

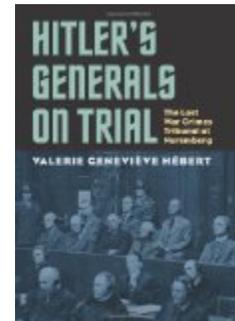


Valerie Genevieve Hebert. *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg*. Lawrence: University Press of Kansas, 2010. xii + 362 pp. \$39.95 (cloth), ISBN 978-0-7006-1698-5.

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## The Winners and Their Great Defeat

The Second World War ended sixty years ago, and during this interval, three generations have experienced the inevitable effects of time and distance on perceptions concerning it. For many, rancor has receded even as recollections, originally intense and vivid, gave way to a lingering postwar sense of political expediency. Not in itself surprising, what remains remarkable is the speed with which political and military enemies of yesterday became our allies. Indeed, this transformation occurred within a period of time even shorter than the actual war itself. Such a development could only lessen the lasting impact of what had happened in Europe between 1939 and 1945. Nor was this change anticipated as the Allies prepared for the war crimes trials in Nuremberg. But even the best of intentions do not always lead to expected and desired results, and while much has been written on war crimes and the Nuremberg trials, Valerie Genevieve Hebert's book breaks new ground. Unlike the collection of essays, *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, edited by Patricia Heberer and Jurgen Matthaus (2008), for example, Hebert presents a thorough analysis of a single incident, which she places in historical perspective, some sixty years after the event under discussion. It is an outstanding contribution to a field increasingly crowded with impressive studies.

She does not devote many pages to the first and most famous Nuremberg war crimes trial, which began on November 21, 1945, barely six months after Germany's

unconditional surrender. Supreme Court Justice Robert Jackson, on loan from his court to serve as chief prosecutor for the Americans, noted that "in the prisoners' dock sit twenty odd broken men." Their wrong doings "which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated" (p. 23). Further, they were "symbols of fierce nationalism, and militarism, of intrigue and war-making," and these forces would gain renewed strength, "if we deal ambiguously or indecisively with the[se] men in whom those forces now precariously survive" (p. 24). In short, justice must be done, and education as to why it must be done became equally essential.

Today, Jackson's eloquent rhetoric rings hollow as we confront the fact that he spoke more than half a century ago. While a number of accused were indeed executed, by 1948—if not sooner—Germans had rejected "collective responsibility for the remaining Nazi crime[s], and further, denied the identification of convicted war criminals as criminals" (p. 36). What happened to Jackson's insistence on simultaneous punishment *and* education for Germany? Hebert's book provides an answer. At its conclusion, we see all too clearly "what was lost when American authorities abandoned" these twin goals of "justice (retribution) and education" (p. 6). But ascertaining the truth was also as important as imposing punishment. Because punishment is the final expression

of justice, she writes, “its imposition should have been” forced onto the public imagination. “Without punishment this message was lost. Without truth, there was no reason to look for it” (p. 7). Allowing the “conclusions of the trials to recede ever further into the recesses of public memory, West Germany was able to perpetuate a view of history containing far fewer victims and almost no perpetrators” (p. 6). How this became possible is the subject of Hebert’s study.

Hebert begins with a graphic overview of Western Europe in 1945. The war had taken at least sixty million lives. If one adds the millions of displaced persons to this sum, as well as the gruesome discovery of the Nazi death camps, one can better understand why the occupying powers determined that judicial examinations and trials were appropriate. But after the initial Nuremberg trial, the United States opted to “go it alone” with their own judicial proceedings, within the American sector of Germany (p. 32). This decision invited claims of unethical prosecutorial conduct, increasingly leveled against American participants not only by Germans but also by other Americans.

Thus, in February, 1948, Iowa Supreme Court Judge Charles Wennerstrum presided at a hostage trial involving the “murder of hostages in the Balkans.” Upon its conclusion, which resulted in a guilty verdict, he criticized the very trial over which he had officiated. While “the victor in any war is not the best judge of the war crime guilt,” the American prosecution “has failed to maintain objectivity aloof from vindictiveness, aloof from personal ambitions for convictions” (p. 40). In turn, Telford Taylor, Jackson’s successor as chief prosecutor, denounced Wennerstrum’s comments. They were “subversive” and “baseless slanders ... [and] will be used by all the worst elements in Germany against the best” (p. 40).

Hebert contrasts the hostage trial with the Malmedy massacre case. In 1944, German military officers had murdered seventy-two American troops who had surrendered near the Belgian town of Malmedy, during the Battle of the Bulge. News of this “massacre” was seen as the final determining factor in the Allied decision to move forward with postwar prosecutions in Germany, and in 1946, a two-month trial was conducted by the U.S. Army in Dachau. Seventy-four SS officers were accused, and forty-three of them were sentenced to death. The lead attorney for the accused SS officers was an American lawyer Willis Everett. He argued first that the murders had taken place “in the heat of battle,” not as a criminal conspiracy by the Nazi hierarchy; second, that the Amer-

icans themselves had committed similar crimes without punishment; and finally, that many of the “confessions” admitted in the trial were based on coercion and brutality. His 228-page critique of the trial was widely circulated, even as the Army began its posttrial review (p. 46).

One JAG (judge advocate general) officer affirmed only twenty-five out of the original forty-three death sentences. Another JAG review panel “found evidence of improper pretrial investigations,” and reduced the number of death sentences to twelve, a verdict affirmed by the military governor in 1948. Everett prepared an appeal to the Supreme Court, but Justice Jackson recused himself, and the remaining eight split four and four, thus denying jurisdiction over the Malmedy case and subsequent cases. Yet Everett went further. He contacted numerous members of Congress, actions that in turn involved the ABA, the Associated Press, and finally, the German clergy.

This all resulted in submission of a large number of affidavits, petitions, and letters to Secretary of the Army Kenneth Royall, who—it might be noted—was himself no stranger to working on behalf of Germans accused by the United States. In 1942, he had defended the Nazi saboteurs in their unsuccessful attempt to bring High Court intervention to their case. Now Royall ordered a stay of execution for the remaining twelve Malmedy defendants, and convened an outside review panel, which, in due course, affirmed the guilt of the twelve, but urged commutation of the death penalties to life imprisonment. Military Governor Lucius Clay confirmed six death sentences from the original forty-three, but Royall refused to lift his stay of execution, and in the end—after well-publicized congressional investigation and hearings—not one single execution from the Malmedy trial was ever carried out. It is in this context that Hebert discusses the major subject of her book, the trials of the German High Command.

Less familiar to the reader than the famous International Military Tribunal’s (IMT) actions in 1945, the proceedings three years later placed fourteen generals and members of Adolf Hitler’s High Command at the bar. They were charged with crimes against peace, war crimes against other belligerents and civilians, and crimes against humanity. In less than one month, prosecutors built their case against the defendants based largely on the records of five secret meetings held with Hitler, as well as records of their conduct in command during the German invasions of Poland, Russia, and Western Europe. They sought to prove that the defendants were well aware of Hitler’s intentions, and al-

though some of the High Command may have disagreed with them, ultimately they acquiesced. If they did not commit war crimes themselves, the generals facilitated their implementation, knowing that mass murders, tortures, and inhumane treatment on an incredible level would be the results, as indeed they were. With the IMT trial as precedent, lack of actual participation was no defense.

The arguments employed by defense counsel for the German generals reflected the changes in both German and American attitudes as the Cold War fog settled over Europe, less than three years after Germany's unconditional surrender. They insisted that they were simply German officers, products of the General Staff, not Nazi partisans. If they obeyed Hitler's orders, it was because he was chief of the German state, and not because they agreed with his policies. They never denied that Hitler and his minions had "formulated and executed racial and political policies." But by following them, they never admitted "the indispensable connection between their functions as soldiers—as conquerors, pacifiers and occupiers—and the achievement of Nazi goals" (p. 126). Moreover, they denounced the trial as victor's justice, hypocritically administered by a country that had just committed horrific atrocities on civilians in Japan. Finally, they pointed to the increasingly popular perception of themselves as victims, rather than aggressors, not just because of the Allied bombing of their country, but also because of German Prisoner of War (POW) captivity in Russia, and the forced "expulsion of millions of Germans from eastern borderlands" (p. 127).

The three judges who decided the generals' case spent 111 trial days, heard 89 witnesses, considered some 3,900 documents, and ultimately reviewed more than 10,000 pages of the trial transcript. They had been informed that "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" (p. 134). While the prosecution had constructed an extremely thorough case against the defendants, Chief Judge John Young, who in America had been chief justice of the Colorado Supreme Court, declined to find all of them equally guilty. Rather, his panel confronted "a complex and differentiated appraisal of individual culpability" (p. 138).

Yet the generals "were neither dumb nor unobserving, and their continued allegiance to [Hitler] before and during the war represented a lapse in moral and profes-

sional judgment that no circumstance could mitigate" (p. 135). As to the defense argument that the Allies, who had drafted the Nuremberg protocol under which the trial was held, were themselves guilty of atrocities, the panel replied that "an accused does not exculpate himself from a crime by showing that another committed a similar crime" (p. 140). Moreover, accepting the defendants' insistence that there had been genuine opposition on their part to some of Hitler's policies, the judges simply noted that "its extent made the defendants' subsequent and continuing allegiance ... all the more damning" (p. 146). They "followed Hitler into catastrophe. And for that they would be held accountable" (p. 147). And in October 1948, so they were. But for how long?

It had been one thing for Germany—as a defeated, dispirited, and occupied country to acquiesce, albeit unwillingly, in war crimes trials and their aftermath. But in 1949 and thereafter, it was quite another thing to expect the new Federal Republic to join as "a key Cold War European state" against the perceived Communist threat, and offer military support while some of the most famous and respected members of the military command were in prison (p. 155). In the post-Berlin Airlift era, and the outbreak of the Korean War in 1950, it became impossible for the United States to reconcile "two unavoidable yet fundamentally contradictory roles: occupier and executor of occupation justice," on the one hand, and "Germany's ally and friend," on the other (pp. 185-186). For better or worse, American policy makers chose the latter, and in so doing apparently insured the ultimate failure of the Nuremberg trials and their progeny, even though trials had been held, the accused had been found guilty, and executions and/or imprisonment had occurred. How was this possible?

Not until the concluding chapter of her study does Hebert articulate what she implies throughout her book. Taken as a whole, as time passed, the Nuremberg trials and their progeny "recede[d] even further into the recesses of public memory." In the Cold War context, American officials "hesitated even to use the words 'war crimes' and 'war criminals,' as discussions—now guided more by the new West German Republic"—"shifted away from the convicts' wartime ... offenses, towards the individual circumstances of these aging, ailing, well behaved, and now harmless men, whom their impoverished families needed, and whom their communities would gladly support" (p. 199). The German generals trial had ended in 1948. Within ten years, American policy reduced or eliminated all war crimes penalties, and by 1958, not a single German so convicted remained in prison. This ac-

tion “undermined the significance of the offenses that had earned these [original] sentences” (p. 200).

Moreover, the Cold War context destroyed “a process by which not only justice would be served, but also an entire nation would be educated about its traumatic and contested history” (p. 200). Clearly viable in 1945, this intention was almost invisible by 1960. This condition resulted from the American choice “to retain West Germany’s loyalty to the West,” and the cost for such a choice was neither to publish and distribute comprehensive accounts of the Nuremberg trials in German, nor “to establish a foundation upon which to build a productive, ongoing discussion about crime, guilt, and responsibility beyond the end of [the] proceedings” (p. 201). In other words, our chosen policy failed to implement what Hebert calls “didactic trials.”

Its procedures, she argues, “further serve educational efforts by gathering and interpreting evidence that clarifies the historical record. They make public that which is privately mourned and irrefutable that which is maliciously denied. By ... conducting proceedings with dignity and reason, these trials also reinforce particular political and legal values that will, it is hoped, be adopted by the state emerging from war and violence” (p. 203). But in the post-Nuremberg years, punishment “became a a complicated and unremitting political liability ... and the truth of the crimes receded ever further from consideration and discussion.” The result was the “Americans’ ultimate abandonment not only of punishment,” but also “the material articulation of justice, and the standing reproach for Nazi crime” (p. 203). For Hebert, the Nuremberg

prosecutions—for all the good intentions with which they were initiated—ultimately failed as didactic trials largely because of American unwillingness and ultimate inability to stand firm against the strong currents of the Cold War.

Within itself, however, and with varying degrees of success, Germany continues to grapple with its Nazi past. But all too often expressions of contrition “never connected with justice. These measures were substitutes, not symptoms, of national self reflection” (p. 205). While there is no doubt that Germany has indulged in its own bitter memories, Germans have focused largely on the Holocaust. But there was more to Nazi depravity than this horror, including the crimes of the military. “Recognizing the breadth of Nazi depravity ... [has taken] much longer to filter into public consciousness. Moreover, despite these many moments and movements aimed at reconciling with the past, most perpetrators never faced justice” (p. 206).

Thus, concludes Hebert, Nuremberg’s original “potential as a tool for social rehabilitation and reconciliation” remains untested (p. 204). But mass violence and genocide have continued, and there are and will be numerous opportunities to put its legacies to work. The only criticism I would make is a desire to see more analysis concerning realistic possibilities for meaningful didactic trials in the future. But for now, Hebert has produced a work that forces the reader to consider difficult questions of what humans owe to each other, how that is assessed, and how and when such a bill is paid. Her book is strongly recommended.

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