Reconsecrating the Temple of Justice: Invocations of Civilization, Humanity, and Justice at the Nuremberg Justice Trial

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In 1947, a court composed of three U.S. judges sat in Nuremberg to judge fourteen former Nazi judges, prosecutors, and Department of Justice officials. This trial is unusual, as the prosecution stated in its opening statement, “in that the defendants are charged with crimes committed in the name of the law.” The United States v. Josef Altstoetter and others – the Nuremberg Justice Trial – is one of the few cases in which judges ever sat in judgment on other judges. All of the Nuremberg Trials have been criticized for victor’s justice and the legal novelty of the charges. Yet the Altstoetter Court, sitting in judgment on other judges, faced these questions in the most direct manner: the Nazi judiciary had used law to commit and justify large-scale violence. The Altstoetter Court not only had to judge violence committed

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1 The manuscript is currently under review. Please don’t cite or circulate without permission. A prior version of this article was presented at the Annual Conference of the Association of the Study of Law, Culture, and the Humanities, Washington, D.C., March 23-24, 2007. I want to thank my co-panelists Irit Dekel, Lena Foljanty and Jennifer Hamilton as well as our superb commentator Martha Umphrey for their discussions and insights.

2 U.S. v. Altstoetter et al. (The ‘Justice Case’), Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. 3 (Washington: United States Government Printing Office, 1951), 31 (prosecution opening statement). [Henceforth cited as: 3 TWC; the document referenced is the court’s judgment unless noted otherwise]

3 3 TWC.

in the name of law, but it also needed to demonstrate that the response to this catastrophic violence should take, once again, the shape of (international) law. The Altstoetter Court found ten of the fourteen defendants guilty of crimes against humanity and war crimes. The sentences ranged from five years imprisonment to life in prison.

How did the prosecution conceptualize the crimes, and how did the court arrive at its judgment? The defendants were charged with, in the words of prosecutor Telford Taylor, “destroying law and justice in Germany, and … then utilizing the empty forms of legal process for persecution, enslavement, and extermination on a vast scale,” amounting to war crimes and crimes against humanity. These novel crimes, Taylor continued, were violations of “international conventions,” “the laws and customs of war,” “the general principles of criminal law as derived from the criminal laws of all civilized nations,” the “internal penal laws of the countries in which such crimes were committed,” and the Allied Control Council Law No. 10.6

This cumulative list of legal sources for the charges bespeaks the prosecution’s and the Court’s uncertainties about the legal status of this tribunal and its relationship with the defendants, the charges, and its wider legitimacy. The tribunal’s anxieties about its own task and status reflected wider normative uncertainties after the catastrophic violence of the Holocaust and World War II.7 Why did Europe, seen as the source and centre of “civilization”, experience two catastrophic wars initiated by Germany? How can a concept of

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5 3 TWC 32 (prosecution opening statement).
6 3 TWC 22-23 (indictment).
civilization and progress be reconciled with violence experienced as “senseless”? 
How can law and morality constrain the behaviour of independent and sovereign states? And how can the “family of nations” that had previously been held together by a “standard of civilization” be modeled after the idealized self-description of Western nation states be reshaped? The Nuremberg Trials were part of an effort to reshape international law and international society. International criminal law – a “legalist paradigm of war” combining ascriptions of individual criminal responsibility and state responsibility for atrocities – emerged at the Nuremberg Trials – at a time when ideas about the association of law and civilization were shaken but not shaken off. Although the connections between international law, human rights, and imperialism have been explored by critical scholars, the Nuremberg Trials have not been subjected to much critical analysis of their place in a history of international law whose universalistic language barely conceals the imaginaries of race and space it was based on. The scarce available literature on the Altstoetter Trial, in turn, does not critically examine or contextualize the judgment.

This article explores and contextualized one dimension of the Altstoetter trial’s “idiom of judgment”: the appeals to “civilization”, usually in the form of appeals to the

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9 Pendas, “The Magical Scent of the Savage.”
10 See Pendas, “The Magical Scent of the Savage.”
13 Douglas, Memory of Judgment, 39.
“general principles of law accepted by all civilized nations.”\textsuperscript{14} The Nuremberg trials are now commonly judged as revolutionary for their reliance on the categories of humanity and crimes against humanity in judging Nazi atrocities. I will argue here that the Altstoetter court’s references to humanity and civilization suggest a temporary interchangeability of these terms. Whereas the language of humanity pointed towards the future of human rights in international law, the language of civilization anchored the judgment in an openly exclusive tradition of international law. Yet the importance of “civilization” for the judgments at Nuremberg is rarely explored. This article shows that the Altstoetter Court responded to questions about the place of law in Germany and its own place in the universe of law with a narrative of polar opposites: whereas the Altstoetter Court represents law, the defendants stand for “prostitution of [the] judicial system”\textsuperscript{15} and lawlessness. Throughout the trial, the law and justice embodied by the trial are described and delineated in reference to their polar opposites, the “savage alterity”\textsuperscript{16} found in the conduct of the defendants. In the Altstoetter trial, law is defined, exalted, and insulated from any complicity in state violence by denying Nazi law the character of law. This account helped the tribunal to assert its authorization for judgment, explain the origins of the injustices, and point to the source and contents of norms that guide the judgment.

The appeals to civilization in Altstoetter refer not only to the sociological theories of modernity within which they have been placed by analysts of the other Nuremberg trials,\textsuperscript{17} but to an edifice of international law built around the “standard of civilization”. In late-19\textsuperscript{th}

\textsuperscript{14} 3 TWC 22-23 (indictment).
\textsuperscript{15} 3 TWC 1086.
\textsuperscript{16} Peter Fitzpatrick, Modernism and the Grounds of Law (Cambridge: Cambridge University Press, 2001), 128.
and early 20th century international law, the “standard of civilization” was modeled on an idealized self-description of Western nation states. The “standard” was widely accepted and performed key functions in grounding norms and limiting the scope of the international legal order.18 International law was, in this view, the body of “rules which are considered legally binding by civilized states in their intercourse with each other.”19 These rules would not apply in relations with or among “barbarous” or non-civilized states.

Where does Nazi Germany fit on the mental map sketched by the “standard of civilization”? Germany’s geographic location destined it for a place among the “civilized nations,” yet the Nazi atrocities seemed “barbaric” not only in the strict meaning of the “standard of civilization.” In the views of many contemporary observers, Nazi Germany offered the spectacle of barbarism within civilization, of “hiccups of barbarism,”20 or “civilized barbarism”.21 This background of “civilization” in Germany allowed a presumption that norms common to all “civilized nations” were generally known in and applicable to Germany. The blameworthiness of the Nazi judges’ deeds arises precisely because their acts were barbaric (hence in clear violation of norms accepted by civilized nations) in a context characterized by the regulative ideal of civilization (hence they should have known and adhered to these norms). The justification for imposing individual criminal liability for acts of Nazi violence was predicated upon an understanding of international legality and morality in which “civilization” and “barbarism” were legally meaningful and terms with spatial and racial references.

20 See Douglas, Memory of Judgment, 89.
21 Pendas, “Magical Scent of the Savage,” 52.
How did the understanding of law as tied to civilization shape the meaning of the Nuremberg Justice trial? The Altstoetter trial was not simply an exercise in judging and condemning Nazi violence. Rather, it was announced as a crucial element of re-enthroning law and the rule of law in Germany. The “true purpose” of the Nuremberg Justice trial was, as prosecutor Telford Taylor stated, “broader than the mere visiting of retribution on a few men for the death and suffering of many thousands.”22 The defendants’ most shameful crime, Taylor stated, was that “they defiled the German temple of justice, and delivered Germany into the dictatorship of the Third Reich.”23 Therefore, he demanded, “the temple must be reconsecrated. This cannot be done in the twinkling of an eye or by mere ritual. It cannot be done in any single proceeding or at any place. It certainly cannot be done at Nuremberg alone.”24 Judging those who “played a leading part in the destruction of law in Germany” in this Court, “in accordance with the law,”25 will, Taylor hoped, contribute to the reconsecration of the “temple of justice.”

Taylor’s description of a courtroom as a “house of law” and “temple of justice”26 suggests that the trial was invested with ritual and quasi-religious meanings. Its purpose was to redeem and re-consecrate law as a response to what Devin Pendas has aptly called “the crisis of civilization in the face of civilized barbarism”27 – the use of the form of law to violate what the Altstoetter judges deemed to be the essential substance of law. Seen from this perspective, law needed to assure itself of its virtue and substance in order to become authoritative again. The Altstoetter Court found this substance of law through appeals to

22 3 TWC 33 (prosecution, opening statement).
23 3 TWC 33 (prosecution, opening statement).
24 3 TWC 33 (prosecution, opening statement).
25 3 TWC 33 (prosecution, opening statement).
26 3 TWC 33 (prosecution, opening statement).
27 Pendas, “Magical Scent of the Savage,” 52.
“civilization” as a governing standard and norm in international law. The Court expelled the more obviously racialized references from the vocabulary of “civilization”. Instead, references to “civilization” were mixed with appeals to “humanity” in ways that suggest a temporary interchangeability of these terms at the moment when the framework older framework of “civilization” that supplied the imaginaries drawn upon for judging the Nazi judges gave way to the new framework of “humanity” that would later be used for describing the “lessons” of Nuremberg. The description of Nazi violence as “civilized barbarism” provides the background for the ascription of individual criminal responsibility for state violence at Nuremberg.

The article proceeds with a brief account of the classic “standard of civilization”. How was this standard discussed at the time of the Nuremberg trials? What was the alleged impact of the Holocaust on the “standard of civilization”? The main section of the article examines the uses of “civilization” in conjunction with the Altstoetter Court’s narrative of the Nazi State as lawless and barbarous. Finally, the paper offers some conclusions about the continuities and discontinuities of the “standard of civilization” in 20th century international criminal law.

I. From Rights for Westerners to the Rule of Law: Shifting Standards of Civilization

The “standard of civilization”, dominant in late 19th and early 20th century international law, is an expression of the idea that international law is a body of norms for

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“civilized states” only. The “standard” was increasingly clearly articulated in late 19th century international law. Jurists such as James Lorimer developed complicated taxonomies of legal statuses for different peoples. In his 1883 treatise on international law, Lorimer combined the legal universalism of claiming that “all races and nations alike” are governed by “those laws of our common nature” with a hierarchical interpretation of cultural difference: he divided humanity into “civilized humanity,” “barbarous humanity,” and “savage humanity.”

Lorimer’s examples and explanations, based on “ethnology, or the science of races,” are primarily based upon the geographic location of the alleged barbarians, combined with folk tales about their capacities to improve or reciprocate or act morally. In other writings, the “standard of civilization” was expressed in terms that suggest an increasing abstraction from the direct geographic references and imaginations of Lorimer. Yet the “standard” had never been an impartial admissions requirement to the “family of nations.” It was not a “rigid classification,” but “a shorthand for the qualities that international lawyers valued in their own societies, playing upon its opposites: the uncivilized, barbarian, and the savage” that were “projected from the European onto its other – the particular and the lawless, the chaotic, static and backward.”

In early 20th century international law, the “standard of civilization” was taken to require respect for the lives, liberties, and property of foreigners; a political bureaucratic

31 Lorimer, Institutes, 101.
32 Lorimer, Institutes, 93.
33 Koskenniemi, Gentle Civilizer, 103.
organization of the state; adherence to generally accepted rules of international law; maintaining diplomatic relations; and conforming to the internal practices of “civilized” states by, for example, outlawing polygamy and slavery. The standard aimed at producing society of relatively homogenous states that interacted with one another on the basis of norms and customs derived from the idealized self-description of European states. “Law” was a key element of this standard: its elements, including guarantees for certain rights, bureaucratic state organization, and diplomacy, depend upon the presence of different parts of a normative system recognizable by Westerners as law. In short, the standard of civilization operated more like an idealized self-description and a projection of undesirable qualities onto others than an impartial standard that states considered uncivilized could meet in order to join the ‘family of civilized nations.’ The efforts of Japan and the Ottoman Empire over the 19th century to be admitted to this exclusive club testify to the elusiveness of the standard as a standard.

In the system of international law up to the Second World War, the standard of civilization had three main functions: First, it determined which political entities would be recognized and states and therefore enjoy international legal personality. Second, the standard was also important in deciding whether the rules of warfare would apply (in the case of civilized peoples) or not (in all other cases). Finally, the “general principles of law recognized by Civilised Nations” are a direct source of international law. This function of

37 See Gong, Standard of Civilization.
the standard of civilization should become the most important one in the discussions about the Nuremberg trials.

In the social imaginaries surrounding the “standard of civilization,” the ideas of “civilization” and “law” are intertwined in different ways: (proper) law constitutes the backbone of a civilization, norms of civilization constitute a normative source of international law, and law is seen as a bulwark against “barbarous” practices. Law, in this understanding, is both constitutive and a product of civilization. What was identified as law, however, depended on the willingness of Western observers to “see” law in the social practices of other cultures. Judgments about foreign law and lawlessness often revealed more about the self-conceptions of the “judges” than about the meaning of these social practices.

What happened with the standard of civilization in the mid-20th century? The standard and its exclusionary presuppositions had been criticized by leading international lawyers such as Hersch Lauterpacht since the 1930s. Lauterpacht did not want to distinguish between civilized and non-civilized nations. Presuming that all nations should be called civilized, Lauterpacht universalized the rules and norms attached to the standard of civilization. In this strand of theorizing, “civilization” has become “humanity.” Lauterpacht’s proposals for putting Nazi war criminals on trial consequently did not use the language of “civilization” but spoke about the “generally recognized principles of humanity” concerning the conduct of warfare. This conceptual move was based on perceptions of “the closing of

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41 See Ruskola, “Legal Orientalism.”
the frontier of international society.” For Lauterpacht, there was no uncivilized space, so that international law and its norms could finally reach into all corners of the earth – including non-European spaces as well as Nazi Germany. Other authors, notably Georg Schwarzenberger, held on to the standard with an explicit reference to “civilization” (not humanity), but realigned it with new political divides and purposes. Schwarzenberger sought to realign international law with its ethical roots in Christianity and proposed a reformulation of civilization as a commitment to “the absolute value of human beings and the refusal to treat them merely as means to worldly ends.” As a result, civilization could be measured by the ability of states to refrain from violence. For Schwarzenberger, the turn from “international law as a law between civilised States to international law as a law between sovereign States” contributed to the massive atrocities committed in mid-20th century Europe:

… in rapidly growing succession, States such as Russia, Italy, Germany and Japan adopted against sections of their own populations barbarous practices which in any but an amoral age would have put them automatically beyond the pale of civilisation.

Schwarzenberger lamented that the standard of civilization “had almost reached vanishing point in international law”—and he interpreted this decline as both a precondition for and a consequence of the barbarous violence unleashed in the center of Europe. What, then, led to the reawakening of the standard that Schwarzenberger observed in his 1955 article? Schwarzenberger pointed to the human rights clauses in the charters of the United Nations and regional organizations as salutary continuations of the old “standard.”

The “minimum standard” of international law, he declared, “demands compliance by any

44 Gong, Standard of Civilization, 23.
subject of international law in its treatment of foreigners with the rule of law as understood in Western countries.”

At least on the surface, Schwarzenberger opted for decoupling the standard of civilization from the geographical imaginations on which it was based since Lorimer’s elaborate taxonomies. Yet the post-1945 standard of civilization, as Schwarzenberger approvingly recognized, would still be based on Western ideas of human dignity that are ultimately “metaphysical,” or even “identical with the maintenance of the rule of law in the Anglo-Saxon meaning of the term in favour of foreign nationals.” The post-1945 universal standard was, therefore, still an extension of a particular Western standard to the globe. Many voices in the current human rights scholarship recognize the affinity of current human rights and rule of law standards with the earlier standard of civilization, but most of these authors have failed to register any ethical concern about these parallels.

The standard of civilization, in short, was a term of art in international law from the late 19th century on. According to Schwarzenberger, the “barbarities committed by the totalitarian aggressors of the Second World War,” among other things, challenged the classic version of this standard. Civilization seemed not necessarily European, and Europe seemed not necessarily civilized. How did participants in the Altstoetter trial use the conceptual tools offered by the standard of civilization? And what do the references to “civilization” in

49 Schwarzenberger, Manual of International Law, 84.
53 For exceptions, see Antony Anghie, Imperialism, Sovereignty, and the Making of International Law (Cambridge: Cambridge University Press, 2005); Douzinas, Human Rights and Empire; and Brett Bowden, “In the Name of Progress and Peace: The ‘Standard of Civilization’ and the Universalizing Project.” Alternatives 29 (2004), 43-68.
Altstoetter suggest about the fate of the standard of civilization? In the Altstoetter case, the Court drew upon the imaginaries underlying this standard by identifying law and the rule of law with civilization, and by invoking the judgment of civilized nations as a normative source for the charge of crimes against humanity. In the decision, “civilization” and “humanity” are used almost interchangeably. Here we can observe the transformation of one ‘idiom of judgment’ into another: the Nuremberg trials are remembered for the idiom of “humanity”, not for their appeals to “civilization”. The Court’s narrative of Germany as a previously civilized state whose law was “destroyed” by the Nazis draws leaves the ideal of civilization and the rule of law offered by the “standard of civilization” intact without dwelling on the spatial and racial imaginations that sustained the standard. The references to “civilization” also operate as an important source of authority for the Nuremburg Court, they became a vehicle for the Altstoetter Court’s judgment.

II. Lawless Judges: Representing Nazi Injustice in Altstoetter

The Altstoetter Court developed an account of Nazi crimes that connected the Nazi legal system to Nazi atrocities but denied that “law” in an exalted sense had any connection to state violence. The Court denied Nazi law the quality of law, and therefore denied Nazi judges the dignity and immunity of the judicial office. In the Altstoetter trial, the legal system under Nazi rule appears as a farce, and the judges seem impostors not worthy of wearing robes:

The defendants and their colleagues distorted, perverted, and finally accomplished the complete overthrow of justice and law in Germany. … The ‘trials’ they conducted
became horrible farces, with vestigial remnants of legal procedure which only served to mock the hapless victims.55

Here, the prosecution contrasts the law represented by the tribunal – which was portrayed as helping to re-consecrate the temple of justice – with the legal form devoid of legality represented by the defendants. To a tribunal struggling to explain its own authority and legitimacy in terms other than as the result of sheer military superiority of the Allied Forces, the depiction of Nazi law as non-law provided crucial self-assurance. The Court’s portrayal of Nazi lawlessness is, in an instance of “legal orientalism,” a confirmation of the U.S. judges’ understanding of themselves through the invocation of its polar opposite.56

The portrayal of Nazi law as non-law was the basis for various arguments during the trial: it allowed the Court to construct a narrative of Germany’s descend into barbarism that absolves law and the institutions associated with the “civilization” shared by the United States from any responsibility for the “destructive urges” exhibited by the Nazi state.57 The account of Nazi law as non-law and of international law as rooted in the norms of civilization also avoids any open confrontation between two legalities. The military violence that was necessary to depose the defendants from their respective judicial and administrative posts and to enthrone the law represented by the Altstoetter Court remains out of sight. The revolutionary concept of crimes against humanity developed at Nuremberg suddenly finds a root in the traditional standard of civilization.

The most immediate effect of declaring Nazi law to be non-law was that the Nazi judges and judicial administrators were stripped of the dignity and immunity that judicial

55 3 TWC 31 (prosecution opening statement).
57 Fitzpatrick, Modernism and the Grounds of Law, 128.
robes might otherwise afford them. The prosecution portrayed law under Nazi rule as a
weapon – more precisely, as a murder weapon. The complicated case of legalized atrocities
was turned into a version of the folk murder trial: we have the suspects (the judges), we have
the lethal weapon (the non-law), and we know that only the suspects could have wielded the
weapon. The indictment charged that “German criminal laws, through a series of additions,
expansions, and perversions by the defendants became a powerful weapon for the subjugation
of the German people and the extermination of certain nationals of the occupied countries.”
Since the juridical forms were “transparent devices for a system of murderous
extermination,” we see the spectre of “a judicial system deliberately fashioned into a
headman’s axe” by the defendants and their associates.

The Altstoetter judges took up the prosecution’s language of law stripped of its
substance and turned into a common murder weapon: “The dagger of the assassin was
concealed beneath the robe of the jurist.” The Court stripped the defendants of any “shield”
of judicial immunity from criminal prosecution on the ground that they had not been proper
judges when they committed the deeds in question. Given the “sinister influences which
were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party,
the Gestapo, and the courts,” the Court refused to see the Nazi judges as independent judges.
Since judicial immunity, “the doctrine that judges are not personally liable for their judicial
actions,” is based on “the concept of an independent judiciary administering impartial
justice,” the Court reasoned, it could not be enjoyed by these Nazi judges. The Altstoetter

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58 3 TWC 23 (indictment).
59 3 TWC 20 (indictment).
60 3 TWC 92 (prosecution opening statement).
61 3 TWC 985.
62 3 TWC 1024.
63 3 TWC 1024.
Court did not need to treat the case as a problem of competing domestic and international legalities. Instead, the domestic law and its administrators were treated as fraudulent appearances that only exacerbated the seriousness of the crimes: “The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil which is not found in frank atrocities which do not sully judicial robes.” The categorical opposition between the legality of the Altstoetter Court and the fraudulent appearances of law represented by the Nazi judges framed the tribunal’s account of its own authority, offered resources for assessing the defendants’ culpability and offering an explanation for the catastrophic violence that the Nazi state visited upon Europe.

Authorizing the Tribunal

How did the Altstoetter Court construct its own authority and authorization? The Court was a U.S. military tribunal constituted on the basis of the Allied Control Council Law No. 10 (20 December 1945). This law established the normative basis for trials of war criminals after the first and major Nuremberg trial conducted by the International Military Tribunal (IMT). The Altstoetter Court was, therefore, a U.S. military Court authorized by a statute passed by the four Allied Powers. As much as the Court emphasized its authority to sit in judgment on Germans in Germany in reference to the temporary disappearance of Germany as a state, it did not want to be seen as a mere occupation court. After all, one of the key charges against the defendants was that they had “aided and implemented the unlawful annexation and occupation of Czechoslovakia, Poland and France” where “Special Courts” were used to “facilitate the extermination of Jews and Poles and the suppression of political

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64 3 TWC 1086.
The prosecution’s and the Court’s constructions of their own authority veered between an emphasis on the political and military power that made the constitution of the court possible and the invocation of normative mandates from “humanity” and “civilization”.

In the tribunal’s language, the power assumed by the Allied powers was acknowledged and translated into a moral mandate: “By reason of the complete breakdown of government, industry, agriculture, and supply, they [the Allied Powers] were under an imperative humanitarian duty of far wider scope to reorganize government and industry and to foster local democratic governmental agencies throughout the territory.” The reconstruction of Germany was seen as a moral imperative akin to the civilizing missions of colonial powers. Authors writing in the American Journal of International Law at the time of the trial also expressed the power and mandate of the Allies in terms borrowing from the idea of the “sacred trust of civilization” common in international law textbooks of that time. Germany’s sovereignty, wrote George Finch in 1947, “is now held in trust by the condominium of the occupying powers.” In his judgment, the war crimes trials sprang from the legislation of these occupying powers without, however, instituting genuinely new and therefore oppressive law:

There could be no more sacred trust than that of upholding the law against primitive and barbarous acts of inhumanity which shock the conscience of all civilized peoples and are forbidden by divine as well as human command.

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65 3 TWC 20 (indictment).
66 3 TWC 960.
In this argument, the physical occupation of Germany is based on military superiority, but it is accompanied by the “sacred” imperative to uphold and restore the law. The authorization of the Court thus becomes broader: the normative mandate of civilization creates tasks such as restoring law or “the temple of justice,” as the prosecution had put it. The Court’s legitimacy, then, rested on the civilization and legality it represented as much as on the political power that had enabled its establishment.

The Altstoetter Court understood international law as grounded in the practices of “civilized peoples.” International law appears as a binding set of norms that must have had a dormant existence in Nazi Germany. As the Court understood it, Control Council Law No. 10 merely “provides procedural means previously lacking for the enforcement within Germany of certain rules of international law which exist throughout the civilized world independently of any new substantive legislation.”69 If these rules seemed new to the defendants, it is because “international law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law.”70 In this argument, the four occupying powers, speaking on behalf of the community of “civilized peoples,” both reflected and transformed international law.

In explaining the source of the Court’s authority and legality, the prosecution and the Court used the terms “humanity” and “civilization” almost interchangeably. Shortly after the prosecution characterized the case as “the people of the world against these men who have

69 3 TWC 966.
70 3 TWC 966.
committed criminal acts against the community we know as the world,”71 it explained that “these proceedings invoke the moral standards of the civilized world.” The legal meaning of “the world” seems identical with the legal significance of “the civilized world”: humanity only speaks through the standard of civilization; and non-civilized peoples (if they indeed existed) were not included in the consideration of “the world”.

In short, the prosecution and the Court understood their authority as derived from two different but related sources: the military success of the Allied powers that assumed temporary but unlimited sovereignty over Germany, and the judgment of “the civilized world.”

**Lawlessness as the Root of Violence**

What is the relationship between law, legality, and the rise of the Nazi dictatorship in the account of the Altstoetter tribunal? The tribunal’s insistence that Nazi law was not law was not a given. At the time of the decision, alternative accounts of the Nazi state were already in circulation. For example, in 1941, Ernst Fraenkel had analyzed the Nazi State as a “Dual State” combining the rationality of capitalist organization with the arbitrariness of the “prerogative state” that gradually extended its jurisdiction.72 Law, in Fraenkel’s analysis, was deeply implicated in the functioning of the Nazi state since it provided the minimum of predictability without which no capitalist state could function.73 Still, the Nazi state that

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71 3 TWC 106 (prosecution opening statement).
73 Fraenkel, *The Dual State*, xvi, 3.
relied on the appearance of legality and the functioning of a legal system was, at its root, based on an illegal *coup d’etat.*

While Fraenkel’s account of the rise of National Socialism blamed law and the capitalist economy for a largely illegal (but not lawless) dictatorship, the *Altstoetter* court blames the decline of the law for the rise of the dictatorship. The prosecution adamantly claimed the incompatibility of the Nazi state with law, largely relying on documents of Nazi ideology that exuded an anti-legalist pathos. In order for the Nazi dictatorship to rise, the prosecution argued, law had to be subdued and abolished: “The ideology of the Third Reich was totally incompatible with the spirit of the law. It could not live under law, and the law could not live under it.” Here, law appears as a restraining, indeed civilizing, mechanism. Its presence would have prevented or at least mitigated the atrocities. According to the prosecution, the destruction of law by the defendants and others was not an end in itself, but a precondition for the escalating atrocities that followed the after the first years of National Socialism:

… the very perversion and brutality of the Nazi penal system may lead us to think of it as aimless cruelty, which it is not. Fanatical, ruthless, and even unbalanced as the German leaders might have been, they were never purposeless. Law and justice were destroyed for a reason. They were destroyed because by their very nature they stood athwart the path of conquest, destruction, and extermination which the lords of the Third Reich were determined to follow.

In this narrative, law acquires heroic qualities: it cannot but stand in the way of atrocities. The lawlessness of National Socialism and its descend into barbarism therefore appear as two sides of the same coin: law serves as the protector of civilization, and barbarism

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74 Fraenkel, *The Dual State*, 4-5.
75 3 TWC 41 (prosecution opening statement).
76 3 TWC 57 (prosecution opening statement).
cannot have been produced or aided by anything worth calling law.\textsuperscript{77} This image of law pre-empts questions about the complicity of law and the appearance of legality with the rise of the Nazi state. The law represented by the Court is innocent, and the law represented by the defendants is not law at all. If the Nazi extermination policies depended on lawlessness, as the prosecution suggested, the reintroduction of a liberal legality would be sufficient to prevent future 'hiccups of barbarism.'

\textit{Civilization as a Source of Norms}

War crimes and crimes against humanity were the core charges at the various Nuremberg trials. But where did these charges stem from? Individual criminal responsibility for violations of international law had rarely been suggested and never been implemented before 1945.\textsuperscript{78} How could the courts apply these charges in light of the objections against retroactive punishment? The \textit{Altstoetter} decision shows that “civilization” as a source of international legal principles according to Art. 38 I of the \textit{Statute of the International Court of Justice} had to shoulder the heavy burden of grounding the novel charges in more traditional legal concepts. While the Nuremberg trials are remembered for inventing humanity and crimes against humanity as legal concepts, closer scrutiny shows that the \textit{Altstoetter} court manufactured these new concepts from the cloth provided by the concept of civilization.

The prosecution and the tribunal sketched a picture of a dynamic international law with a strong normative core that was best represented by the actions powerful members of the international community. International law, in this view, is based on “civilization” but it

\textsuperscript{77} Douglas, “Shrunken Head,” 46.
\textsuperscript{78} See Pendas, “Magical Scent of the Savage”.
can be articulated by a small number of members on behalf of the larger community: “The
four nations which have written the substantive law under which we proceed … have
proclaimed it as a codification of crimes denounced as such by the moral conscience of that
community where the crimes we try were committed.” To proclaim the existence of
unambiguous norms of civilization in 1947 in Nuremberg, however, seems to invite doubts. A
number of the states associated with the classical geographical centre of “civilization” had
violated these rules for years systematically and unapologetically as a matter of policy. The
Court thus added a caveat to its observations about rules based on the acceptance of civilized
nations: While it is “conceded that the circumstance which gives to principles of
international conduct the dignity and authority of law is their general acceptance as such by
civilized nations,” it is not necessary that the “general acceptance of a rule of international
conduct [is] manifested by express adoption thereof by all civilized states.” The norms of
civilization, therefore, are not to be inferred from their actual observance by all civilized
states. These norms have deeper roots and can survive an assault on their validity by one or
more of the member states without much damage. Civilized states, as a consequence, do not
necessarily distinguish themselves by civilized conduct – all states are in principle vulnerable
to ‘hiccups of barbarism’ that need to be guarded against. By extending the applicability of the
norms of civilization to cases in which actual state consent to the norm is not
present, the Altstoetter Court created space for judging violations of the norms of civilization – but here
only in states generally classified as civilized. The invocation of civilization as a source of

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79 3 TWC 106 (prosecution opening statement).
80 For the importance of this observation, see Mazower, “An international civilization?” and Pendas, “Magical
Scent of the Savage”.
81 3 TWC 966.
norms resulted in a spatially uneven normativity: here, members of a state deemed civilized are held to standards that cannot, by the logic of this argument, be easily extended to states not deemed civilized.

How were the norms of civilization applied to civil servants of the Nazi state? The prosecution and the Court create the space for individual blameworthiness and criminal liability by reconstructing Germany as an essentially civilized state that tragically descended into a lawless dictatorship, and by reconstructing the defendants as professional jurists who were familiar with the normative requirements of the profession in the context of international legal standards.

Although the prosecution claimed that the defendants’ actions “were repugnant to the laws of every civilized country,”\(^82\) they emphasized a prior context in which the defendants had not yet departed from the norms of civilization: “a court is far more than a courtroom; it is a process and a spirit. It is the house of law. This the defendants know, or must have known in times past. I doubt that they ever forgot it.”\(^83\) For a moment, there was no difference between the courtrooms over which the defendants had presided and the present U.S. Tribunal in Nuremberg. Yet, the prosecution continued, the defendants who could not have forgotten the essentials of law as practiced in “civilized” countries, chose to depart from it: they “consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system to an engine of despotism, conquest, pillage, and slaughter.”\(^84\) By addressing the defendants as professional jurists, the prosecution drew them into the circle of those to whom the norms common to

\(^{82}\) 3 TWC 75 (prosecution opening statement).
\(^{83}\) 3 TWC 31 (prosecution opening statement).
\(^{84}\) 3 TWC 31 (prosecution opening statement).
civilized countries apply. The defendants’ “conversion” of the law into a murder weapon appears as a deliberate departure from the law that they had practiced before.

The Court established the blameworthiness of the defendants’ specific actions by showing that the norms of international law as derived from the judgment of (civilized) nations pre-existed the Nazi state: “at least on paper the Germans had developed, under the Weimar republic, a civilized and enlightened system of jurisprudence.”85 As a consequence, the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. … Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the states at war with Germany.86

The prosecution and the Court established individual criminal responsibility for judicial injustice in Nazi Germany by appealing to the norms of “civilization” and Germany’s identity as a “civilized” state. The classification of Nazi atrocities as “barbarous” and “tyrannical” only buttressed the claim that the judges, schooled in the law that is the companion of civilization, should have known that they were violating a higher legality.

III. Civilization after Nuremberg?

The Nuremberg Trials are an important reference point for the current system of international criminal justice. Since the end of the Cold War, the Nuremberg Courts have been recast as revered ancestors of the International Criminal Tribunals for Rwanda and for the former Yugoslavia, of the International Criminal Court, and of a number of hybrid

85 3 TWC 985.  
86 3 TWC 977-978.
domestic-international courts. The substantive law of these courts, though developed through international treaties and jurisprudence, also points back to the law developed at Nuremberg. Yet at Nuremberg, international criminal law did not emerge from a vacuum. It was based on, among other ideas, the “standard of civilization” encompassing a set of ideas about the evaluation of cultural difference in the medium of law. It is time for scholars and practitioners of international criminal law to take a closer look at what it is they inherited with the Nuremberg legacy: not only the concept of “crimes against humanity,” for example, but also its grounding in the “practices of civilized nations.” How did the standard of civilization shape the judgment at Nuremberg, and how did the Nuremberg trials shape or diffuse the standard of civilization?

Before Nuremberg, the “standard of civilization” was used to exclude actors who were not deemed “fit” for statehood and self-governance from the scope and benefits of international law. At Nuremberg, the language of civilization was used for establishing individual criminal responsibility for “civilized barbarism”, for atrocities committed by agents of a state that had once been considered civilized. The use of this standard allowed the Altstoetter Court to create an evaluative narrative that attributed Nazi atrocities to the realm of lawlessness and left law intact as a medium of judgment and companion of civilization. The Altstoetter Court did not allow the Nazi atrocities to blur the line between barbarism and civilization. Instead, the Court placed Germany within the community of civilized nations and Nazi practices in the realm of barbaric lawlessness, subject to the judgment guided by the moral standards of civilization.\(^7\) Attention to details of the judgment reveals that the appeals to the generally civilized status of Germany and the German judicial system were crucial for

\(^7\) See Douglas, “Shrunken Head,” 45.
establishing the blameworthiness of the Nazi judges’ conduct. The question asked here it not whether the *Altstoetter* judgment did justice to the Nazi judges, but how the judgment was arrived at. The judgment is, as closer scrutiny reveals, based on grounds that are both narrow and problematic.

How did the Nuremberg Trials shape the “standard of civilization”? Historical accounts of the “standard of civilization” often see the postwar period as an end-point or as a turning point for the standard. Authors who see the “standard of civilization” disappearing in the mid-20th century argue that it was delegitimized by the dual forces of colonialism and the demonstration by Nazi Germany that “civilized” states, too, commit atrocities. Authors who see the standard persisting past Nuremberg, in turn, see a transformation of its scope and contents: “civilization” is replaced by “modernity,” “human rights,” or “the rule of law.” I have suggested here that the “standard of civilization” was surely not discredited at Nuremberg. To the contrary, it was a crucial vehicle of judgment in the *Altstoetter* trial. However, “civilization” and “humanity” were sometimes used to the same legal and rhetorical effect. This slippage indicates that the Nuremberg Trials might be the point of transition from the openly exclusionary language of the “standard of civilization” to a language of “humanity” and human rights that makes stronger claims to universality. Yet if “humanity” is the new “civilization”, what happened to the “barbarians”?

The invocations of “civilization” in the *Altstoetter* case suggest that the old “standard of civilization” has found a new expression in standards of humanity and human rights without losing key trait of drawing upon and privileging norms perceived to be common in

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89 The language of “civilization” in the IMT trials has also been scrutinized, see Douglas, *Memory of Judgment*, 80-89.
Western societies. The use of human rights and international criminal law for empire-building purposes in the 1990s and beyond⁹⁰ might, then, not be a lapse to imperialism but a result of a deeper continuity in international law – a tradition of favouring and universalizing European principles of governance that was not delegitimized by the Holocaust nor superseded by the commitment to universal human rights. On the contrary: the Altstoetter judgment kept the framework of civilization and its association with law intact. By interpreting Nazi state violence as results of inexplicable failures of law and civilization, rather than products of a Western system of law and governance, the tribunal maintained the hierarchy between Western law and its “savage alterity”.⁹¹ In the tribunal’s account, law is always an agent of order and justice. Violence and injustice, then, are produced by the failure to honour the law and the “temple of justice”. This account failed to see the involvement of legal institutions and legal professionals in state violence that had already been analyzed by German émigré jurists such as Franz Neumann and Ernst Fraenkel.⁹² The categorical innocence of law is a given at the Nuremberg Justice Trial. The trial did not promoted not self-reflection about legal institutions but the “self-exaltation” of (international) law⁹³ as a “bulwark against apocalypse”.⁹⁴ At the same time, the Altstoetter judgment obscured the involvement of legal norms, institutions and professionals in violence – including but not limited to the violence judged at Nuremberg.

⁹⁰ See Anne Orford, Reading Humanitarian Intervention: human rights and the use of force in international law (Cambridge: Cambridge University Press, 2003); and Douzinas, Human Rights and Empire.
⁹¹ Fitzpatrick, Modernism and the Grounds of Law, 128.
⁹³ Fitzpatrick, Modernism and the Grounds of Law, 152.
⁹⁴ Pendas, “Magical Scent of the Savage,” 53.