalgouverneur's* representative when the final solution of the Polish Jews was decided.[210]

86. Apart from the relationship established between Frank and the persecution of the Jews in Treblinka, *Aktion Reinhardt* featured in the American phase of the trial in a completely different way as well. During the 'Case on Persecution of Jews', a report was cited that had been sent by Katzmann, Lieutenant General of the Police, to Krüger, General of the Police East, entitled 'Solution of the Jewish Question in Galicia'.[211] It said the following: '*Together with the evacuation action we executed the confiscation of Jewish property. Very high values were confiscated and handed over to the Special Staff 'Reinhard'. Apart from furniture and many textile goods, the following amounts were confiscated and turned over to Special Staff 'Reinhard''*.[212] The document featured in the discussion of the expropriation of Jewish goods. This was indeed one aspect of *Aktion Reinhardt* next to the greater objective of extermination. When taking this document at face value, its deeper meaning could easily be missed. It seemed as if this so-called 'Special Staff 'Reinhard' must have been in charge of this expropriation mission and nothing else. As we shall see, this one-sided interpretation featured even more so in the trials before the NMT.[213]

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[208] Nuremberg Trial Proceedings, Vol. V, *The Trial of German major war criminals*, 66.
[209] Nuremberg Trial Proceedings, Vol. V, *The Trial of German major war criminals*, 78.
[210] M. HOUSDEN, *Hans Frank*, 219.
[211] Nuremberg Trial Document L-18, Exhibit USA-277; D. BLOXHAM, *Genocide on Trial*, 120.
[212] Nuremberg Trial Document L-18, Exhibit USA-277.
[213] See margin nr. 143.

87. The French Prosecution started to present their evidence on war crimes and crimes against humanity on January 24th 1946.[214] While there were no *Aktion Reinhardt* camps situated in France, the Gerstein Report, one of the most important pieces of evidence relating to the *Aktion*, was put into evidence by French Assistant Prosecutor, Charles Dubost, on January 30th 1946. It was written by Kurt Gerstein, *SS-Obersturmführer* and member of the Institute for Hygiene of the Waffen-SS. While Gerstein's personal life and his objectives for writing the report are still ridden with controversies, the report represents the single most important source on the camps of Belzec and Treblinka existing today.[215] However, the Tribunal refused to have the report read aloud in the courtroom due to the absence of a certificate establishing its origin.[216] Contrary to what many revisionists claim, the document was later the same day accepted in evidence, and excerpts of it were read in court.[217] Unfortunately, those were not the parts relating to Treblinka and Belzec, but concerned the bills of lading for the procurement of Zyklon-B gas that were attached to the report.[218]

4.2.1.2. The extermination of 'Polish citizens'

88. The Soviet Prosecution, under the leadership of Lieutenant-General Roman Andreyevich Rudenko, was responsible for presenting the evidence concerning war crimes and crimes against humanity in Poland. Frank's case, therefore, featured mostly and more extensively under the Soviet Prosecution. The Soviet phase of the trial started on February 8th 1946 with the Opening Statement of General Rudenko. On February 25th, Colonel L.N. Smirnov began the presentation of evidence on the count of crimes against humanity.[219] A first requirement for understanding *Aktion Reinhardt* is the recognition of the special nature of the camps of Belzec, Sobibor and Treblinka as extermination camps. Donald Bloxham has suggested that there was a profound misunderstanding of the concentration camp system at the IMT and notably

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[214] Nuremberg Trial Proceedings, Vol. VI, *The Trial of German major war criminals*, 118.
[215] For a more extensive discussion of the contents of the Gerstein Report, see infra.
[216] Nuremberg Trial Proceedings, Vol. VI, *The Trial of German major war criminals,* 333.
[217] Nuremberg Trial Proceedings, Vol. VI, *The Trial of German major war criminals,* 363.
[218] Nuremberg Trial Proceedings, Vol. VI, *The Trial of German major war criminals,* 364.
[219] Nuremberg Trial Proceedings, Vol. VII, *The Trial of German major war criminals,* 146.

of the difference between labour and extermination camps.[220] While this can certainly be said of the American Prosecution, it does not apply to the Soviets.[221] Furthermore, it must be borne in mind that the United States was not responsible for the charges of crimes against humanity as such, yet merely referred to it in light of the conspiracy charge.

89. Indeed, it seems that the Soviets grasped the intricacy of the Nazi murder machinery better than their American, British and French counter-parts. They even connected the workings of the camps to Hans Frank. In his effort to establish Frank's personal responsibility for crimes against humanity in the *Generalgouvernement,* Counsellor Smirnov stated: '*For it was precisely Frank, as the diary proves, who first thought about the creation of special concentration camps, later officially known as "Vernichtungslager*"'.[222] Counsellor Smirnov further continued that it was important for the Tribunal to take notice of the fact that all the major extermination camps were located on the territory of the *Generalgouvernment*. These references add to the belief that at least the Soviet Prosecution was aware of the nuances of the concentration camp system.

90. However, what remains peculiar and highly unfortunate is, that the existence and the special nature of the extermination camps was never explicitly linked by the Soviet Prosecution to the Jewish population. Instead a constant referral was made to the 'Polish citizens' as victims. Technically speaking, this is not incorrect, yet the fact that the Polish citizens – and people from other nationalities – who perished in the camps all happened to be Jewish is a crucial nuance. Whether this omission of the Jews as a specifically targeted group stemmed from a miscomprehension of the camp system or rather from the refusal to recognize the Jewish community as a distinct group, is not entirely clear. As we have seen, the Soviet Prosecution was no stranger

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[220] D. BLOXHAM, *Genocide on Trial*, 101.
[221] See the American confusion of Treblinka as a concentration camp, supra
[222] Nuremberg trial, Vol. VII, *The Trial of German major war criminals*, 469. Author's note: This statement awards too much 'credit' to Hans Frank. While he aided in their functioning, it was certainly not his idea to create the extermination camps. Rather, the idea was first pitched by Globocnik and taken on – enthusiastically – by Himmler.

to anti-Semitism.[223] On the other hand, an important witness in their case was in fact a Jew.[224]

91. The camp that eventually featured most prominently during the Soviet phase of the trial was unsurprisingly Majdanek, which technically had not been a real extermination camp.[225] The fact that it had been liberated by the Soviet army in July 1944 was probably the main reason for the attention awarded to it by the Soviet Prosecution. No further mentioning was made of Belzec or Sobibor during the Soviet phase of the trial.

92. However, Treblinka did feature in the Soviet case. Despite the focus on documentary material, one of the few people who testified as a witness before the IMT, was in fact the former Treblinka inmate and Jewish accountant, Samuel Razjman. He testified in relation to crimes against humanity on February 27th and was first directly examined by Smirnov. Razjman presented a truly chilling, yet accurate account of the operations of the camp. He also spoke of 'Jews' who were sent to the camp. Upon being asked how long people approximately lived after their arrival at Treblinka, Razjman also refuted the 'steam' story of the Polish report used during the American phase of the trial: '*The whole process of undressing and the walk down to the gas chambers lasted, for the men 8 or 10 minutes, and for the women some 15 minutes. The women took 15 minutes because they had to have their hair shaved off before they went to the gas chambers*'.[226] Despite the fact that at least one camp of *Aktion Reinhardt* had featured fairly prominently during the phase of the IMT that dealt with war crimes and crimes against humanity, it was not nearly enough to capture the enormity of the killing operation.[227]

4.2.1.3. 'I went to Belzec the next day'

93. Finally, on April 18th 1946, Hans Frank himself took the stand and was directly examined by his defence counsel Alfred Seidl. His testimony was

[223] See margin nr. 62.
[224] See margin nr. 92.
[225] Nuremberg Trial Proceedings, Vol. VII, *The Trial of German major war criminals*, 456.
[226] Nuremberg Trial Proceedings, Vol. VIII, *The Trial of German major war criminals,* 325.
[227] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals*, 1.

characterised by several emotional outbursts. He admitted much that proved potentially incriminating, yet at the same time he tried to deflect as much of the guilt as possible to others. In general, it presents a highly contradictory and incoherent account of his time as *Generalgouverneur*. Nonetheless, some clues as to the true depth of his knowledge of *Aktion Reinhardt* surfaced.

94. His counsel was at pains to show that Frank had not been a member of the SS and that his main task under the *Reich* consisted of merely making sure that the regime was perceived as legal.[228] The part of the direct examination that is interesting for this thesis is of course related to his actions as *Generalgouverneur*. Frank alleged that he was kept in the dark about the existence of the 'concentration camps'[229] in the *Generalgouvernment*.[230] It had been a deliberate tactic of Himmler to keep him uninformed.[231] When asked by Seidl whether he had ever participated in the persecution of the Jews he gave the oft-quoted and sly answer: '*I say "yes;" and the reason why I say "yes" is because, having lived through the 5 months of this trial, (...) my conscience does not allow me to throw the responsibility solely on these minor people. I myself have never installed an extermination camp for Jews, (...) but if Adolf Hitler personally has laid that dreadful responsibility on his people, then it is mine too (...). Therefore, it is no more than my duty to answer your question in this connection with "yes." A thousand years will pass and still this guilt of Germany will not have been erased'*.[232]

95. While just minutes before, Frank had stubbornly refused to admit any knowledge of these 'concentration camps', upon being asked whether and when he had learnt of the existence of camp Majdanek, a remarkable moment of lucidity occurred. Suddenly, Frank admitted having had knowledge of Majdanek. He even voluntarily elaborated on the existence of Belzec. He claimed having heard of both camps through enemy publications. He further answered: '*I went to Belcec the next*

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[228] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals*, 1-64.
[229] Of course Seidl was very careful not to refer to 'extermination camps'. Frank was indeed ousted by Himmler on more than one occasion in the area of jurisdiction over the extermination camps in the *Generalgouvernment*. However, one must bear in mind the relativity of jurisdiction in the Nazi regime. That Frank had knowledge of and aided the administration of the Holocaust in Poland stands as an unquestionable fact today: M. HOUSDEN, *Hans Frank*, 219.
[230] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals*, 7.
[231] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals*, 7.
[232] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals,* 12.

day. Globocznik showed me an enormous ditch which he was having made as a protective wall and on which many thousands of workers, apparently Jews, were engaged. I spoke to some of them, asked them where they came from, how long they had been there, and he told me, that is, Globocznik, "They are working here now, and when they are through-they come from the Reich, or somewhere from France-they will be sent further east." I did not make any further inquiries in that same area'.[233] It was of course impossible to visit Belzec and 'the ditch' without understanding what exactly was happening to the inmates. It was thus, thanks to Frank that Belzec eventually featured at the IMT.

96. In his testimony, Frank remains deliberately vague as to the exact details of the workings of the camps and he does not refer to Belzec explicitly as an extermination camp. Yet, Frank's following remark certainly hints at it: '*The rumor, however, that the Jews were being killed in the manner which is now known to the entire world would not be silenced'.*[234] Again, without being explicit, the '*manner in which is now known*' refers indeed to the gas chambers. Furthermore, at this point, the only camps mentioned during the trial proceedings as places of extermination using gas chambers were Majdanek, Auschwitz and Treblinka.[235] In this part of his testimony, Frank mentions Belzec in one breath with Majdanek and Auschwitz.[236] So, even when not explicitly mentioning Belzec as an extermination camp, to a clever Prosecution counsel, it must have been clear that Belzec was not just your 'average' concentration camp.

97. Unfortunately, the possibility of exploring this information further was not utilized, as during his cross-examination of Frank, Smirnov again turned to the question of Majdanek. Smirnov was at pains to connect Majdanek to what he referred to as 'the mass murder of Poles', again foregoing the fact that the inmates who were exterminated in the gas chambers were exclusively Jewish.[237] The confusion on the part of Frank was apparent as he stated: '*With reference to Maidanek we were talking about the extermination of Jews. The extermination of Jews in Maidanek became*

[233] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals,* 17.
[234] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals,* 17.
[235] D. BLOXHAM, *Genocide on Trial*, 122.
[236] Later on, in the same passage, he explains his failed attempts to visit Auschwitz.
[237] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals*, 34.

known to me during the summer of 1944. Up to now the word "Maidanek" has always been mentioned in connection with extermination of Jews'.[238] This failed attempt at linking the non-Jewish Polish population with extermination is yet another illustration of the, previously mentioned, misplaced Soviet strategy of focusing on 'Poles' instead of 'Jews'.

98. The fact that none of the prosecution counsels pressed Frank further on the point of Belzec presents a missed opportunity. Keeping the casualty figure of 3,400,000 Jews mentioned in Frank's diary in mind, the prosecutorial powers simply had to do the math. They possessed detailed population statistics on the Jews in the *Generalgouvernment* from before the war and the figures of the Jews exterminated in the camps of Auschwitz and Majdanek and by the *Einsatzgruppen* in the same area.[239] It was a matter of subtracting the numbers in order to find out that about two million Jews were unanswered for. It is not clear why they did not pursue the question of Belzec any further. Perhaps they had the information and they simply felt it was not important enough as a conviction of Frank on the matter of Majdanek, Auschwitz or Treblinka was already sufficiently secured?

99. In any case, by the time Frank was cross-examined the trial had reached its one hundredth and eleventh day. The press was getting tired of all of this talk about war crimes and concentration camps and it seems that the bench at the IMT was quite fed up with it as well.[240] Indeed, on more than one occasion the Tribunal judges urged the prosecution to generalize the facts on concentration camps as they felt the particulars were already sufficiently known: *'(...) It is not in the interest of the Trial, which the Charter directs should be an expeditious one, that further evidence should be presented at this stage on the question of concentration camps'*.[241] At least, the prosecution was not encouraged by the bench to dig up yet another story of what would have seemed like just another concentration camp.

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[238] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals,* 34

[239] Nuremberg Trial Proceedings, Vol. III, *The Trial of German major war criminals,* 568.

[240] B.K. FELTMAN, 'Legitimizing Justice: The American Press and the International Military Tribunal, 1945-1946', *The Historian* 2004, 310-312.

[241] See for figures: Nuremberg Trial Proceedings, Vol. VI, *The Trial of German major war criminals,* 389 and E. HILARY, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law and History*, Cambridge, Cambridge University Press, 120-125.

4.2.1.4. Flowers at Buchenwald

100. Quite separate from Frank's case, *Aktion Reinhardt* featured in great detail and accuracy in a completely different case: the SS as a criminal organisation. On August 7th 1946, Horst Pelckmann, defence counsel for the SS, called Konrad Morgen to the stand.[242] Morgen was an SS judge, who had been responsible for investigating corruption within the ranks of the SS, and more specifically, in the administration by the SS of the concentration camps.[243] He testified to the existence of at least three extermination camps – without naming them – and the organisation of operations of mass destruction in Eastern Poland.[244] He had first come across this information upon receiving reports of a bizarre kind of wedding ritual wherein Jewish prisoners and SS guards had participated under the guidance of Christian Wirth. He interrogated Wirth on this point, upon which the latter also told Morgen that he was in charge of the extermination camps set up for the mass extermination of the Jews along with the task of expropriating their personal belongings. Consequently, apart from the name of the *Aktion* itself, Morgen could recite all of the details of *Aktion Reinhardt* in his testimony: from the deceptive 'train arrival' scheme to the locking up of victims in gas chambers. He was even aware of the origins of *Aktion Reinhardt*, namely the euthanasia program: '*When Wirth took over the extermination of the Jews, he was already a specialist in mass-destruction of human beings. He had previously carried out the task of getting rid of the incurably insane'*.[245] The information Wirth had provided had seemed beyond imagination, so Morgen had decided to see for himself whether it was true. After witnessing the awful truth at Treblinka, Morgen allegedly '*pursued Wirth up to his death*'.[246] Here, finally, was a more or less accurate account of *Aktion Reinhardt*.

101. Morgen's testimony does not seem to have made a great impact on the prosecution nor did it on the Tribunal. Despite the fact that he had been accurate on all aspects of *Aktion Reinhardt*, it was clear from the moment he entered the witness box, that Morgen was not a reliable witness on most other points. Demonizing

[242] Nuremberg Trial Proceedings, Vol. XX, *The Trial of German major war criminals*, 478.
[243] Nuremberg Trial Proceedings, Vol. XX, *The Trial of German major war criminals*, 488.
[244] Nuremberg Trial Proceedings, Vol. XII, *The Trial of German major war criminals*, 490.
[245] Nuremberg Trial Proceedings, Vol. XX, *The Trial of German major war criminals*, 493.
[246] Nuremberg Trial Proceedings, Vol. XX, *The Trial of German major war criminals*, 494.

Christian Wirth did not have any significant repercussions, as Wirth was already dead. The 'hot pursuit' of Wirth by Morgen served more as an illustration that the SS actually investigated its own members on potential misconduct. Morgen was first and foremost a defence witness for the SS, embellishing here and there some of the organisation's actions, even describing Buchenwald as: '*situated on wooded heights, with a wonderful view. The installations were clean and freshly painted. There was much lawn and flowers. The prisoners were healthy, normally fed, sun-tanned, working'*.[247] After months of hearing of one atrocity after the other being perpetrated at Buchenwald, such a description would have sounded utterly ridiculous to the Tribunal. It most likely discredited most of the other things Morgen said.

102. Perhaps hearing the same information from Frank's mouth would have seemed more credible to the judges? That Frank possessed a wealth of information he chose not to disclose is unquestionable. It raises the difficult question of the relationship between criminal punishment and the process of truth-finding, an issue also touched upon by Frank's biographer, Martyn Housden.[248] From the onset of the Trial, it was clear that Frank would in all likelihood receive the death penalty. Fully aware of this, Frank had carefully constructed an image of himself as the repentant ex-Nazi, who, indoctrinated by the wrong ideology, had been misled by Hitler and Himmler, but who certainly had no knowledge of or had not participated himself in any atrocities. This was the image he would take with him to the grave along with all of the dark secrets of *Aktion Reinhardt*. Had Frank been given the credible hope of receiving a prison sentence he would perhaps have disclosed some of the information that is now invariably lost.

103. Despite the fact that some aspects of *Aktion Reinhardt* featured at the IMT, by way of, for example, the citation of the Polish report and the testimony of Lanzman, only the camp of Treblinka was given real attention. It seemed to have been the strategy chosen by the prosecution to only focus on a few representative examples of crimes against humanity that proved most detrimental to the gathering of a complete picture of *Aktion Reinhardt*.

[247] Nuremberg Trial Proceedings, Vol. XX, *The Trial of German major war criminals*, 490.
[248] M. HOUSDEN, *Hans Frank*, 237.

4.3. The phase of representation

104. After two hundred and eighteen days the Tribunal reached its Judgment on October 1st 1946.[249] The Judgment first dealt with each count separately and then proceeded to a discussion of the individual defendants.[250] War crimes and crimes against humanity only took up a very small portion of the Judgment. During the proceedings the focus had been on the conspiracy charge and crimes against peace and this was equally true for the Judgment. The criticism by historians that the Judgment neglected the Holocaust is therefore true, yet it must be nuanced by considerations of legal necessity.[251] The Judgment necessarily condensed the facts of the case to what is judicially relevant in view of the indictment and the substantive elements of the crimes outlined in the London Charter. It could therefore never convey all the nuances of a complete historical inquiry, even less so than the proceedings. Furthermore, the Tribunal could never judge more or different evidence than the one presented during the proceedings by the prosecution or the defence. Could they have awarded more space in their Judgment to the Holocaust? Yes, but in view of the great emphasis put on crimes against peace and the conspiracy charge, taking a U-turn away from this emphasis would have been extremely unlikely.

105. The American gamble that the Tribunal would accept the conspiracy charge with regard to war crimes and crimes against humanity proved a disappointment. The Tribunal, without further ado, rejected Jackson's strategy: '*The Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war (...). The Tribunal will therefore disregard the charges in count one that the defendants conspired to war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war*'.[252] This meant that the efforts the American prosecution had put into trying to prove the persecution of the Jews as part of the conspiracy to commit crimes against peace, had been in vain.[253]

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[249] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals*, 411.
[250] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals*, 413.
[251] D. BLOXHAM, *Genocide on Trial,* 273; M. MARRUS, 'The Holocaust at Nuremberg', 5-42; J. ROBINSON, 'International Military Tribunal and the Holocaust – Some Legal Reflections', 1-13.
[252] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 469.
[253] S. POMORSKI, 'Conspiracy and Criminal Organization', 232.

106. The Tribunal discussed the substantive elements of war crimes and crimes against humanity together in one section of the Judgment.[254] There is a general confusion of the two sets of crimes and rather than discussing the substantive elements of crimes against humanity as such, the focus seems to have been more on war crimes. The nexus requirement played an important role. The Judgment affirmed that crimes against humanity required a connection with, or must have been in execution of, any crime within the Charter. The Tribunal therefore concluded: *'The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter'*.[255] Despite its assessment that the crimes committed before the war could not be considered as crimes against humanity, the Judgment did describe the development of the Final Solution in general, though accurate terms, from its first inception through anti-Jewish speeches, followed by a widespread boycott, to the creation of a whole-scale extermination policy.[256] That the crimes committed before the war did not constitute crimes against humanity, is therefore, from a historical point of view, more of a symbolic nature as they were indeed discussed in the Judgment. Furthermore, it has been assessed by legal scholars, that the Tribunal was referring in fact to its jurisdictional scope, instead of really saying that the crimes committed before the war did not live up to the substantive elements of crimes against humanity.[257]

107. The part of the Judgment that discussed war crimes and crimes against humanity awarded an entire sub-section to the persecution of the Jews.[258] The somewhat jumbled up view the American Prosecution had painted of the concentration camps was combined with some of the issues touched upon by the Soviet prosecution. The Tribunal rightly assessed the existence of camps built for the purpose of extermination of the Jews: '*(...) all who were not fit to work were*

[254] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 469.
[255] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 497.
[256] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 490-497.
[257] R.S. CLARK, 'Crimes Against Humanity', 195; E. SCHWELB, 'Crimes Against Humanity', 146-147.
[258] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 490-497.

destroyed in gas chambers and their bodies burnt. Certain concentration camps such as Treblinka and Auschwitz were set aside for this main purpose'.[259] Yet again, Treblinka and Auschwitz were mentioned in one breath.

108. Concerning the individual guilt of Hans Frank, the Tribunal felt it insufficiently proven that he was guilty on the basis of count one, the crime of conspiracy.[260] He was found guilty on counts three and four, war crimes and crimes against humanity.[261] Reference was made again to Majdanek and Treblinka, this time not as places of extermination, but as concentration camps in relation to the Polish population as a whole.[262] The repentant demeanor of Frank was firmly rejected by the court as it stated: '*At the beginning of his testimony, Frank stated that he had a feeling of " terrible guilt " for the atrocities committed in the occupied territories. But his defence was largely devoted to an attempt to prove that he was not in fact responsible;(...); and that he never even knew of the activities of the concentration camps'*.[263] It also assessed that Frank had been a knowing and willing participant in the reign of terror over Poland.[264]

109. Belzec did not feature, nor was the testimony of Morgen cited in the section of the Judgment dealing with the SS as a criminal organization. No mention of the interpretation of *Aktion Reinhardt* as a pure expropriation mission was made. The damage in that respect had already been done during the proceedings.[265] The example of the IMT has shown that the several political and practical constraints surrounding the documentary phase have had a severe impact on which evidence was available to the prosecution. Furthermore, the legal frameworks of the conspiracy charge and crimes against humanity have distorted the picture of the Holocaust and consequently of *Aktion Reinhardt* significantly. This distorted image was further reinforced by the final Judgment.

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[259] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 495.
[260] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 544.
[261] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 544.
[262] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 543.
[263] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 543.
[264] Nuremberg Trial Judgment, Vol. XXII, *The Trial of German major war criminals,* 544.
[265] See margin nr. 86.

5. The NMT

110. There were a number of second level perpetrators still up for trial in the subsequent proceedings before the NMT. On at least two occasions the prosecution could have tackled the crimes committed in the *Generalgouvernement*: the Medical Case and the Pohl Case.

5.1. The documentary phase

111. The organisation of the subsequent NMT was by no means an obvious choice. Much like the organisation of the IMT, its genesis was determined by policy considerations, practical choices and the personal preferences of some of the key-players. Much of the analysis concerning the different evidence gathering bodies discussed for the IMT also apply here, as the evidence available for NMT came – or at least was supposed to come – from the same agencies. Nevertheless, several new problems arose as well.

5.1.1. Preparing the evidence for the NMT

112. Until the end of 1946, the option of a second international trial was still contemplated by the majority of the four Allied powers of the IMT. At the London Conference of July 1945, the option of a second trial or a series of trials in the respective occupational zones of the Allies was left open and was included as a possible option in the London Charter.[266]

113. The idea of holding a second international trial gained momentum after the 'Krupp'-debacle.[267] As the original idea had been to indict at least one major Nazi industrialist at the IMT, the choice had logically fallen on Gustav Krupp, as head of

[266] Article 14 London Charter.
[267] H. EARL, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958*, 32, P.J. WEINDLING, *Nazi Medicine and the Nuremberg Trials*, New York, Palgrave Macmillan, 2004, 103.

the Krupp armaments concern.[268] Due to a series of communication blunders on the part of the Allied prosecution, no member of the Krupp family was ever tried at the IMT.[269] However, the idea of trying at least some industrialists was firmly planted in the heads of the Soviet and the French prosecution, as it had been their nations that were plundered and exploited by the Nazis.[270] As seen, the British had found themselves, quite against their will, entangled in the organisation of the IMT.[271] Consequently, they wanted to get it over with as quickly as possible. It led them to make the unfortunate promise to the French of supporting a second international trial in order to get the proceedings before the IMT finally going.[272]

114. The Americans had made no such commitment and, if all depended on Jackson, they were not going to either. The prospect of another costly and time-consuming trial did not appeal to him.[273] More importantly, the forced co-operation between his team and that of the Soviets vexed him increasingly.[274] Performing the same exercise all over again, this time, moreover, in a case against leading industrialists, which could easily be abused by the Soviets for anti-capitalist propaganda, seemed a nightmare. In his Report of June 1945 to President Truman, Jackson had already foreseen the possibility of zonal trials.[275] However, the War Department and the OMGUS were not keen on being the ones to blow up Soviet and French expectations, so at least for the time being, until the end of 1946, they chose instead to hold both options open of organising either a second international trial or a

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[268] D. BLOXHAM, ''The Trial that Never was': Why there was no Second Trial of Major War Criminals', *History: J. Hist. Ass.* 2002, 46.

[269] Gustav Krupp had left the management of the firm in the hands of his son, Alfried Krupp in 1942, when old age left him incapable of running it himself. Jackson insisted on indicting Gustav – much to the dislike of the French and the Soviets - as his case fitted better under the conspiracy charge, whereas Alfried's case was more suitable for a conviction under the counts of war crimes and crimes against humanity. However, by the time Gustav was brought before trial his dementia was so bad, the IMT ruled him unfit for trial. Jackson then tried to indict Alfried in Gustav's stead, yet the IMT refused to grant him this switching exercise.

[270] D. BLOXHAM, ''The Trial that Never was', 46; P.J., WEINDLING, 'From International to Zonal Trials: The Origins of the Nuremberg Medical Trial', *Holocaust & Genocide Stud*. 2000, 370.

[271] See margin nr. 56.

[272] P.J. WEINDLING, *Nazi Medicine and the Nuremberg Trials*, 103-105.

[273] D. BLOXHAM, ''The Trial that Never was', 50.

[274] J. FRIEDMAN, 'Law and Politics in the Subsequent Nuremberg Trials, 1946-1949', in P. HEBERER and J. MATTHÄUS (eds.), *Atrocities on Trial. Historical Perspectives on the Politics of Prosecuting War Crimes*, Washington, University of Nebraska Press, 2008, 77.

[275] *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials.*

series of zonal trials.[276] For this reason, President Truman issued Executive Order 9679, which provided for the further prosecution of Axis criminals before either an international tribunal or military or occupational courts.[277] The Executive Order also instructed Jackson to *'designate a Deputy Chief of Counsel, to whom he may assign responsibility for organizing and planning the prosecution of charges of atrocities and war crimes, other than those now being prosecuted as Case No. 1 in the international military tribunal'*.[278] It was decided that Jackson's deputy, Telford Taylor would do the job under the auspices of a new office, the Office of the Chief-of-Counsel for War Crimes (OCCWC) with the same investigative and prosecutorial staff as OCCPAC.[279] In April 1946 a committee composed of representatives of the four prosecution authorities met to discuss the possibility of a second international trial.[280]

115. Taylor himself was more inclined towards the idea of a second IMT, yet Jackson's formidable influence on the War Department swayed the vote in favour of zonal trials.[281] By the end of 1946, Taylor was ordered to delay negotiations about a second international trial pending further instructions.[282] The British seized the moment and voiced their own concerns about further international proceedings.[283] All the while, the French and Soviets were kept in the dark about American plans to try war criminals in their own zone. By the time they were finally informed, in January 1947, two cases before the NMT were already largely set in motion and the French and the Soviets were forced to follow suit.[284]

116. On his own initiative, Jackson had already set the wheels in motion in the summer of 1945 for the creation of a legal framework that could govern US zonal

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[276] H. EARL, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958*, 34.
[277] §1 Executive Order 9679 'Provisions for Representation of the United States in Preparation and Prosecuting Charges of Atrocities and War Crimes Against the Leaders of the European Axis Powers and Their Principal Agents and Accessories' of January 16 1946, in T. TAYLOr, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law n°10*, Washington, Government Printing, 1949, 267.
[278] §2 Executive Order 9679.
[279] §1 OCCPAC General Memorandum No.15 'Organization for Subsequent Proceedings' of March 29 1946, T. TAYLOR, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law n°10*, 268.
[280] J. FRIEDMAN, 'Law and Politics in the Subsequent Nuremberg Trials, 1946-1949',77.
[281] H. EARL, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958*, 34.
[282] P.J. WEINDLING, *Nazi Medicine and the Nuremberg Trials*, 107.
[283] D. BLOXHAM, ''The Trial that Never was', 53.
[284] D. BLOXHAM, ''The Trial that Never was', 54.

proceedings.[285] Following Jackson's June 1945 Report to Truman, the Joint Chiefs of Staff in Germany had drafted JCS 1023/10 in July 1945, which instructed the Commanders-in-Chief of the US forces to detain all persons suspected of crimes against peace, war crimes and crimes against humanity.[286] It urged the other occupying powers to adopt similar policies in their own zones of occupation. The less important criminals would be tried either by one of the former occupied countries, the allies or by the United States in zonal trials. The Theater Judge Advocate, Jeffrey C. Betts was instructed to create a law that would govern proceedings.[287] The result was Control Council Law n°10 (CCL n°10), approved on December 20th 1945. It was largely inspired on the Nuremberg Charter and differed from it only very slightly. It constituted the legal framework for the prosecution of war criminals and other similar offenders, other than those dealt with by the IMT.[288] Ordinance n°7 of October 18th 1946 enacted by Lucius Clay, as Military Governor of the US Zone, further outlined the appointment of the judges, the jurisdiction of the prosecution and the procedure to be followed before the NMT.[289]

117. Ordinance n°7 gave the Chief of Counsel for War Crimes the task of determining which individuals were to be tried by the Tribunals.[290] The logistical problems Taylor faced in the organisation of the NMT were substantive. These are described in great detail by Taylor himself in his Final Report to Lucius Clay.[291] Directive JCS 1023/10 had provided a broad legal basis for the detention of war criminals. As a result, by the end of 1945, some 100,000 individuals found themselves in US custody.[292] Furthermore, CCL n°10 provided for jurisdiction over the crime of membership in categories of a criminal group or organisation declared criminal by the

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[285] H. EARL, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958*, 27.
[286] §5(a), JCS 1023/10 of the Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders of July 8 1945, T. TAYLOR, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law n°10*, 242.
[287] H. EARL, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958*, 26.
[288] J. FRIEDMAN, 'Law and Politics in the Subsequent Nuremberg Trials, 1946-1949', 76.
[289] Ordinance n°7 on the Organisation and Power of Certain Military Tribunals of October 18 1946, T. TAYLOR, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law n°10*, 267.
[290] Article III, Ordinance n°7.
[291] T. TAYLOR, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law n°10*, Washington, Government Printing, 1949, 346.
[292] H. EARL, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958*, 25.

IMT.[293] It meant that another 100,000 people could potentially be brought before trial.[294] It would be an impossible undertaking.

118. The issue of selecting defendants was further complicated by considerable pressure from OMGUS: they wanted to release the bulk of individuals in US custody as quickly as possible and in order to keep the trial momentum going, it was considered psychologically important that the proceedings before the NMT would follow the IMT as soon as possible.[295] Therefore, several strategies to limit the large number of possible defendants were devised. One of which was a law drafted in March 1946 by OMGUS, which foresaw that the lower echelon members of criminal organisations would be tried by German denazification courts.[296] Taylor himself established several working groups that would investigate all levels of German society in order to establish the chains of command and to determine which individuals had been most responsible in the different sectors of society.[297] The first and second group were assigned to investigate the case against leading Nazi industrialists and financiers. A third group was in charge of preparing the case against Nazi organisations, such as the *Reich*'s *Kriegsmarine*, while a fourth group had to look into the crimes committed by medical personnel. Finally, a fifth group concerned itself with the crimes of the foreign office.

119. Despite all the time constraints Taylor and his team faced, this system of working groups proved remarkably efficient. It contributed to the fact that the cases before the NMT were much better structured than those before the IMT and it also brought to light important historical documents pertaining to *Aktion Reinhardt*. Furthermore, Taylor's team managed to reduce the number of possible defendants to around 5,000 individuals.

120. Prosecutorial considerations determined the further cutback of defendants. As Taylor writes in his Final Report: '*Since it was a firm policy of OCCWC not to indict anyone unless there was substantial evidence available against him, the existence of*

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[293] Article II 1(d) CCL n°10.
[294] P.J. WEINDLING, *Nazi Medicine and the Nuremberg Trials,* 105.
[295] T. TAYLOR, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law n°10*, 54.
[296] Law for the Liberation from National Socialism and Militarism of March 5 1946, *Final Report,* 54.
[297] T. TAYLOR, *Final Report,* 54.

such evidence was a sine qua non (...)'.[298] The available evidence was scattered across the different war crimes investigative bodies and across the different zones of occupation.[299] Again – similar to what had happened in relation to the IMT – the lack of a central collection office, shortage of resources and time constraints led Taylor to conclude that '*the available evidence of all kinds was infinitely vast and varied, and we could not possibly scan more than a small fraction of it*'.[300] After this further scanning of evidence the final number of defendants Taylor could muster was 200 to 400 individuals, to be tried in thirty-six trials. Eventually, the other logistical problem that Taylor would have to tackle throughout the NMT proceedings, namely funding, would determine that only 185 defendants were tried.[301] While there had been initial enthusiasm for organising zonal trials, the less than favourable attitude towards them of the general American press and the public, led OMGUS to deliberately underfinance and understaff the OCCWC.[302] The idea of thirty-six trials had to be reduced due to financial restraints and was reduced to twelve trials.

121. Following the judicial escape of the Krupp family, the idea was to focus on the prosecution of major industrialists and financiers. However, as the Americans had almost unilaterally taken the decision that forced the other Allies into organising zonal trials themselves as well, the issue of prosecuting Krupp and consorts had become politically sensitive. The quest had therefore begun to find an alternative case that would be easy to prepare and swift to try. By that time, the investigation teams of the OCCWC had uncovered a large body of evidence relating to medical experiments conducted in the concentration camps.[303] As the culpability of the perpetrators concerned seemed obvious and the amount of documentary evidence substantial, it was considered a safer choice to start the trials with this case.[304] It was therefore only by a strange historical coincidence that the Nuremberg Medical Case - the most notorious of all the NMT cases - even featured at all. As we shall see, it also played a

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[298] T. TAYLOR, *Final Report*, 75.
[299] See margin nr. 44.
[300] T. TAYLOR, *Final Report*, 75.
[301] K.J. HELLER, *The International Military Tribunals,* 36; P.J. WEINDLING, 'From International to Zonal Trials', 368.
[302] B.K. FELTMAN, 'Legitimizing Justice', 300-305; K.J. HELLER, *The International Military Tribunals*, 43; H. FREYHOFER, *The Nuremberg Medical Trial. The Holocaust and the Origin of the Nuremberg Medical Code*, New York, Peter Lang Publishing, 2004, 57.
[303] H. FREYHOFER, *The Nuremberg Medical Trial.* 49; P.J. WEINDLING, 'From International to Zonal Trials', 368.
[304] P.J. WEINDLING, *Nazi Medicine and the Nuremberg Trials,* 1-43.

role in the uncovering of *Aktion Reinhardt*. Other than the Medical case, the NMT focused on four major sectors of the Nazi economy: the judiciary, the *Einsatzgruppen*, the ministries and the High Command.[305] In the twelve cases before the NMT, the defendants would be grouped together according to their involvement in specific activities performed by the four major sectors.[306] This grouping together of defendants held significant drawbacks in terms of securing a conviction for especially crimes against peace, but it also had an impact on the coherence of the truth-finding process with regard to *Aktion Reinhardt*.[307] By the end of May 1947, all of the indictments were filed and the trials could begin.

5.1.2. The legal framework

122. The subject-matter jurisdiction of the NMT, set in Article II of CCL n°10 was modelled after the London Charter. It gave explicit effect to the Moscow Declaration that provided for the perpetrators of the crimes committed in specific geographic locations to be sent back for punishment to the countries in which their deeds had been done.[308] CCL n°10 contained four crimes: crimes against peace, war crimes, crimes against humanity and membership of a criminal organisation.[309] The crime of membership of a criminal organisation had not been included as a separate crime in the London Charter, yet it was needed in order to allow courts to prosecute the individuals who were members of the organisations that had been found criminal by the IMT.[310]

123. Nonetheless, there were significant differences between the substantive elements of the crimes in the London Charter and those of CCL n°10. Concerning crimes against humanity, the new definition now read in Article II 1.(c) CCL n°10: *Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts*

[305] T. TAYLOR, *Final Report*, 75-78.
[306] J. FRIEDMAN, 'Law and Politics in the Subsequent Nuremberg Trials, 1946-1949', 79.
[307] For a more comprehensive account on the implications for crimes against peace, see K.J. HELLER, *The International Military Tribunals*, 47-49.
[308] Moscow Declaration.
[309] Article II 1.(a)(b)(c)(d) CCL n°10.
[310] H. EARL, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958*, 28.

committed against any civilian population, or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated. A number of differences between Article II 1(c) CCL n°10 and Article 6(c) London Charter are evident. Firstly, there is the main capture of 'atrocities and offenses', the scope of which is broadened by 'imprisonment' and 'rape'. Very significantly, the nexus-requirement was dropped, as Article II no longer stated that crimes against humanity had to be committed '*in execution of or in connection with any crimes within the jurisdiction of the Tribunal*'.[311]

124. Making crimes against humanity thus an independent crime was done in an effort to get rid of having to prove the difficult connection with crimes against peace or war crimes, yet it held only very shaky legal ground considering the *nullum crimen sine lege* principle.[312] The advantage was that without the tyranny of the nexus requirement it could be expected that crimes against humanity would play a more substantive role in the proceedings.

125. The dropping of the nexus-requirement might seem as if the American authorities had accepted the judgment of the IMT that clearly had not allowed the expansion of crimes against humanity to the period before 1939. However, this was explicitly not the case, as Article II 3. CCL n°10 stated: '*In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945*'. The intention was clearly to include the period from 1933 onwards.[313]

126. As we have seen, the conspiracy charge had played a crucial role in the strategy of the prosecution before the IMT.[314] Conspiracy was also included in CCL n°10, but it played only a limited role compared to its unifying function in the IMT.[315] Also, CCL n°10 did not explicitly make conspiring to commit war crimes or crimes against humanity legally possible. However, again the prosecution alleged the existence of such a conspiracy in the first three cases before the IMT, which included

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[311] J. FRIEDMAN, 'Law and Politics in the Subsequent Nuremberg Trials, 1946-1949', 83.
[312] C. BASSIOUNI, *Crimes Against Humanity*, 131-135.
[313] K.J. HELLER, *The International Military Tribunals*, 128-130.
[314] See margin nr. 68.
[315] H. EARL, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958*, 27.

the Medical Case and the Pohl Case.[316] Despite these attempts, the conspiracy charge never dominated the proceedings in the way it had dominated those before the IMT. This – next to the absence of the nexus-requirement – provided extra space for the presentation of crimes against humanity.

127. CCL n°10 also provided the NMT with a comprehensive list of so-called modes of participation. It was not enough that the tribunal judged a particular fact as a war crime or a crime against humanity. Rather, once they decided that a fact constituted such a crime, they also had to assess whether criminal responsibility could be attached to it in the case of a particular defendant.[317] While the NMT, much like the IMT was not apt to elaborate on technical legal questions, scholars have identified three aspects of criminal responsibility that had to be proven before the NMT: the commission of a crime specified in the indictment, the defendant's knowledge of the crime and finally also, the defendant's participation in the crime according to one of the modes of participation governed by Article II (2) CCL n°10.[318] The Article identified six possible modes of participation. They would not all prove to be relevant, as for example, Article II (2)(a) CCL n°10 that counted being a 'principal' as a possible mode of participation, could rarely be used in the proceedings before the NMT as most of the defendants were 'desk perpetrators'.[319] The more relevant forms were therefore ordering, abetting, taking a consenting part in, being connected to a criminal enterprise and membership of a criminal organization.[320]

128. The rules of procedure of the NMT were also very similar to those of the IMT. CCL n°10 stated in Article VII, that the Tribunal would not be bound by technical rules of evidence. Ordinance n°7 further allowed the Tribunal to adopt whatever procedural rules it felt necessary for the orderly and expeditious conduct of the trials, which it subsequently did in the Medical Case. There were no rules of admissibility.[321] Any evidence, which was deemed to have probative value by the

[316] K.J. HELLER, *The International Military Tribunals*, 276.
[317] Article II (1) CCL °10.
[318] J. FRIEDMAN, 'Law and Politics in the Subsequent Nuremberg Trials, 1946-1949', 83; K.J. HELLER, *The International Military Tribunals*, 252.
[319] K.J. HELLER, *The International Military Tribunals*, 251.
[320] K.J. HELLER, *The International Military Tribunals*, 251.
[321] Article VII Ordinance n°7.

Tribunal, was allowed.[322] The standard of proof, required for the prosecution to secure a conviction, consisted of proof beyond reasonable doubt.[323] Concerning testimonial evidence, the procedural rules were again modelled after the Common Law and provided that witnesses would be subjected to direct examination and cross-examination.[324] Importantly, Article X Ordinance °7 accepted that certain aspects of the IMT judgment were to be considered by the NMT as *res judicata* or binding facts. These facts were, according to Article X, that invasion, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or had occurred.[325] As much of these facts summed up by Article X were related to war crimes and crimes against humanity as well, it meant that the Tribunals could be substantively shorter when judging similar facts. Unfortunately, the effect of this could be that an even shorter summary account of crimes against humanity in the NMT judgments would be given.

129. While it has generally been argued that the NMT's reliance on documentary evidence was less significant than the IMT, the number of documents introduced in each case reached staggering heights.[326] If the same rigid approach towards documentary evidence was not present under the guidance of Taylor, the real difficulty lay more in the appraisal of the evidence. Indeed, the bulk of the documents introduced at the NMT had not been previously used before the IMT, which meant that the analysis of the probative value of these documents was entirely left to Taylor's team.[327] The pressure to see a timely ending to the investigations meant that documents were overlooked or thought to be of greater importance than they actually were.[328] This misinterpretation of the evidence clearly happened with the documents relating to *Aktion Reinhardt*. Another important caveat with regard to witness testimony is that the use of affidavits, instead of live testimony, was amply used before the NMT.[329] Only the most important defendants were asked to testify in front of the tribunals.

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[322] B. FERENCZ, 'Nurnberg Trial Procedure and the Rights of the Accused', *J. Crim. L. & Criminology* 1948, 148.
[323] J. FRIEDMAN, 'Law and Politics in the Subsequent Nuremberg Trials, 1946-1949', 79.
[324] Article X Ordinance n°7.
[325] Article X Ordinance n°7.
[326] K.J. HELLER*, The International Military Tribunals*, 46.
[327] T. TAYLOR, *Final Report*, 75-78.
[328] K.J. HELLER*, The International Military Tribunals*, 46.
[329] B. FERENCZ, 'Nurnberg Trial Procedure and the Rights of the Accused', 150.

130. The analysis of the documentary phase of the NMT has illustrated that substantive improvements were made when compared to the Documentary Phase of the IMT. The OCCWC could benefit from Taylor's experience. He tackled the problem of evidence gathering in a much more sufficient way by establishing different working groups that reconstructed the history of the *Reich*. Also, important obstacles such as the nexus-requirement, the focus on conspiracy and the dominance of documentary evidence were no longer part of the legal framework. Yet, certain problems remained. Most notably, the focus on the Nazi economy and the time constraints to which the OCCWC was subjected meant that important evidence concerning *Aktion Reinhardt* could be misinterpreted or overlooked.

5.2. The phase of explanation and understanding

131. The trials that could have dealt with *Aktion Reinhardt* most prominently before the NMT, were the Medical Case and the Pohl Case. The first one dealt with the forerunner of *Aktion Reinhardt*, namely the euthanasia program and the latter dealt with the economic aspects of the *Aktion*.

5.2.1. The Medical Case

132. The Medical Case started on December 9th 1946.[330] The focus during the Medical Case was to a great extent on the medical experiments conducted by the Nazi's on prisoners of war (POW's) and other camp inmates. Only a rather small portion of the Case also concerned euthanasia actions and its connection with the *Aktion Reinhardt* personnel. Despite the involvement of the same perpetrators, these euthanasia actions are to be considered as quite separate from the issue of medical experiments. The latter will therefore not be discussed.

133. The Medical Case included twenty-three defendants, most of whom were of the medical profession.[331] The defendants that were most connected to *Aktion*

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[330] Nuremberg Medical Trial, Vol. I-II, *Trials of war criminals before the Nuernberg Military Tribunals under Control Council no. 10*, Washington D.C., US GPO, 1949.
[331] Indictment The United States of America against Brandt et al., Vol. I, *Trials of war criminals before the Nuernberg Military Tribunals under Control Council no. 10*, 8. (Hereafter Indictment Brandt et al.)

Reinhardt were Karl Brandt and Victor Brack. Brandt had been Hitler's personal physician and Reich Commissioner for health and sanitation.[332] He stood at the head of the euthanasia program and was also the first person to suggest to Hitler the use of the same gas chambers utilised in the euthanasia program for the extermination of the Jews.[333] Brack was one of the three defendants who did not hold a medical position. Instead, he had been SS *Oberführer* and *Oberdienstleiter* of the Führer's Chancellery.[334] As Globocnik had first contacted the Führer's Chancellery to secure the support of T-4 personnel for *Aktion Reinhardt*, Brack subsequently visited Globocnik several times to discuss the details of the transfer of personnel.[335] Both defendants therefore had ample and detailed knowledge of the *Aktion*.

134. Count One of the indictment charged all of the defendants with conspiracy to commit war crimes and crimes against humanity.[336] Count Two charged both Brandt and Brack, in §9, with being principals in, accessories to, ordering, abetting, taking a consenting part in, and being connected with plans and enterprises in the execution of the 'euthanasia program'.[337] The indictment further elaborated on the details of the euthanasia program. A small, but crucial last sentence was added in §9: '*German doctors involved in the euthanasia program were also sent to Eastern occupied countries to assist in the mass extermination of Jews*'.[338] Without explicitly calling it such, this sentence referred to the early beginnings of *Aktion Reinhardt*. The inclusion of the transfer of personnel of the *T-4 Aktion* to the *Generalgouvernmen*t in the Indictment indicated that this aspect would substantially feature during the proceedings. The defendants were also charged with Count Three, crimes against humanity, which also considered the crimes under §9 of Count Two as constituting crimes against humanity.[339]

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[332] H. FRIEDLÄNDER, 'Die Entwicklung der Mordtechnik. Von der "Euthanasie" zu den Vernichtungslagern der "Endlösung", in H. ULRICH, K. ORTH and C. DIECKMANN (eds.), *Die Nationalsozialistischen Konzentrationslager. Entwicklung und Struktur*, Göttingen, Wallstein, 1998, 494.
[333] H. FRIEDLÄNDER, 'Die Entwicklung der Mordtechnik', 494.
[334] Indictment Brandt et al., Vol. I, *Trials of war criminals before the Nuernberg Military Tribunals under Control Council no. 10,* 9.
[335] H. FRIEDLÄNDER, 'Die Entwicklung der Mordtechnik', 499.
[336] Indictment Brandt et al., Vol. I, *Trials of war criminals,*10.
[337] Indictment Brandt et al., Vol. I, *Trials of war criminals,*15.
[338] Indictment Brandt et al., Vol. I, *Trials of war criminals,*15.
[339] Indictment Brandt et al., Vol. I, *Trials of war criminals,* 16.

135. The opening statement given by Taylor on December 9th 1946, made it clear that establishing the link between the euthanasia program and the mass killings of Jews in the East was a deliberate strategy of the prosecution.[340] Indeed, the link with the Eastern occupied countries would enable them to argue that euthanasia was a war crime.[341] A chronological evolution was given of the euthanasia program, starting with the symbolic and meaningful dating of the start of the euthanasia program on September 1st 1939, the very day that Germany had invaded Poland.[342] The prosecution recounted how the euthanasia program increasingly got out of hand as it gradually became synonym with wholesale slaughter, as '*the defendants involved in the euthanasia program sent their subordinates to the eastern occupied territories to assist in the mass extermination of the Jews'*.[343] It was further alleged that the conspiracy to commit war crimes and crimes against humanity came not only from Himmler's distorted racial agenda, but also from the German military leaders, as they '*caught up the opportunity which Himmler presented them with and ruthlessly capitalized on Himmler's hideous overtures in an endeavour to strengthen their military machine*'.[344] This of course again established the link between the euthanasia program and the war.

136. New evidence concerning *Aktion Reinhardt* that had not featured in the IMT was brought to light by the prosecution. This included the affidavit of Hans Bodo Gorgass, one of the euthanasia doctors of Hadamar Institute. He testified that Christian Wirth, as administrative director of several euthanasia institutes, had told him that he had been transferred to the Lublin area for the purpose of extermination.[345] Apart from these new documents, old evidence that had also been used before the IMT was reappraised as well. The prosecution amply cited the testimony given by judge Konrad Morgen at the IMT, which had been untrustworthy on all points except on the issue of the link between euthanasia and the extermination of the Jews in the *Generalgouvernment*.[346] Finally also, the Gerstein Report was not only cited for its relevance concerning the use of Zyklon-B gas in other extermination

[340] P.J. WEINDLING, *Nazi Medicine and the Nuremberg Trials*, 252.
[341] H. FREYHOFER, *The Nuremberg Medical Trial,* 53.
[342] Nuremberg Medical Trial, Vol. I, *Trials of war criminals*, 64.
[343] Nuremberg Medical Trial, Vol. I, *Trials of war criminals*, 67.
[344] Nuremberg Medical Trial, Vol. I, *Trials of war criminals,* 69.
[345] Nuremberg Medical Trial Document NO-3010, Pros. Ex. 503, Vol. I, *Trials of war criminals*, 836.
[346] Nuremberg Medical Trial Document NO-2614, Pros. Ex. 503, Vol. I, *Trials of war criminals,* 836.

centres, but now it was also used for its importance in illustrating the connection between euthanasia and the *Aktion*. In the report Gerstein recounts that in 1942 he was appointed chief of the branch disinfection. His task involved procuring poison gas for mass disinfection. On June 8th 1942, he was ordered to take with him '*canisters of prussic acid*' and was brought to Lublin, where he was given the task by Globocnik to improve the use of gas in the gas chambers of Belzec, Sobibor and Treblinka.[347] Importantly, with regard to the Medical Case, Gerstein recounted visiting Christian Wirth, former euthanasia expert, who according to Gerstein '*was on familiar ground*' at Belzec.[348] Gerstein witnessed the entire gassing procedure there and again in Treblinka. The fact that Morgen's testimony and Gerstein's report were given its appropriate meaning at the NMT illustrates the great professionalism of Taylor's team.

137. Yet, regarding the issue of the transfer of personnel to Globocnik, the case against Brandt remained weak. Despite the use of the above cited evidence, there were no documents that directly implicated him on this part, besides the pre-trial affidavit given by Brack, in which he had stated that '*it would have been impossible for these men to participate in such things without the personal knowledge and consent of Brandt. The order to send these men to the East could only have been given by Himmler to Brandt, possibly through Bouhler*'.[349] Due to the lack of substantial evidence, the prosecution focused on establishing the chain of command with Brandt as key figure.[350] Brandt himself portrayed his responsibility in the euthanasia program as extremely limited. It was merely his task to license the physicians on the basis of the personal responsibility of the physicians.[351]

138. The case against Victor Brack with regard to the transfer of euthanasia-personnel was considerably more substantial. Apart from the evidence cited above, the prosecution used a heavily incriminating letter sent from Dr. Wetzel of the *Reich* Ministry for the Occupied Eastern Territories to the *Reich* Commissar for the East, Hinrich Lohse. It described how Brack had agreed to produce gassing devices for the

[347] Nuremberg Medical Trial Document, PS-1553, Pros. Ex. 428, Vol. I, *Trials of war criminals*, 847.
[348] Nuremberg Medical Trial Document, PS-1553, Pros. Ex. 428. Vol. I, *Trials of war criminals,* 847.
[349] Nuremberg Medical Trial Document, NO-426, Pros. Ex. 160. Vol. I, *Trials of war criminals,* 875.
[350] Nuremberg Medical Trial, Vol. I, *Trials of war criminals*, 807-809.
[351] Nuremberg Medical Trial, Vol. I, *Trials of war criminals*, 819.

solution of the Jewish question and how he had even offered to send his chemist, Dr. Kallmeyer for assistance.[352] There was also the pre-trial affidavit given by Brack in which he admits that he sent euthanasia personnel to Lublin to render them at the disposal of Globocnik in 1941. However, according to Brack, he only '*found out that they were used to assist in the mass extermination of the Jews*', at the end of 1942 or the beginning of 1943.[353] The fact that at the least he had not knowingly participated in the extermination of the Jews was a tactic he also tried to use during his cross-examination by Associate Counsel Arnost Hornik-Hochwald. He even denied having heard of the name Eichmann. Upon being confronted with the letter from Dr. Wetzel, Brack exclaimed: '*I should even like to maintain that misuse, terrible misuse, was made of my name. (...) I must admit that at this period something was going on which entirely contradicted my opinion, but this could only have been done under misuse of my name and my agency. I have never willingly participated in these things*'.[354]

139. Several other defences were relied upon by the defendants as well, such as the argument that euthanasia was applied as a genuine medical method to end the suffering of the disabled and the incurable ill.[355] Equally were the decisions to kill presented as the result of individual decisions of the doctors after careful consideration of each patient.[356] It was therefore, according to them, not up to the Tribunal to place themselves in the position of the doctors. While some of these defences may have held a hint of credibility with respect to the ordinary euthanasia program, they paled into insignificance when confronted with the issue of mass extermination of Jews in the East.

140. In the closing argument against Brandt, the prosecution again referred to his involvement in the transfer of personnel, '*who were sent to Lublin and put at the disposal of SS Brigadefuehrer Globocnik in order to assist in the mass extermination of Jews*'.[357] It equally considered Brack's defence of not knowing that the personnel was meant to participate in mass killings, as utterly fabricated. It had been clear that

[352] Nuremberg Medical Trial Document, NO-365, Pros. Ex. 507. Vol. I, *Trials of war criminals,* 903 and 921.
[353] Nuremberg Medical Trial Document, NO-426, Pros. Ex. 160. Vol. I, *Trials of war criminals,* 842.
[354] Nuremberg Medical Trial, Vol. I, *Trials of war criminals,* 889.
[355] Nuremberg Medical Trial, Vol. I, *Trials of war criminals*, 813.
[356] Nuremberg Medical Trial, Vol. I, *Trials of war criminals*, 814.
[357] Nuremberg Medical Trial, Vol. I, *Trials of war criminals*, 803.

'*Wirth's assignment came from Bouhler's office, from the very office where Brack was active*'.[358]

141. While the connection between euthanasia and *Aktion Reinhardt* was amply referred to and illustrated with documents by the prosecution in the Medical Case, no actual mention of the name of the *Aktion* nor of its size or its implications was made. At this point, it is clear that the prosecution had not yet conceived of the *Aktion* as constituting a premeditated, clearly outlined goal of the Nazi hierarchy.

5.2.2. The Pohl Case

142. The so-called 'Pohl Case' or the *United States v. Pohl case* involved the prosecution of members of the *Wirtschaftsverhaltungs Hauptamt* (WVHA), one of the twelve main offices of the SS, with as its most prominent defendants, Oswald Pohl and his deputies August Frank[359] and Georg Loerner.[360] The Pohl Case fitted within the original intention of Taylor to focus on the economic perpetrators within the Nazi hierarchy.[361] Pohl was, like Frank and Loerner, another desk perpetrator. Next to Karl Wolff, he was the most prominent protagonist concerning the economic administration of the concentration camps as head of the WVHA, subordinate to Himmler only.[362] As we have seen, Pohl had played a particularly important role in the implementation of the economic aspects of *Aktion Reinhardt*.[363] August Frank had been deputy chief of the WVHA and chief of Amtgruppe A of the WVHA, in charge of budget.[364] His tasks, amongst others, consisted of allocating funds for the administration of the concentration and extermination camps. Georg Loerner was chief of Amtsgruppe B of the WVHA, which was in charge of the food supply to the concentration camps. He was also deputy chief of Amtsgruppe W, which

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[358] Nuremberg Medical Trial, Vol. I, *Trials of war criminals*, 813.
[359] Not to be confused with Hans Frank.
[360] M. LIPPMAN, 'The Other Nuremberg: American Prosecution of Nazi War Criminals in Occupied Germany', *Ind. Int'l & Comp. L. Rev.* 1992-1993, 30.
[361] See margin nr. 121.
[362] M. SALTER, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg*, 30-31.
[363] See margin nr. 31.
[364] Indictment The United States of America against Pohl et al., Vol. V, *Trials of war criminals before the Nuernberg Military Tribunals under Control Council no. 10*, Washington D.C., US GPO, 1949, 200. (Hereafter Indictment Pohl et al.)

administered the economic enterprises owned by the WVHA.[365] At one point, in 1943, he had been responsible for the auditing of *Aktion Reinhardt*.

143. Historians have been quick to say that the Pohl trial is responsible for the fact that *Aktion Reinhardt* has been conceived of, for a period of at least twenty years, as a purely economic operation.[366] The mentioning during the proceedings of the IMT of 'Special Staff Reinhard' as being responsible for the expropriation of Jewish assets has certainly complicated a correct understanding of the *Aktion* at the NMT.[367] Yet, upon a detailed examination of the trial records of the NMT, the picture is slightly more nuanced.

144. The trial began on April 8th 1947 and constituted the fourth case before the NMT.[368] All twelve defendants in the Pohl Case were charged with Count One, a conspiracy to commit war crimes and crimes against humanity.[369] Importantly this conspiracy, amongst other crimes, consisted of the carrying out of the policies and purposes of the German *Reich* with reference to the extermination of the Jews and also of the plundering of Jewish property.[370] Pohl, Frank and Loerner were also charged with Count Two and Three, namely war crimes and crimes against humanity, which included the WVHA's operations in occupied territories.[371] The indictment further stated with regard to the count of crimes against humanity, that these war crimes also constituted crimes against humanity in so far as they had been committed against German nationals and nationals of other countries. Finally, the defendants were charged with Count Four, the membership of a criminal organisation, namely the SS.[372]

145. With reference to war crimes, the indictment considered that: '*Countless Jews, Russians and Poles were immediately driven from the transport trains and trucks into*

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[365] Indictment Pohl et al., Vol. V, *Trials of war criminals,* 201.
[366] D. BLOXHAM, *Genocide on Trial,* 115; J. ROBINSON, 'International Military Tribunal and the Holocaust – Some Legal Reflections', 1-13.
[367] See margin nr. 86.
[368] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals before the Nuernberg Military Tribunals under Control Council no. 10*, Washington D.C., US GPO, 1949, 199.
[369] Indictment Pohl et al., Vol. V, *Trials of war criminals,* 201-203.
[370] Indictment Pohl et al., Vol. V, *Trials of war criminals,* 202.
[371] Indictment Pohl et al., Vol. V, *Trials of war criminals*, 204-207.
[372] Indictment Pohl et al., Vol. V, *Trials of war criminals*, 207.

the waiting gas-chambers, where they were exterminated. Throughout the administration of the concentration camps, the worst treatment was systematically given to Jews of all nationalities and Poles and Russians'.[373] This illustrates a clear recognition of the existence of gas chambers and the fate of the Jewish community. Although some sloppiness can still be detected during the trial proceedings concerning the difference between concentration and extermination camps, this passage of the indictment was an important indication that greater prominence would be given to an analysis of the Nazi extermination program.

146. Upon a closer examination of the opening statement given by Prosecutor James Mchaney on April 8th 1947, it quickly becomes clear that the Pohl case was better structured than the trial against the major war criminals at the IMT.[374] Again, this is a testament to the great effort Taylor put into the investigation of the Nazi hierarchy.

147. A large portion of the opening statement was dedicated to the general history and organization of the SS and the WVHA, a badly needed introduction, as the SS was notorious for its unrevealing and complicated structure.[375] From a legal point of view, it also served as an illustration of the complicity of Pohl in the administration of the Death Heads and the earliest concentration camps – such as Dachau – from at least 1934 onwards, when he became chief of the WVHA.[376] As there was no statute of limitation to benefit from, it was clear that the prosecution would try to implicate the defendants from the earliest possible moment in time. During this chronological description of the workings and development of the WVHA within the SS, the opening statement further made reference to the participation of the WVHA in the extermination program of Auschwitz and Treblinka.[377] Despite the minor detail of naming Auschwitz and Treblinka in one breath, for the first time, all three camps of *Aktion Reinhardt* were recognized as extermination camps: '*Indeed, the slaughter in the charnel houses of Auschwitz, Treblinka, Majdanek, Belsec, and Sobibor was on a*

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[373] Indictment Pohl et al., Vol. V, *Trials of war criminals*, 206.
[374] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 211.
[375] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals,* 216.
[376] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 216.
[377] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals,* 219.

vaster scale. These extermination camps were all located in Poland'.[378] Importantly, a portion of the statement was dedicated to the euthanasia program that had also been administrated by the WVHA.[379] There was, however, no link made between the euthanasia program and the Eastern extermination camps.

148. From a historical outline of the concentration camp system under the administration of the WVHA, Mchaney moved on towards the role of Pohl and consorts in the exploitation of the properties of Jewish prisoners. This expropriation was deemed by him to be *Aktion Reinhardt: 'It was the task of special staff "G" to seize and account for all property in the Government General of occupied Poland derived from the extermination and enslavement of Jews. This ghoulish program was called "Action Reinhardt" presumable in honor of Reinhard Heydrich who was assassinated in the summer of 1942'*.[380] It was further assessed that the *Aktion* could be divided into three spheres consisting of the deportation of the Jews, the exploitation of personal property and the exploitation of Jewish manpower and industrial equipment.[381] This is a crucial passage of the opening statement, as it seems to suggest that the Prosecution considered *Aktion Reinhardt* in its economic aspects only. However, during the further development of the Pohl case, a very peculiar thing happened: from the cross-examination of the defendants could be derived that *Aktion Reinhardt* had been more than just an expropriation exercise. The prosecution picked up on this as in their final statement they suddenly also discussed the extermination side of *Aktion Reinhardt*. One can only guess why the prosecution did not include this information in the indictment. Is it possible that they only understood the greater implications of the *Aktion* as the trial progressed? Or did they consider the documentary materials only as solid enough to prove just the economic aspects?

149. Indeed, a considerable amount of documents pertaining to mostly the economic part of *Aktion Reinhardt* had found its way into the investigations of Taylor's team. Consequently, the case against Pohl rested on solid documentary evidence and on incriminating statements of witnesses in that regard. In fact, a top secret letter from Globocnik to Himmler dated January 5th 1944, which is considered

[378] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals,* 252.
[379] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals,* 225.
[380] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals,* 254.
[381] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals,* 254.

by historians to be one of the key documents regarding *Aktion Reinhardt*[382], was put into evidence by the prosecution.[383] The letter was sent to Himmler by Globocnik '*to give an account of the economic side in order to show you that in this respect also the work is as it should be*'.[384] While the letter specifically dealt with the economic aspects of the *Aktion*, the mentioning of '*the economic side*' necessarily also implied the existence of another side.

150. The main strategy of Alfred Seidl, this time as Pohl's defence lawyer, rested on proving that general administrative and executive matters with regard to the concentration camps were not within Pohl's competence. As there was not much documentary evidence that pleaded in favour of Pohl's defence, Seidl had opted to prove his case to a large extent by letting Pohl testify.

151. Ironically, it seems to have been thanks to the technique of direct examination not only of Pohl, but of the other defendants and witnesses as well, that the full extent of *Aktion Reinhardt* surfaced. Although there is a wide array of different defences the defendants relied upon before the NMT, such as the *Führerprinzip*, defence of superior orders, necessity, etc.,[385] only the defences relevant to *Aktion Reinhardt* will be discussed. The defence strategy during direct examination consisted of alleging that the defendants had not known the criminal origin of the goods due to the cloak of secrecy that had surrounded the entire operation and that they had only been a part in administrating the economic side of the *Aktion.* At least for Pohl, Seidl's strategy was destined to fail as, being the head of the WVHA, his signature was on most of the documents put in evidence by the prosecution.[386] They consisted of reports that were provided to Pohl concerning the total amount of goods – with detailed lists – taken from the 'evacuation' of the Jews.[387] Strikingly, the judges of the Tribunal played a very proactive role in trying to trick Pohl into admitting that he had known of the origin of the goods.[388] After confronting Pohl with the report, presiding Judge Toms

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[382] Y. ARAD, *Belzec, Sobibor, Treblinka*, 430-437; P. WITTE and S. TYAS, 'A New Document on the Deportation and Murder of Jews', 468-474.
[383] Nuremberg Pohl Trial Document, Vol. V, NO-046, Pros. Ex. 486.
[384] Nuremberg Pohl Trial Document, Vol. V, NO-046, Pros. Ex. 486.
[385] K.J. HELLER, *The International Military Tribunals*, 295-312.
[386] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 693-695.
[387] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 693-695. 'Evacuation' being a known synonym for murder. Something which had already been known at the IMT.
[388] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 742.

asked him about the whereabouts of the goods, followed by the following sharp barrage of questions:

'Q. Well, you had a good idea, not some sort of an idea; you know exactly where it came from, didn't you?

> *A. I did not know against whom it was directed, however, I could imagine that it was in connection with the extermination of the Jews. That was clear to me.*

Q. You knew it was not a present from somebody?

> *A. Yes. I knew that.*

Q. You knew it was taken away from somebody?

> *A. Yes. I knew that, too.*

Q. And you suspected it was the Jews?

> *A. Yes.'*[389]

152. That the WVHA had been heavily implicated in the process of extermination was not only asserted through the direct examination of Pohl, but also through the cross-examination of one of his defence witnesses, Karl Wolff, Himmler's chief of staff.[390] As organiser of the transportation from the ghettos to the concentration and extermination camps, he was also heavily implicated in *Aktion Reinhardt.* Wolff had been on the list of possible defendants for the IMT, yet the suggestion of including him in the dock had been vetoed by Allen Dulles of the OSS because of the part Wolff had played in the negotiations surrounding the surrender of the German forces.[391] His absence from the IMT had guaranteed him a spot in the subsequent proceedings before the NMT, had it not been for another veto from Dulles.[392]

153. Fully aware of the comfortable position he was in, Wolff adopted a somewhat smug attitude on the witness stand on June 3rd 1947, speaking with considerable pride of the innocence of the SS.[393] In his overconfidence he claimed that Pohl would not have been informed of the final solution and that he himself had only found out about it through Swiss newspapers. It made him vulnerable to attempts of the prosecution to

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[389] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 744.
[390] M. SALTER, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg*, 30-31.
[391] M. SALTER, *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg*, 128.
[392] K.J. HELLER, *The International Military Tribunals*, 57.
[393] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 770.

discredit him during cross-examination.[394] Not to wonder, therefore, that his cross-examination lasted three days. Upon being asked, by Chief Prosecutor, Jack Robbins, whether he knew of the deportation of the Jews from the Warsaw ghetto to Treblinka and Auschwitz, he firmly denied having had any knowledge of this.[395] Yet, Robbins showed him a letter to refresh Wolff's memory, sent from Ganzenmüller to Wolff, reporting on the smooth deportation of some 5.000 Jews each day to Treblinka and Sobibor.[396] Without blinking, Wolff persisted to claim that he had not been aware of mass deportations.

154. Yet upon being asked by Seidl when he had first heard of *Aktion Reinhardt* and whether he had at any point discussed it with Himmler, Wolff suddenly equated the *Aktion* with the extermination of the Jews: '*Of the terrible extermination of the Jews and other exterminations in the camps which was carried out at Lublin and Auschwitz I heard for the first time on 19 March 1945 (...)*'.[397] It made matters more difficult for Pohl, as Judge Phillips further questioned Wolff on the point of whether it was in any way possible that members of the WVHA could have completed their tasks of allocating labour forces to concentration camps and private enterprises, without having had knowledge of the exact figures of deaths in the camps.[398]

155. The short interaction between Judge Toms and Pohl did not stop the other defendants from trying to deny having known of the origins of the goods. Upon being asked by his defence counsel, Carl Haensel, whether he had had anything to do himself with the confiscation of Jewish property personally, Georg Loerner, vehemently asserted that he '*did not know anything about this problem*'.[399]

156. The direct examination that eventually gave away the extermination component of the *Aktion* most plainly was that of August Frank by his own defence counsel, Gerhard Rauschenbach, due to a miscomprehension between the two. That Frank had intimate knowledge of *Aktion Reinhardt* was not to be doubted, as the prosecution had at its disposal a memorandum in which Frank had requested the

[394] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 771.
[395] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 776.
[396] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 777.
[397] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 679.
[398] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 680.
[399] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 744

allocation of all funds of the *Aktion* coming from the 'evacuation' of the Jews to be directed to the SS Ethnic German Welfare Office.[400] Frank wanted to explain that the WVHA had had nothing to do with what he referred to as '*the affair'*, by which he simply meant the transfer of Jewish funds to the Reichsbank. However, this was not entirely clear to Rauschenbach who asked him: '*Do you mean by this the term "Reinhardt Action"? Or do you mean the confiscation of Jewish property, generally speaking?*'. Presumably, Rauschenbach himself implied by '*Reinhardt Action*' merely the confiscation of Jewish property from the Lublin area as opposed to the general confiscation of Jewish property. Yet, his question prompted Frank to a panicky response in which he firmly stated that '*it could never have been the extermination action. (...) the Reinhardt Action, the term as such, was always known to the WVHA as an economic-use action. (...) not one single word was contained of the killing or of an extermination, or any other kind of Action Reinhardt*'.[401]

157. Instead of deflecting attention away from the origins of *Aktion Reinhardt*, the statements of the defendants and of Karl Wolff, only seemed to have achieved the opposite effect. In any case, it is remarkable that neither the indictment nor the opening statement of the prosecution discussed *Aktion Reinhardt* other than in its economic components, but the closing argument of the prosecution, given on September 17th 1947 suddenly discussed the extermination component as well.[402] It is however important to bear in mind that the focus was still predominantly on the economic aspects of the *Aktion*, as all of the documents introduced in evidence presented clear illustrations of this. It was no doubt the strongest part of the case. Nevertheless, for the first time during the proceedings, *Aktion Reinhardt* was also described as involving a process where the Jews '*were asphyxiated in the gas chambers and incinerated*'.[403]

158. The account of the extermination side of the *Aktion* in the prosecution's final statement is still rather vague and overly generalised, and also not completely accurate in all its details. For example, after having outlined the process of herding the Jews into ghettos along with the confiscation of most of their movable goods, the

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[400] Nuremberg Pohl Trial Document, NO-724, Pros. Ex. 472.
[401] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 758.
[402] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 822.
[403] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 844.

prosecution states that '*they were "resettled" a second time by being shipped from the ghettos into the concentration camps*'.[404] In truth the Jewish prisoners were either brought immediately from the ghetto's to the extermination camps or to transit camps where they would only stay for a couple of days before being moved to one of the main extermination sites.[405] These transit camps were not concentration camps in the real sense of the word, namely of being designed for forced labour. None of the camps of *Aktion Reinhardt* were mentioned in the closing argument. Understandably, from a legal point of view, the focus lay entirely on Auschwitz as it was the camp that had been visited personally by Pohl and who had been identified at the scene there by several witnesses.[406]

159. Considerable attention was also given to the destruction of the Warsaw ghetto as an important event in the history of *Aktion Reinhardt*, yet also rightly assessing that it '*was no more than an incident in the execution of the Action Reinhardt, and if we think of it as more than that, we lore our perspective and sense of proportion in judging the extent of the Action Reinhardt*'.[407] Then finally, the prosecution moved on to a key passage in its final statement where it discussed the defence strategy of denying any knowledge of the origins of the goods. The prosecution stated that the utilisation of Jewish property was a principal objective of the *Aktion,* yet '*it had a further purpose of achieving a "final solution of the Jewish problem"; this is, of wiping out the Jews in Europe completely. The aim was double-barreled and the two objectives were inseparable*'.[408] In view of this aim of extermination it was deemed as highly improbable that none of the defendants had known of the criminal origins of the goods.[409] This passage illustrates that it was indeed thanks to the defendants' own strategy that the extermination side was also discussed in the prosecution's final statement.

160. Seidl's closing statement again alleged that Pohl had not known of the criminal origins of the goods and that he had not taken a considerable part in *Aktion*

[404] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 844.
[405] Y. ARAD, *Belzec, Sobibor, Treblinka*, 119-125.
[406] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 650.
[407] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 845.
[408] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 845.
[409] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 845.

Reinhardt.[410] Furthermore, it was claimed that Pohl had acted on the superior orders of Himmler, a defence that had been rejected by the IMT. In his own final statement, like Frank and Loerner, Pohl never referred to the *Aktion*, yet only claimed that he had not known the extent of the extermination nor that he had ever supported it.[411]

161. The analysis of the phase of explanation and understanding shows that despite the efforts of Taylor to conduct a quasi-historical investigation into the development of the Nazi *Reich*, some factors of *Aktion Reinhardt* were still overlooked. Euthanasia took only a small portion of the proceedings in the Medical Case and the emphasis on the economic facets of the Nazi regime meant that the extermination side of the *Aktion* was overlooked in the Pohl Case. The direct and cross-examination of the defendants had revealed the true extent of the Aktion, yet because of its absence in the indictment, the chances of its inclusion in the final judgment were slim.

5.3. The phase of representation

5.3.1. The Medical Case

162. Much like the IMT, the Tribunal in the Medical Case did not elaborate any further on the substantive elements of war crimes or crimes against humanity. The only delineation between the two sets of crimes that the NMT made was that crimes against humanity were committed against German civilians and nationals of other countries.[412] The two sets of crimes were subsequently discussed together. The focus in the Judgment lay to a considerable extent on the medical experiments conducted by the Nazis.[413] It was not even directly discussed whether euthanasia as such constituted a war crime or a crime against humanity. However, it was certainly considered as such as it was separately discussed in the sections dealing with the personal responsibility of Brandt and Brack and both were also subsequently found guilty on both Counts.[414]

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[410] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 865.
[411] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals*, 932.
[412] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals,* 174.
[413] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals,* 171.
[414] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals,* 278 and 191.

163. Concerning the personal responsibility of Karl Brandt, the Tribunal assessed that it was sufficiently proven that, despite Brandt's objections to the contrary, his position within the Reich Commission of Health was such that it showed that Hitler had put his personal trust and reliance in him.[415] He was considered to be head of all medical affairs in the Reich.[416] While the euthanasia program was discussed in some length, no mention was made of the transfer of personnel from the program to the Eastern extermination camps. Instead it was asserted in a very general way that from the disposal of '*incurables*', the program was extended to Jews and concentration camp inmates where they were '*deemed by the examining doctors to be unfit or useless for labour*'.[417] This is certainly true for camps such as Auschwitz, but no such selection procedure existed in the extermination camps of *Aktion Reinhardt*.[418] The Tribunal further determined that even if it were true that, as Brandt contended, he was not implicated in the extermination of Jews, it was already clear from the beginning that non-German nationals were also selected for euthanasia.[419] Therefore, if euthanasia does not constitute a war crime, the Tribunal decided that it was then at least a crime against humanity. This section of the Judgment illustrates that despite the rather weak documentary evidence that incriminated Brandt to the direct involvement in the extermination of the Jews, the Tribunal nonetheless accepted that he was guilty of planning it and carrying it out and was therefore found guilty on both counts and also on the count of criminal membership.[420]

164. In the discussion of Victor Brack's personal criminal responsibility, no mention was made of the transfer of euthanasia personnel either. For the section concerning the factual outline of the euthanasia program, the Judgment simply referred to the section dealing with the criminal responsibility of Brandt.[421] The Tribunal recognised the crucial part that Brack had played in the development of the gas chambers, describing how victims were unknowingly being led into the so-called shower room. It concluded that: '*Brack's direct connection with and participation in*

[415] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals*, 192.
[416] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals,* 192-193.
[417] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals,* 197.
[418] See margin nr. 29.
[419] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals*, 198.
[420] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals*, 198.
[421] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals,* 279.

the execution of euthanasia is conclusively proved by the evidence in the record'.[422] Brack was found guilty on Counts Two, Three and Four.[423]

165. The question that invariably surfaces when analysing the judgment is: why did *Aktion Reinhardt* not feature in the same way it seemingly did during the proceedings? The indictment actually referred to the transfer of personnel and the trial record shows that the prosecution thought the connection with the Eastern extermination camp important enough to include a barrage of documents illustrating exactly this link. The evidence against Brandt concerning the transfer of personnel was indeed rather weak, yet he was found guilty of planning and carrying out the extermination of the Jews. Especially the evidence against Brack seems to have been highly incriminating and yet again no mention was made of the transfer of personnel in the Judgment. A number of different explanations for the absence of the transfer of personnel for *Aktion Reinhardt* rise. One possible explanation is that it was perhaps confused with or included in what the Tribunal referred to as '*the extermination of the Jews*' in general. Another and perhaps more plausible explanation is that, as the guilt of the defendants was already clear on other points, the issue of the transfer of personnel was not deemed relevant enough to discuss separately. Indeed, the Judgment in the Medical Case seems rather short on the issue of euthanasia in general, as the focus during the trial was more on medical experiments.

166. Brandt and Brack, together with two other defendants, were both sentenced to death by hanging.[424] Of the 124 convictions before the NMT, only 24 defendants were sentenced to death.[425] However, after the precedent of the IMT, the prospect of a death sentence to the defendants in the Medical Case – the first case before the NMT – must have loomed large. No explanation was given by the Tribunal as to why they had awarded the death sentence. However, legal scholars have suggested that the logic applied by the judges was related to the defendants having either membership of the SS or prime responsibility for the conduct of at least one type of medical

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[422] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals,* 281.
[423] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals,* 281.
[424] Nuremberg Judgment Medical Trial, Vol. II, *Trials of war criminals*, 298-299.
[425] K.J. HELLER, *The International Military Tribunals*, 328.

experiment.[426] Brack, it is suggested, was sentenced to death, because of his central role in the euthanasia program.[427] If this reasoning is true, it illustrates that at least the Tribunal deemed the carrying out of the euthanasia program as 'sufficiently horrible' to warrant the death penalty.

5.3.2. The Pohl Case

167. A considerably large portion of the Judgment rendered in the Pohl Case dealt with the issue of *Aktion Reinhardt*, followed by a determination of the level of participation of each defendant in the *Aktion* and an analysis of the different defences they relied upon during the proceedings. In its definition of the *Aktion*, however, the Tribunal solely focused on its economic aspects: '*The purpose of the action was to gather into the Reich all the Jewish manpower and wealth which could be reached. It was an ambitious and profitable undertaking for Germany*'.[428] No further elaboration by the Tribunal into the extermination aspects of the *Aktion* was made. Considering the rights of the accused, this should not come as a surprise as the indictment against the defendants had also limited itself to its economic aspects. Article II (2) CCL °10 had made it plain that in order to establish criminal responsibility the defendant was to have committed a crime as specified in the indictment. A necessary counterpart of this rule is therefore that the Tribunal must limit itself to the facts of the indictment.[429]

168. The defendants had early on in the proceedings filed a motion to strike the conspiracy to commit war crimes and crimes against humanity from the indictment. They alleged that the Tribunal did not have jurisdiction to try it as a separate substantive crime. The Tribunal granted the motion and included it in its Judgment as well.[430] Again, attempts to create a conspiracy to commit war crimes and crimes against humanity had failed.

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[426] M. DRUMBL, *Atrocity, Punishment, and International Law*, Cambridge, Cambridge University Press, 2007, 50; K.J. HELLER*, The International Military Tribunals*, 314.
[427] K.J. HELLER*, The International Military Tribunals*, 314.
[428] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 977.
[429] B. FERENCZ, 'Nurnberg Trial Procedure and the Rights of the Accused', 148.
[430] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 961.

169. After having described the *Aktion* as such, the Tribunal asserted that without a doubt the facts describing the extermination of the Jews, the euthanasia program, the spoliation of Jewish property, *Aktion Reinhardt*, etc. constituted war crimes and crimes against humanity.[431] Again, the Tribunal in the Pohl Case did not elaborate any further on the substantive elements of war crimes or crimes against humanity. The extermination of the Jews was accepted as *res judicata*: '*As to the systematic extermination of the Jews, the International Military Tribunal has found that, in pursuance of a fanatical public policy, it was deliberately decided to exterminate an entire race of human beings*'.[432] The secrecy defence that some of the defendants had tried to rely upon during the proceedings was not accepted by the Tribunal, as their unawareness of these facts could not reasonably be believed and that '*the ignorance professed by many of the defendants is the ignorance of convenience*'.[433]

170. The Judgment then moved on to assess which modes of participation could be recognised on the part of the defendants. As Oswald Pohl was the principal defendant of the Case, a large portion of the judgment is awarded to assessing the criminal responsibility of Pohl in the different facts the Tribunal considered to be crimes against humanity. The Tribunal first assessed that Pohl's duties had not been merely perfunctory or formal, but that he had been the active head of one of the largest branches of the SS.[434] With regard to the concentration camps, the Tribunal continued that Pohl could not possibly escape the fact that he was the administrative head of the agency '*which brought about these tragedies*'.[435] In fact, the Tribunal dryly asserted that there quite probably was no other person in Germany who knew as much about all of the details of the concentration camps as he did.[436] Equally, it found that Pohl's participation in the medical experiments at the concentration camps was intimate and direct. More importantly, with regard to *Aktion Reinhardt*, the Tribunal established Pohl's criminal participation: '*Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation in the after-phases of*

[431] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 962.
[432] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 970.
[433] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 980.
[434] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 980.
[435] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 984.
[436] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 984.

the action make him particeps criminis in the whole affair'.[437] He was found guilty on Counts Two, Three and Four.

171. Next in line in the Judgment, was August Frank, who was also deemed guilty on all three counts. He was found to be an active and direct participant in the slave labour program.[438] More importantly, his contention that he had not known of the criminal origins of the collected goods of *Aktion Reinhardt* was rejected. It seemed highly improbable to the Tribunal that the sheer amount of loot that came into the hands of the WVHA never led Frank to question where it actually came from.[439] Yet, according to the court the fact that he had participated in the confiscation of Jewish goods, did not necessarily make him guilty to the extermination of the Jews as such: '*We therefore cannot find the proof that the defendant Frank is in law guilty of the murder of the Jews in the concentration camps, but we do find that he was guilty of participating and taking a consenting part in the wholesale looting which has been described as Action Reinhardt*'.[440]

172. Concerning, Georg Loerner, the Tribunal found that his connection with *Aktion Reinhardt* was insufficiently established to warrant a conviction. It ruled that whole from the evidence it may be inferred that he had knowledge that the goods had been confiscated from the Jews, '*but in the aggregate it is insufficient to justify a determination beyond a reasonable doubt that Loerner took a consenting part in or was actually connected with the action itself'*.[441] Despite this, he was still found guilty on all three counts.

173. The issue of 'reasonable doubt' is interesting, because, as seen above, the IMT never elaborated further on this point. The NMT had, however, from the very beginning established that '*proof beyond a reasonable doubt, does not mean beyond a vain, imaginary or fanciful doubt, but means that the defendant's guilt must be fully proved to a moral certainty*'.[442] It may be true that, from a legal point of view, Frank and Loerner could not be considered guilty beyond a reasonable doubt. A historian

[437] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 989.
[438] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 994.
[439] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals*, 996.
[440] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 997.
[441] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,* 1010.
[442] Nuremberg Pohl Trial, Vol. V, *Trials of war criminals,* 965.

writing on the same subject would not talk in terms of 'guilty' or 'not guilty', but most likely would have accepted their indirect or even direct complicity in *Aktion Reinhardt*.

174. Oswald Pohl was sentenced to death by hanging, accountably on the basis of his prime involvement with the WVHA.[443] Loerner and Frank were both sentenced to life imprisonment.[444]

175. Another aspect worth mentioning concerning the Judgment in the Pohl Case is the concurring opinion of Judge Michael A. Musmanno, who is primarily known for his role as presiding judge in the Einsatzgruppen Case, where he played a very active role throughout the trial. His concurring opinion is interesting, partly because it is one of the few concurring or dissenting opinions to be found at the NMT, but also because of the reasons Musmanno had for writing it. Despite the majority opinion of the Judgment with regard to the guilt or innocence of the defendants, which he agreed with, Musmanno felt that the Judgment '*does not devote (...) considerable space to the corpus delicti itself*'.[445] Indeed, Musmanno wished to write '*one document, sufficiently comprehensive to which the legal profession and the lay public, now and in the future, can turn for an authoritative account on concentration camps*'.[446] What followed in his concurring opinion was therefore a highly detailed and somewhat dramatic – even at one point quoting Shakespeare[447] – one hundred page account of the concentration camp system ranging from an analysis of the SS bureaucracy to the treatment of the inmates in the concentration camps. Musmanno also referred to what he considered to be one of the goals of the Nuremberg trials, namely that '*it affords the German people to see what frauds their leaders were, what petty thieves they were and more than all, what despoilers they were not only of the present but of the future*'.[448] Judge Musmanno therefore clearly underwrote the Allied policy of re-educating the German people.

[443] Nuremberg Judgment Pohl Trial, Vol. V, *Trials of war criminals,*1064; K.J. HELLER*, The International Military Tribunals*, 317.
[444] Loerner was first sentenced to death, yet his sentence was commuted to life imprisonment. Frank's sentence was commuted to 15 years.
[445] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1067.
[446] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1067.
[447] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1119.
[448] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1162.

176. All good intentions aside, some crucial factual mistakes slipped into his analysis. Firstly, in the section concerning the euthanasia program, Musmanno never referred to the fact that former euthanasia personnel was shipped to the *Generalgouvernement* to assist Globocnik in the setting up of *Aktion Reinhardt*.[449] Perhaps Musmanno was influenced by the Judgment of the Medical Case where the issue of the transfer of personnel was not discussed either.

177. Secondly, Musmanno persistently equated Auschwitz with Belzec. The first time this happened is when he described the transportation of the Jews to the ghetto's, which he illustrated with passages of the Gerstein Report: '*Kurt Gerstein describes the arrival of a 45-car at Auschwitz (Belsec)*'.[450] Apparently it was not clear to him that Belzec constituted an entirely different camp and not – as he seemed to suggest – some kind of a sub-camp at Auschwitz. The second time he made this mistake, he first announced that '*an eye witness (would) describe the operation of the gas chambers in Auschwitz*'[451], after which he again quoted two pages from the Gerstein Report. Unfortunately, the pages quoted were a description of Belzec and not of Auschwitz. A final time, also concerned a reference to Gerstein '*who describes the killings at Auschwitz (Belsec)*',[452] when Musmanno described the Treblinka death camp. This citation again suggests that Musmanno thought that Belzec was a sub-camp.

178. Thirdly, Musmanno rightly recounted that in the spring of 1942 another extermination camp was set up at Treblinka. Yet then he alleged that '*death was inflicted here by gas and steam, as well as by electrical current*'.[453] As already stated, the use of steam or electrical current was not used at the camps of *Aktion Reinhardt*.[454]

179. Under the telling heading '*Thievery*', Musmanno also dealt with *Aktion Reinhardt* more explicitly as he recounted how the late Reinhard Heydrich gave his

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[449] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1117.
[450] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1127.
[451] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1129.
[452] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1134.
[453] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1134.
[454] See margin nr. 92.

name to an action connected to the spoliation of Jewish property.[455] It is clear from his account that he also – like the other judges in the Pohl Case – considered *Aktion Reinhardt* to primarily consist of an expropriation exercise. Yet, contrary to the majority Judgment, Musmanno also referred – albeit in a very concise way – to the extermination side of the *Aktion*: '*As the Jew arrived at Auschwitz, or any other extermination camp, he turned in for "safe keeping" everything he carried with him except the clothes on his back. Before entering the "shower room" he removed his clothing and then after the lethal bath some sturdy Nazi apprentice dentist tore out his gold fillings*'.[456] Despite the fact that Auschwitz is wrongly considered as exclusively an extermination camp here, at least some reference was made to the killing side of *Aktion Reinhardt*.

6. Conclusion: evaluating the theory of incompatibility

180. The following assessment of how the Nuremberg trials have dealt with the history of *Aktion Reinhardt*, must be subjected to the important caveat that it is made with the benefit of hindsight. Apart from the undeniable fact that mistakes were made at Nuremberg, this thesis has also shown that considering the challenges the Tribunals faced, it is almost a miracle that the trials were able to take place at all and in the orderly and – at least seemingly – professional way that they did. This is in itself worthy of respect. However, the fact remains that at strategic points in the process of the Historiographical Operation conducted at the IMT and NMT, problems occurred that significantly influenced the further development of history writing by the Tribunals.

6.1. Problems encountered during the Historiographical Operation

181. The historiography of *Aktion Reinhardt* within the IMT and the NMT presents only a rather limited view of what the *Aktion* actually was. The name '*Aktion Reinhardt*' was mostly associated with the program of expropriation of the Jews by the WVHA. The camp that featured the most was Treblinka, although it was

[455] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1145.
[456] Concurring Opinion Musmanno, Vol. V, *Trials of war criminals,* 1146.

sometimes depicted as being merely a concentration camp. In the Medical Case, *Aktion Reinhardt* was indeed linked to euthanasia, yet euthanasia itself played only a secondary role next to the issue of medical experiments. The one-sided and incomplete account of *Aktion Reinhardt* stemmed from several problems that arose during the Historiographical Operation conducted by the legal actors of the trials.

182. When analysing the documentary phase of the IMT and the NMT it is clear that OCCPAC and the OCCWC did not operate in a vacuum. They formed part of a complex societal and political environment that exerted considerable pressure on the evidence gathering process. From 1941 onwards the Allied Powers received regular reports of *Aktion Reinhardt*. The evidence presented in section 3.2 of this thesis may even be only the tip of the iceberg, as there are still state archives holding intelligence documents that historians do not have access to yet. The fact that this information never reached OCCPAC was, in the case of the IMT, mainly due to the post-war indecisiveness and differences of opinion between the Allies as to what exactly to do with the Nazi leadership. The lack of one central co-ordinating war crimes policy and a fully functioning international agency to implement it, resulted in a proliferation of different national war crimes investigative bodies that did not work together. Furthermore, the information these bodies collected was subject to national political considerations and was at times deliberately kept secret. This jeopardised the efficient collection of evidence during the documentary phase.

183. While political considerations certainly also played a role in the genesis of the NMT, such as the discussion between the Allies whether or not to hold a second international trial, the problems that most urgently interfered with the gathering of evidence were financial and time constraints. It is however clear that the strategy Taylor adopted of establishing working groups to conduct, what one could almost refer to as 'historical research' into the Nazi *Reich*, led to a significantly better understanding of the Nazi hierarchy and a more thorough selection of evidence. Taylor's team could also benefit from his experience of being a member of the American prosecution team before the IMT. The most crucial documents concerning *Aktion Reinhardt* indeed surfaced during the proceedings before the NMT or were better valued for their importance.

184. The fact that important evidence never reached the OCCPAC or the OCCWC also had an impact on the subsequent phases of understanding and representation. This is very clear when closely examining the strategic choices Jackson and Taylor made when preparing their cases for respectively the IMT and NMT. Not only was important evidence not made available to them due to outside pressures, but they also chose not to select certain evidence or to selectively interpret it as their focus lay elsewhere. This is where the documentary phase and the phase of understanding and explanation unequivocally overlap. Perhaps the most telling example of how the one is influenced by the other is the Gerstein Report, which recounted in detail the killings at Belzec and Treblinka. Yet, it was merely used for the gas bills attached to the document.

185. The goal of the prosecution was of course to establish the criminal responsibility of the defendants. In both the IMT and the NMT the facts were chosen to prove exactly that. Yet, at the IMT, it was the conspiracy charge and crimes against peace that served as an overarching interpretative scheme throughout the American phase of the trial. It dominated the entire phase of understanding and explanation. Crimes against humanity were reduced to representative examples of the greater scheme to launch an aggressive war. This led to a jumbled and incoherent account of the Holocaust during the proceedings and the virtual non-discussion of *Aktion Reinhardt*. Crimes against humanity were specifically designed to deal with the atrocities committed by the Nazis against their own German population, yet the nexus-requirement dictated that a connection need to be made with war crimes or crimes against peace. Therefore, the Soviet phase of the trial, which dealt with war crimes and crimes against humanity in the *Generalgouvernment*, was decidedly shorter than the American phase of the IMT as it was exactly in the American phase that the launching of an aggressive war had to be proven. Furthermore, the Soviet prosecution directed its attention to atrocities committed against Soviet POW's and failed to distinguish the Jewish victims as a distinct group. Jackson's choice to focus on documentary evidence also had an impact on how *Aktion Reinhardt* featured. The documents cited in court referred mostly to Treblinka. It therefore became the only camp of the *Aktion* that really featured before the IMT. Equally, witnesses, such as Konrad Morgen, were not valued for the information they could provide.

186. The NMT suffered significantly less from the dominance of the conspiracy charge and benefited from the absence of the nexus-requirement. Yet the focus of Taylor's team on prosecuting mostly industrialists and those involved in the war economy, meant that less attention was given to the thorough preparation of the Medical Case. It may have also contributed to the fact that *Aktion Reinhardt* was initially viewed as purely an economic exercise.

187. Apart from the choices made by the prosecution teams, criminal procedure as applied by the IMT and the NMT itself, had an impact on the phase of understanding and explanation. The most notable example is the issue of criminal punishment, especially the death penalty, which hovered above the heads of the defendants and may have led them to hide information. Equally, the long and drawn out system of reading documents in court urged the Tribunal at the IMT to speed up the trial, leaving less time for the presentation of war crimes and crimes against humanity. However, procedure could also have a positive impact. The system of cross-examination at the NMT made the prosecution realise that there was more to *Aktion Reinhardt* than merely expropriation.

188. The phase of representation was perhaps most problematic as it necessarily condensed the facts to those that constituted the criminal responsibility or innocence of the defendants. These facts did not necessarily coincide with what the prosecution attempted to prove during the proceedings. An important example is how in the Medical Case the transfer of personnel to Globocnik was not considered as relevant enough to even mention in the Judgement. Equally, in the Pohl trial, it was considered as not sufficiently established beyond all reasonable doubt that Goerg Loerner and August Frank had been guilty of exterminating the Jews. Furthermore, even if the facts mentioned in the Judgment correlated with the presentation of evidence by the Prosecution, the case of the IMT has shown that the same confused account of concentration and extermination camps were recaptured in the Judgment.

6.2. Res judicata pro veritate habetur?

189. Aside the risk of engaging in counterfactual history, the question that inevitably rises is: Could these problems have been averted or were they, as the Theory of Incompatibility suggests, unavoidable? And if so, what are the implications?

190. As seen in the above analysis, problems in especially the documentary phase of the historiographical operation were caused by contextual factors, which are always subject to change. The way contextual factors therefore shape international criminal trials will always be different. Yet, the issue remains, however, that political pressure seems to be a constant factor in international criminal law.[457] This tends to have a significant impact on which defendants can be indicted, when or if they can be extradited and which evidence is made available to prosecutorial authorities.

191. Yet, the legal restraints that are a necessary correlate of the tasks of the legal actors in the courtroom have a significant impact on the historiographical operation as well. With regard to the prosecution – and also to some extent, the defence – these problems are, as we have seen, related to the impact of sentencing on the truth-finding process before and during the trials. They also include restrictions on the presentation of facts inherent to the legal framework of the different criminal counts and the limitations that proving criminal responsibility has on the presentation of facts. With regard to the judge, this involves assessing whether criminal responsibility is proven beyond all reasonable doubt and also involves a necessary condensation of the facts to what is relevant in that regard. These legal constraints seem to be inevitable to the judicial process.

192. An assessment of the Theory of Incompatibility with regard to *Aktion Reinhardt* therefore has shown that a one-sided and impoverished historical account will inevitably leave the courtroom when it engages in history. What does this imply from both a historical and a legal point of view?

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[457] R.A. WILSON, *Writing History in International Criminal Trials*, 24.

6.2.1. Historical implications

193. Examining exactly which impact the Nuremberg trials have had on the collective memory[458] of *Aktion Reinhardt* is very complex and would therefore have to be the subject of a whole new thesis. This thesis therefore limits itself to merely some tentative conclusions in that regard. Nevertheless, it is no coincidence that the general public considers Auschwitz and Bergen-Belsen as prime signifiers of the Holocaust rather than the camps of *Aktion Reinhardt*.[459] In fact, historiography of *Aktion Reinhardt* only really got underway from the 1970's onwards.[460] Not surprisingly this is after the so-called *Aktion Reinhardt*- and Euthanasia trials took place in Western Germany in the mid-1960's.[461] In the immediate post-war period little or no attention was given by historians to the Eastern death camps or to the fate of the predominantly Polish Jews that perished there. In fact, most attention in the Nuremberg trials, but also in historical monographs of World War II, was given to POW's and resistance fighters as national heroes. The early historical works of the Holocaust only really appeared in the 1960's. The ones that mentioned *Aktion Reinhardt*, saw it as mostly an economic operation, not surprisingly, exactly the interpretation that was given to it by the Nuremberg trials.[462] Even more striking is that legal scholars who analyse the Nuremberg trials even as recent as the year 2011, take the historical accounts outlined at the trials at face-value and refer to the *Aktion* as an expropriation exercise.[463] The focus of these scholars was of course on the legal

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[458] Collective memory is here understood in the way it is defined by C. FOURNET in *The Crime of Destruction and the Law of Genocide. Their Impact on Collective Memory*, Hampshire, Ashgate Publishing, 2007, xxxi: '*Collective memory can be understood as the merging of the different individual memories and thus as the predominant understanding of past events within the same group, the global society'.*

[459] D. BLOXHAM, *Genocide on Trial.*

[460] D. POHL, 'Die "Aktion Reinhard" im Licht der Historiographie', in B. MUSIAL, *'Aktion Reinhardt': Der Völkermord an den Juden im Generalgouvernement 1941-1944*, Osnabrück, Fibre Verlag, 2004, 17.

[461] D.W. DE MILDT, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany: the Euthanasia and Aktion Reinhard Trial Cases*, The Hague, Nijhoff, 1996, 447.

[462] D. POHL, 'Die "Aktion Reinhard" im Licht der Historiographie', 21. Clear in: R. HILBERG, *The Destruction of the European Jews*, Chicago, Quadrangle Books, 1961, 630; L. POLIAKOV, *Bréviaire de la haine. Le IIIe Reich et les Juifs, Paris, Calmann-Lévy*, 1960, 280.

[463] Dating from 1992-1993: M. LIPPMAN, 'The Other Nuremberg', 35. Dating from 2011: K.J. HELLER*,* *The International Military Tribunals*, 248.

issues at stake in the Tribunals and not on its representation of facts, yet it certainly does not help the correct translation of the *Aktion* to the greater public.

194. A far more damaging effect of the absence of or, of the limited way in which *Aktion Reinhardt* featured in the Nuremberg trials, is historical revisionism in the form of Holocaust denial. Notorious revisionists, such as Robert Faurisson and David Irving, gratefully focus on the seeming absence of evidence surrounding the camps of Belzec, Sobibor and Treblinka to deny the Holocaust.[464] Ironically, they often refer to the *Aktion* as consisting merely of dealing with the economic effects of displacement of the Jews.[465] Apart from these well-known deniers, one need only to conduct a simple search on the internet to find a large number of websites 'refuting' *Aktion Reinhardt*.[466] The fact that in the 1960's the *Aktion Reinhardt* and Euthanasia trials eventually took place does not seem to have helped much. By then, the enthusiasm for war crimes trials had dwindled into non-existence. The only trial between 1945 and the mid-1960's – until the Eichmann trial – that ever really managed to attract global media attention was the IMT.[467]

6.2.2. Legal implications

195. Quite apart from the historical importance of *Aktion Reinhardt*, stand the particular needs of victims or victims' relatives of the *Aktion* or of the Holocaust – one might even say – of genocide in general. While traditionally the objectives of criminal justice have always been retribution and deterrence, upcoming legal and criminological sub-disciplines, such as victimology, restorative justice and transitional justice, suggest that victims' needs should be included as one of those objectives as well. Not recognizing or forgetting the crimes that have been committed would constitute an injustice all over again. It engenders, what is generally referred to as, 'secondary victimisation'.[468] Research has shown that this is exactly what

[464] See for Faurisson: http://robertfaurisson.blogspot.com/2009/08/aktion-reinhardt-1986.html; See for Irving: http://www.inconvenienthistory.com/archive/2009/volume_1/number_2/david_irving.
[465] http://robertfaurisson.blogspot.com/2009/08/aktion-reinhardt-1986.html.
[466] This is just a small sample of the search results for the google search term 'Aktion Reinhardt revisionism': http://www.revblog.codoh.com/2012/01/aktion-reinhardt/
http://forum.codoh.com/viewtopic.php?f=2&t=6055#p42099.
[467] B.K. FELTMAN, 'Legitimizing Justice', 310.
[468] C. FOURNET in *The Crime of Destruction and the Law of Genocide*, 127.

perpetrators of genocide intend to do.[469] Genocide is not merely killing, it involves quite literally the obliteration of the victims' bodies and of any memories of the fact that they ever existed.[470] This is quite clear when applying these findings to *Aktion Reinhardt*, where victims' bodies were actually pulverised and the extermination centres razed to the ground.

196. It is exactly through survivor testimonies that collective memory is created. Ironically, criminal trials as an institution are recognized as ideal arena's for the construction of collective memory.[471] It is the ultimate place where victims can testify. It is argued that the Eichmann trial in fact brought the process of collective memory of the Holocaust under way, because of the way it was structured, as it extensively made use of victim testimony.[472] This is of course aside from the question of whether or not the Eichmann trial distorted historical facts.[473] Furthermore, the trial medium can be a valuable tool for achieving closure and the official recognition that the suffering of the victims has actually taken place. As seen, the absence of such an official recognition sets the door open for revisionism.

6.3. The truth of the matter

197. This presents us with the following paradoxical situation: victims' needs centre around the existence of collective memory for which the trial medium is ideal, yet, as this thesis has shown, the constraints on history writing inherent to the legal process inevitably distorts this memory and, in the case of *Aktion Reinhardt*, possibly to the detriment of the victims. This paradox seems to be the result of the greatest difference between the tasks of the historian and the judge relating to the final phase of representation of the Historiographical Operation: the constant re-writing of history vs. the finality of the judgement. The judge creates a final version – or even – a canon of history. Not only will flaws in the Historiographical Operation impede the creation

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[469] C. FOURNET in *The Crime of Destruction and the Law of Genocide*, 128.
[470] C. FOURNET in *The Crime of Destruction and the Law of Genocide*, 128.
[471] See for a very extensive analysis: M. OSIEL, *Mass Atrocity, Collective Memory and the Law*, 321; L. DOUGLAS, *The Memory of Judgment*, 336; C. FOURNET in *The Crime of Destruction and the Law of Genocide*, 127.
[472] L. DOUGLAS, *The Memory of Judgment*, 187.
[473] If we may believe Hannah Arendt it did in fact distort memory: H. ARENDT, *Eichmann in Jerusalem*, 312.

of collective memory, but it also sets the door open for historical revisionism and the denial of mass atrocities.

198. These considerations show that the problems that occur when courts engage in history are not just of theoretical importance, but have grave practical and societal consequences as well. The claim that modern tribunals make of being able to construct a 'true' historical record is therefore far from innocent. Not only should courts refrain from making these bold statements, but more awareness also is needed of the important impact their truth-finding process has on collective memory. This might also call for specific legal mechanisms to guide this process of memory-making on the right track, such as awarding more time and space for victim participation and victim testimony. More attention must also be given to the important role historians could play in aiding prosecutorial and investigative teams either behind the scenes or as expert witnesses. More research is this area is undoubtedly needed, because the truth of the matter is, that, without these mechanisms, when judges become historians, both law and history are damaged.