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## **The Legal Moment in International History: Global Perspectives on Doing Law and Writing History in Nuremberg and Tokyo, 1945–1948.**

### **Introduction**

When the Second World War ended, the work of the courts began. Instead of a political-diplomatic search for stability and peace by way of a ‘conference to end all wars,’ as in the Paris Peace Conference of 1919-1920, the new world order emerging from the mass destruction of lives and assets was to manifest and validate itself in a court drama on display to all, ideally in a ‘trial to end all wars’.<sup>1</sup> However, the global dimensions of the Second World War and the complexities of modern court trials made it inconceivable from the beginning to concentrate everything at only one location and in only one trial. Consequently, numerous trials were held from the Philippines via Japan and China to Germany, Italy, and France. The major ones were the two international military tribunals – one in Nuremberg (IMT: 1945-1946) and the other in Tokyo (IMTFE: 1946-1948).<sup>2</sup>

Although doing law and writing history may be very diverse activities, each following its own rules and logics, there are moments in history when the two were very much interlinked and interdependent. This was certainly the case in the late 1940s, in a period of transitional justice that we would like to call the *legal moment in international history*.<sup>3</sup> It was a global moment, but – as the following contributions will demonstrate – one with very disparate national and regional consequences. Especially in historiography, this global moment also proved to have a long-term effect. Not only did the legal interpretation of the events determine the way in which the war was remembered in each of the respective countries, but the tribunals also pre-empted many of the scholarly historiographic debates. Therefore, the basic argument

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<sup>1</sup> Concerning the ‘trial to end all wars’, see D. Luban, “The Legacies of Nuremberg”, in G. Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford, 2008 (1987), 638–672, 639.

<sup>2</sup> Among the overviews published in recent years are G. Mettraux (ed), *Perspectives on the Nuremberg Trial*; N. Boister / R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford, 2008; D. Bloxam, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford, 2001; M. Kittel, *Nach Nürnberg und Tokio: "Vergangenheitsbewältigung" in Japan und Westdeutschland 1945-1968*, Munich, 2004; Y. Totani, *The Tokyo War Crimes Trial*. For Tokyo, see also C. Hosoya et al. (eds.), *The Tokyo War Crimes Trials: An International Symposium*, New York, 1986.

<sup>3</sup> For the older notion of a ‘Nuremberg moment,’ see G. Mettraux (ed), *Perspectives on the Nuremberg Trial*, Oxford, 2008, 605; for the term ‘global moment’ more generally, see S. Conrad / D. Sachsenmaier, “Introduction: Competing Visions of World Order: Global Moments and Movements, 1880s–1930s,” in S. Conrad / D. Sachsenmaier (eds.), *Competing Visions of World Order: Global Moments and Movements, 1880s–1930s*, Basingstoke, 2007, 1–25.

on which the following contributions build is, following Michele Battini, ‘that the judicial representation of the war offered by the trials of the second half of the 1940s [...] has provided, for a long time, the categories of a selective memory.’<sup>4</sup>

The growing estrangement of Clio and Justitia over the past few decades further contributed to the selective appropriation of these trials. At least some historians and legal scholars have lamented on this development, but to little avail.<sup>5</sup> According to Mark Mazower, historians – in part out of a ‘well-founded fear of treading on lawyers’ toes’ – have instead allowed research ‘to turn the history of law into a ghetto in historical studies while the history of how law has been deployed in international politics remains a ghetto within a ghetto.’<sup>6</sup> A closer look at the international war crimes tribunals and their histories, however, may contradict Mazower’s claim. Nuremberg and Tokyo are the ‘most often studied trials’ of the twentieth century, if not automatically ‘the best studied trials’.<sup>7</sup> From the moment these trials took place, historians and legal scholars were engaged in a lively and often controversial exchange.<sup>8</sup> It proved a defining factor that most of the significant source material on the Second World War was initially examined, used, and interpreted in connection with the tribunals. Yet, in order to understand how the inherent logic of law and the processual drama influenced the way in which we remember the war, it is necessary to examine more closely the transfer processes from the legal to the historical context and to question how the perception of the actors involved turned judges into historians and historians into judges. What then emerges is a complex, often confusing interplay between jurisprudence and historiography. From this perspective, Mazower’s plea to give legal history greater consideration in historiography, particularly that of the Second World War, makes a very pertinent point. We argue the case that the interconnectedness between the different narratives of the war crimes tribunals and the methodological and empirical turns in historiography needs more reflection.

The following contributions address five aspects in particular. We ask, firstly, how the international military tribunals of Nuremberg and Tokyo influenced historiography, thus turning Friedrich Hegel’s notion of ‘*Weltgeschichte als Weltgericht*’ [World history as the

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<sup>4</sup> M. Battini, *Peccati di memoria. La mancata Norimberga italiana*, Roma, 2003, 35.

<sup>5</sup> See D. Hedinger / D. Siemens, What’s the problem with law in history? An introduction, in: *InterDisciplines. Journal of History and Sociology* 3 (2012) 2, 6-17.

<sup>6</sup> M. Mazower, *Hitler’s Empire. Nazi rule in occupied Europe*, London 2009, 380.

<sup>7</sup> D. Pendas, “Seeking Justice, Finding Law: Nazi Trials in the Postwar Era, 1945-1989,” in *Journal of Modern History* 81 (2009), 347-68, here 359.

<sup>8</sup> For a survey of the recent literature see the review essay by K. C. Priemel, “Consigning Justice to History: Transitional Trials after the Second World War,” in: *The Historical Journal* 56 (2013) 2, 553-581.

world's tribunal] upside down.<sup>9</sup> It is well known that both tribunals were planned from the outset as global media events that, apart from 're-educational' functions in the former Axis nations, also served to legitimize the hegemonic discourse of the West, in general, or the United States, in particular.<sup>10</sup> Whereas historians so far have put much effort into demonstrating that the intended political 'message' of the Tokyo and Nuremberg tribunals was received with considerable hostility in post-war Japan and Germany,<sup>11</sup> we don't know much about the narratives established in the former allied nations.<sup>12</sup> Secondly, we believe that the relationship between justice and history is not to be understood as a simple equivalence. Instead, the following studies highlight the difference between courtroom proceedings and historiography, their distinct logics and mechanisms, as well as their complicated relationship.<sup>13</sup> Thirdly, we focus on historical actors and their agency: in doing law, lawyers, prosecutors and judges produced means and materials that were later used by historians for writing history. Fourthly, we prefer to use plurals instead of singulars: formative for historiography were not one, but two major tribunals – Tokyo and Nuremberg – although in very different ways. This brings us to a fifth and final point: with the following contributions, we add to a global perspective of the trials in Nuremberg and Tokyo by analysing them as entangled events. Somehow paradoxically, however, our thesis is that the outcome of these two world tribunals often resulted in a re-territorialisation, re-regionalisation, or re-nationalisation of the history of the Second World War.

This observation points to a general problem. Although in the last decade historians of legal and political history have increasingly emphasised the necessity to pay more attention to the global dimensions of Tokyo and the IMT, the existing historical work on these tribunals is still very nationally or regionally focussed. In several ways, global history challenges the history of the trials we are now accustomed to, not only because it points to the Eurocentric bias of the existing scholarship, which has dealt with the IMT approximately five times more often than

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<sup>9</sup> For details of Hegel's concept of history, see R. Bubner / W. Mesch (eds.), *Die Weltgeschichte - das Weltgericht? Stuttgarter Hegel-Kongress 1999*, Stuttgart, 2001.

<sup>10</sup> For details, see in particular the discussion by Y. Totani, *The Tokyo War Crimes Trial. The Pursuit of Justice in the Wake of World War II*, Cambridge and London, 2008.

<sup>11</sup> For the German case, see H. Krösche, „Abseits der Vergangenheit. Das Interesse der deutschen Nachkriegsöffentlichkeit am Nürnberger Prozess gegen die Hauptkriegsverbrecher 1945/46“, in: J. Osterloh / C. Vollnhals (eds.), *NS-Prozesse und deutsche Öffentlichkeit. Besatzungszeit, frühe Bundesrepublik und DDR*, Göttingen, 2011, 93-105.

<sup>12</sup> To give just one example: One can argue that today's Western reluctance to establish international military tribunals is partly due to the fact that the charges of 'conspiracy against peace' that figured so prominently both at the IMT and in Tokyo ultimately and definitely 'failed' in a legal sense to pass the test of its practical applicability.

<sup>13</sup> Highly instructive: C. S. Maier, "Doing History, Doing Justice. The Narrative of the Historian and of the Truth Commission", in: R. I. Rotberg / D. Thompson (eds.), *Truth versus Justice. The Morality of Truth Commissions*, Princeton, 2000, 261-278. See also J. Finger / S. Keller / A. Wirsching, "Einleitung," in: J. Finger / S. Keller / A. Wirsching (eds.), *Vom Recht zur Geschichte, Akten aus NS-Prozessen als Quellen der Zeitgeschichte*, Göttingen, 2009, 9-24. C. Ginzburg, *Il giudice e lo storico. Considerazioni in margine al processo Sofri*, Torino, 1991 or C. Ginzburg, "Checking the Evidence. The Judge and the Historian," in: *Critical Inquiry* 18 (1991) 1, 79-92.

with its Asian counterpart,<sup>14</sup> but also because it contributes to a growing awareness of the fact that both trials took place within a relatively short period when such international trials were promoted as being suitable instruments with which to come to terms with the past and to contribute to a lasting and peaceful world order.<sup>15</sup>

Furthermore, comparative approaches disclose important differences. Generally speaking, the Tokyo trial is seen in a much more controversial light than its European counterpart, also on a legal level. ‘It is certainly justified to regard Nuremberg as a shining example of fairness and efficiency, compared with the long list of grave faults committed in Tokyo,’ as Bruno Simma concluded. One result of this was that the discussion about ‘victor’s justice’ and war guilt still lives on in Japan today, whereas ‘in contemporary German legal and historical writing, a strongly critical view of Nuremberg is decidedly in the minority.’<sup>16</sup> Not only Japanese but also Western historians tend to be very critical concerning the accomplishments of the International Military Tribunal for the Far East. This negative image of the Tokyo trial sharply contrasts with what is sometimes called the ‘human rights revolution’ that is regarded as Nuremberg’s primary legacy.<sup>17</sup> The reasons for these – at times sharply contrasting – images and narratives, however, need more explanation.

To make things even more complicated, a number of historians have emphasised in recent years that such concentration or even over-emphasis on the two major war criminals trials after World War II tends to overshadow the fact that both International Military Tribunals were accompanied by a number of lesser-known trials in Asia as well as in Europe. Widely forgotten in public memory today are the twelve American-led Military Tribunals in Nuremberg (NMT) that took place in the second half of the 1940s.<sup>18</sup> For Asia, the number of war crimes trials is even greater with about 50 separate war crimes courts under the jurisdiction of the individual Allied states.<sup>19</sup> The large majority of these trials have come under closer

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<sup>14</sup> Kittel, *Nach Nürnberg und Tokio*, 50.

<sup>15</sup> For a discussion of this argument in a long-term perspective, see Daniel Siemens, “Popular dramas between transgression and order: Criminal trials and their publics in the nineteenth and twentieth century in global perspective”, in: Paul Knepper and Anja Johansen (eds.), *The Oxford Handbook of the History of Crime and Criminal Justice*, New York 2016, 555-572, here 560-561, 565-568.

<sup>16</sup> B. Simma, “The Impact of Nuremberg and Tokyo. Attempts at a Comparison”, in: Nisuke Ando (ed.), *Japan and International Law: Past, Present and Future*, The Hague 1999, 59-84, here 74. For a balanced assessment, see also Kirsten Sellars, “Imperfect Justice at Nuremberg and Tokyo,” in: *The European Journal of International Law* 21 (2011) 4, 1085-1102. The accusation “‘victor’s justice’ was raised against the Tokyo trials from the start. Influential in the discussion has proven to be R. H. Minear, *Victor’s Justice. The Tokyo War Crimes Trial*, Princeton, 1971.

<sup>17</sup> T. Buergenthal, “The Human Rights Revolution,” in: *St. Mary’s Law Journal* 23 (1991/1992) 3, 3-6. For a critical reassessment of such views, see A. Weinke, *Gewalt, Geschichte, Gerechtigkeit. Transnationale Debatten über deutsche Staatsverbrechen im 20. Jahrhundert*, Göttingen 2016.

<sup>18</sup> Kim C. Priemel / A. Stiller (eds.), *NMT. Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtsschöpfung*, Hamburg, 2013; idem (eds.), *Reassessing the Nuremberg Trials. Transitional Justice, Trial Narratives, and Historiography*, New York, 2012.

<sup>19</sup> Totani, *The Tokyo War Crimes Trial*, 7.

scrutiny (of historians) only recently. At the moment, we are in the middle of a shift of focus in research. Instead of the Tokyo trial, in which the major war criminals (the so-called Class A war criminals), the leadership of imperial Japan, were tried and punished for having perpetrated ‘crimes against peace’, there is now a stronger interest in the other Asian trials of minor war criminals, who were charged with conventional war crimes and crimes against humanity, the so-called Class B and Class C war crimes trials.<sup>20</sup> The challenging fact here is that these trials took place all over East Asia, except Japan, and that this kind of transitional justice has therefore been seen in the context of the fall of the European empires, decolonisation, and the beginning of Asia’s ‘hot’ Cold War. Key to such approaches is the concept of memory.<sup>21</sup> However, it is not the intent of the following contributions to distinguish between memory and history or to play one concept against the other. On the contrary, the purpose throughout is to examine the close relationship between historiography and the politics of memory in very specific cases. Nor is it the intent here to play the “smaller” trials against the “larger” ones (or vice versa).

Instead, the following contributions take into consideration the diversity of the trials in the legal moment of the late 1940s. However, several of them also make it clear how worthwhile it indeed is to concentrate on the two main trials, since these trials are the ones that have proved to be decisive in shaping historical debates from the immediate post-war period until today. Both proceedings are often regarded as cornerstones for the development of international law and human rights,<sup>22</sup> and particularly relevant for the history of the legal category ‘crimes against humanity’ and their meanwhile institutional implementation (in particular in the International Criminal Court in Den Haag).<sup>23</sup> The predominant narrative is a success story, but dissenting voices have also attracted attention. They point to ambivalences and the fact that the *Weltgemeinschaft* (or, more precisely, the political leaders of the world powers) seemed to have

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<sup>20</sup> For this thesis see H. Hayashi, 戦犯裁判の研究. 戦犯裁判政策の形成から東京裁判・BC級裁判まで, *Senpan saiban no kenkyū. Senpan saiban seisaku no keisei kara Tōkyō saiban bīshikyū saiban made* [Research on war crime trials: From the formation of a policy of war crime trials to the Tokyo and BC trials], Tokyo, 2010. To elucidate the scale of the problem: The United States, Britain, Australia, France, Holland, Philippines, China and the Soviet Union conducted such trials in occupied “Asia, based on their own laws and jurisdiction. More than 55,000 individuals were taken into custody and 5,700 faced trial as Class B and C war criminals. A total of 984 were sentenced to death, 475 to life imprisonment and 2,944 to limited prison sentences. These figures exclude war crimes trials conducted by the Soviet Union, of that details are still unknown.” (M. Futamura, *War Crimes Tribunals and Transitional Justice. The Tokyo Trial and the Nuremberg legacy*, London and New York, 2007, 75). For the concept of ‘transitional justice’, see in particular Ruti G. Teitel, *Transitional Justice*, Oxford, 2000; idem, *Globalizing Transitional Justice. Contemporary Essays*, New York 2014.

<sup>21</sup> On the so called ‘memory boom,’ see e.g. J. Winter, *The Great War Between Memory and History in the Twentieth Century*, New Haven, London, 2006. For Japan see especially F. Seraphim, *War Memory and Social Politics in Japan, 1945-2005*, Cambridge, 2006.

<sup>22</sup> Most recently: J. Eckel, *Die Ambivalenz des Guten: Menschenrechte in der internationalen Politik seit den 1940er Jahren*, Göttingen, 2014; S. Moyn, *Human Rights and the Uses of History*, London and New York, 2014; L. Hunt, *Inventing Human Rights. A History*, New York, 2008.

<sup>23</sup> D. M. Segesser, „Der Tatbestand Verbrechen gegen die Menschlichkeit,“ in: Priemel/Stiller, *NMT*, 586-604.

lost faith in recent years in the problem-solution capacity and educational purpose of international criminal proceedings.<sup>24</sup>

The following four contributions thus add to the extensive body of studies on empirical or legal aspects of these trials, but they also analyse the historiographical narratives that emerged from them and, in particular, explore how courtroom practices and judicial procedures affected the historiography of the Second World War. How was the material, later re-used as historical sources, affected by different legal cultures? Were there any significant differences between the events and practices in Germany and Japan? The four studies attempt to provide answers to these questions as they focus on the relationship between legal experts and historians during the trials and in their aftermath.

The first contribution by Daniel Hedinger analyses how the Tokyo and Nuremberg tribunals led to the disappearance of the Axis alliance. In this process, in Germany as well as Japan, a domestication of the past set in as the memory of the war became regionalized and, above all, nationalized – with paradoxical consequences to this day: we are left with a history of the Second World War in which the world has been left out. This article argues that the starting point for these developments is to be found in the judicial logic of the proceedings, particularly in how the charge of a global conspiracy against peace was applied and finally rejected in Nuremberg and Tokyo. The ‘judicial model’ that thus emerged pre-empted many of the later historiographical debates. As Hedinger shows, those tribunals also generated the sources that proved in the decades that followed to be of fundamental importance for historiography. He argues that clearer insight into these processes would enable us to move towards a truly global history of the Axis and thus better understand the entanglements from which the Second World War originated.

The second article by Kim Christian Priemel also analyses global narratives. Specifically, he looks at those global narratives that emerged from the IMT and the subsequent NMTs in Nuremberg and that contributed in important and lasting ways to the historiography of the Holocaust. Priemel disagrees with those historians who have argued over the last two decades that the murder of the European Jewry was not a formative element of these trials. Instead, he advances the view that it was these historians’ selective appropriation of the historical evidence produced in court that lies at the heart of historiographical misrepresentation, not the alleged disinterest of the former prosecutors and judges in Nuremberg. In Priemel’s view, the IMT and the NMTs, taken together, produced a surprisingly

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<sup>24</sup> M. J. Bazylar, “The Holocaust, Nuremberg and the Birth of Modern International Law,” in: D. Bankier and D. Michman (eds.), *Holocaust and Justice. Representation and Historiography of the Holocaust in Post-War Trials*, Jerusalem and New York 2010, 45-57.

nuanced picture and clearly ‘articulated an appreciation of the Holocaust as the epicentre of German criminality.’ If historians would engage in a process of historicizing these trials, which includes a careful analysis of the legal standards of the time, then many of the shortcomings in assessing them could be avoided.

The third article by Daniel Siemens concentrates on the IMT and its importance for modern historiography. In an exemplary case study, Siemens analyses in how far the proceedings against the National Socialist *Sturmabteilungen* (SA) in Nuremberg shaped not only the perception of the Stormtroopers in the immediate postwar years, but also contributed to the image of the post-1934 SA as a relatively unimportant National Socialist mass organisation, an image that remains prevalent in the historiography of the Third Reich until this very day. Siemens demonstrates that the defence strategy of the lawyers for the SA not only succeeded in court – the judges did not sentence the SA as a ‘criminal organisation’ – but also found its way into historiography. Later historians downplayed the structural elements of the SA’s violence, underestimated its importance in scale and relevance, and neglected many of the actual crimes committed by the SA in the late 1930s and during the Second World War. Siemens argues that historians should neither disregard the military tribunals as such nor the rich historical material produced at them; yet they will benefit from paying more attention both to the narratives produced in court and to their historiographical legacies.

The starting point of Matthias Zachmann’s article is the observation that the Second World War still looms large in the politics of East Asia. Time seems to have stopped, because the memory of the Tokyo trial still seems fresh and ‘raw’ even today. Zachmann discusses why the passing of time has not allowed the emotions to settle and produce a modicum of consensus on the validity and value of the Tokyo trial. He supplements the political argument by pointing out a number of practices and perspectives that have aggravated the situation on the *legal* side. The article thus addresses the question about the role jurists and juridical forms play in creating and negotiating memories of war crimes and war responsibility. It also includes a discussion on the subsequent Atomic Bomb and Comfort Women Trials. Zachmann demonstrates that the problematic core of the Japanese practices and perspectives were not only the result of their postwar repudiation of Allied ‘victor’s justice’, but also originated from their fundamental scepticism towards universal international law as an absolute standard prevalent already in the early prewar times.

Despite their different methodological approaches as well as the diverse thematic and geographical foci, all four articles demonstrate that doing law and writing history were closely intertwined in the 1940s, with lasting repercussions. At this legal moment of international

history, new legal categories were explored while more traditional ones were challenged, in Nuremberg as well as in Tokyo. However, the contributions also make clear that an international perspective does not necessarily produce globally shared or mutually accepted narratives. Writing history both in court and also afterwards relied on a wide variety of local, regional, national, and transnational factors without having to establish a clear hierarchy among them. Future analyses of the two 'world's tribunals' will benefit from taking this complex web of dependencies into account more than has been done to date.