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Martyrs and Scapegoats of the Nation? The Finnish War-Responsibility Trial, 1945–1946

Immi Tallgren*

36.1. Why and How to Write about the Finnish War-Responsibility Trial Today?

In place of a complicated empirical world, men hold to a relatively few, simple, archetypal myths, of which the conspiratorial enemy and the omniscient hero-savior are the central ones. In consequence, people feel assured by guidance, certainty and trust rather than paralyzed by threat, bewilderment, and unwanted personal responsibility for making judgements.¹

For the political historian Karl Deutsch, a nation is “a group of people united by a mistaken view about the past and a hatred of their neighbours”. Accounts of the past are one of the ways in which individuals and communities construct their identity. The histories of struggle of good and evil and the search for ‘heroes’ and ‘villains’ bind or separate people. In a world where individuals identify with their nation states, there is a tendency to find heroes in the home country and anti-heroes abroad. Problems emerge when this collective view of the world is violently shaken in a short period of time. The narrative of heroism and its violent unsettling into ambiguity where no closure is at hand offers one key to understanding the story of the Finnish war-responsibility trial, held

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¹ Murray Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence*, Academic Press, New York, 1971, p. 83.

against eight Finnish leaders in Helsinki from 15 November 1945 to 21 February 1946.

The Finnish trial was conducted by Finns in Finland applying Finnish law, but based on an international obligation, the Moscow Armistice between the Soviet Union and Britain with Finland of September 1944,² and under tight Allied (Soviet) surveillance. The alleged crimes for which the Finnish accused were tried were in substance similar to crimes in other national and international post-Second World War trials. Considering that it presented neither extravagant legal nor procedural elegance in its proceedings, was held in the secretive vernacular language and did not contain obvious elements of drama, such as capital punishments, it is perhaps unsurprising that the trial is not well-known abroad. Despite the increased attention to international criminal law in the past 20 years, the Finnish war-responsibility trial remains absent in international criminal law textbooks cataloguing post-Second World War national trials.³ Yet in Finland, it is still a topic of public interest and sensibility, perhaps as a symbolic culmination of the controversies relating to the traumatic period of the Second World War.⁴ The ardent controversies concerning the criminal accountability for the war started as soon as the Moscow Armistice was signed. In Article 13 it stated: “Finland shall co-operate with Allied Powers to arrest and pass judgment on those accused of *war crimes*”.⁵ Together with the use of the

² See Suomen asetuskokoelman sopimussarja (Finnish Treaty Series), 4/1944.

³ See the market-leading textbooks, such as Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013; Robert Cryer Hakan Friman, Darryl Robinson and Elizabeth Wilmschurst (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2010.

⁴ Most of the historians of recent Finnish history have addressed the trial in one way or another. Much less research has taken place by legal scholars, and even less so from the point of view of international law. For a study commissioned by the Ministry of Justice, see Jukka Lindstedt and Stiina Löytömäki, *Sotasyyllisyysoikeudenkäynti, Oikeusministeriön selvityksiä ja ohjeita*, Helsinki, 2010.

⁵ See Suomen asetuskokoelman sopimussarja (Finnish Treaty Series) no. 4/1944, and the national implementing law act Suomen säädöskokoelma (Finnish Law Gazette) no. 645/1944. The Armistices between the Allies and Romania and Bulgaria contained a similar clause. The Armistice with Hungary added an obligation to deliver the accused to the concerned governments; see also Tamás Hoffmann, “Post-Second World War Hungarian Criminal Justice and International Law: The Legacy of the People’s Tribunals”, *HOICL*, vol. 2, 2014, pp. 735–63.

established legal term “war crimes”, the lack of substantial discussions on the Article in the negotiations seem to have led the Finnish leadership to believe that the obligation concerned prosecution of conventional war crimes only, not responsibility at the highest political level of foreign relations.⁶ The confusion persisted throughout the preparations to implement the treaty obligation, and it was also brought up in the trial. A parallel can be drawn to the controversy concerning the International Military Tribunal at Tokyo that was established in January 1946 based on Principle 10 of the Potsdam Declaration, which promised stern justice for *war criminals*.⁷ Adding to the confusion, the Soviet Union also immediately used Article 13 to require national prosecution of conventional war crimes allegedly committed by the Finnish military in the Soviet territories that Finland was occupying.⁸ Today, it appears likely that nobody in the autumn of 1944 knew for sure what types of legal measures were to be covered by Article 13. The search for its ‘meaning’ was in that sense futile. It was a placeholder for some sort of criminal accountability to follow in legal developments of the near future and, as such, it offers a telling example of the elasticity of legal argumentation in times of crisis and transition. As the Allies developed their plans concerning the prosecution of the major war criminals of the Axis, after the conclusion of Finland’s armistice it became clear that they expected the highest leadership of wartime Finland to also face criminal liability for the war of aggression.⁹

⁶ See, for example, Jukka Tarkka, *13.artikla*, WSOY, Porvoo, Helsinki, 1977, pp. 49–55. On the negotiations of the Armistice in general, see Tuomo Polvinen, *Teheranista Jaltaan*, WSOY, Porvoo, Helsinki, 1980, pp. 92–124.

⁷ The defence in the Japanese trial challenged the tribunal’s jurisdiction for crimes against peace. The challenge was rejected by arguing that the Japanese government had understood that war criminals referred also to those responsible for initiating the war, see International Military Tribunal for the Far East (“IMTFE”), *The United States of America et al. v Araki, Sadao et al.*, Judgment, 4 November 1948, p. 48 (<http://www.legal-tools.org/en/doc/28ddb/>). I have not been able to find information on similar legal arguments in Romania, Bulgaria or Hungary, see *supra* note 5.

⁸ In 1944 Finnish soldiers were arrested for expected trials. Most of them were freed after pre-trial detention without charges and received compensation from the Finnish state for deprivation of liberty. On the so-called List No. 1, in which the Soviet Union had included 61 names of alleged war criminals, see Lauri Hyvämäki, (Hannu Rautkallio, ed), *Lista 1:n vangit : vaaran vuosina 1944-48 sotarikoksista vangittujen suomalaisten sotilaiden tarina*, Weilin & Göös, Helsinki, 1983.

⁹ See Tarkka, 1977, pp. 56–72, 96–126, *supra* note 6; Tuomo Polvinen, *Jaltasta Pariisiin rauhaan*, WSOY, Juva, 1981, pp. 131–38.

At the time, some Finns regarded the trial as part of the local communists' preparation for revolution, behind which the whole of international communism was mobilised.¹⁰ For others, criminal responsibility was simply evident and the absence of pre-existing national legislation on the crimes was merely a detail.¹¹ In the midst of the claims that the principle of legality had been violated and that the trial was a form of victors' justice or national political vengeance, the histories of the trial continue to represent a battlefield of political, ideological and generational conflicts and forms of identification.¹² Commentaries, legal actions and political motions have proliferated down the decades. Distance in time has certainly started to render the controversies less burning and more a matter of principle, considering that even the remaining eyewitnesses who experienced the post-war period as children are today in an advanced age. Yet the memory of the trial still stirs public emotions, and it has a place amongst other sore points of commemoration of Finland's past.¹³ These sensitivities persist also in academic research, whether from a historical, legal or sociological perspective, as several scholars conducting research on the period of the Second World War have pointed out.¹⁴

¹⁰ See, for example, Yrjö Soini, *Kuin Pietari hiilivalkealla, Sotasyyllisyysasian vaiheet 1944–1949*, Otava, Helsinki, 1956, p. 373.

¹¹ See, for example, Minister Leino in a government meeting on 8 August 1944, see Hannu Rautkallio (ed.), *Sotasyyllisyyden asiakirjat*, EC-Kirjat, Espoo, 2006, p. 318.

¹² See, for example, Jukka Tarkka, "Tuomio, syyllisyys ja kunnia", in Jukka-Pekka Pietiäinen (ed.), *Sota ja tuomio*, Edita, Helsinki, 2002. For a compilation of personal recollections, see Aarne Långfors (ed.), *Isänmaan vangit*, Otava, Helsinki, 1997.

¹³ Zägel and Steinweg point to the particular feature that the position from which history is remembered in Finland is typically that of a victim, in the absence of sentiments of responsibility or guilt and thus the absence of a *Vergangenheitsbewältigung* in the German sense, see Jörg Zägel and Reiner Steinweg, *Vergangenheitsdiskurse in der Ostseeregion*, LIT Verlag, Berlin, 2007, pp. 168–72. On the "victim myth" in Austria, see Heidemarie Uhl, "From Victim Myth to Co-Responsibility Thesis", in Richard Ned Lebow, Wulf Kansteiner and Claudio Fogu (eds.), *The Politics of Memory in Postwar Europe*, Duke University Press, Durham, NC, 2006.

¹⁴ See, for example, Seppo Hentilä, "Aseveljeyden nurjalla puolella: saksalaisten sotavankileirit Suomessa 1941–1944", in Pirjo Markkola (ed.), *Historiallinen aikakauskirja*, SHS and Historian ystävien liitto, Helsinki, 2009, pp. 346–49; Sari Näre and Jenni Kirves, "Esipuhe", in Sari Näre and Jenni Kirves (eds.), *Ruma sota: Talvi- ja jatkosodan vaiettu historia*, Johnny Kniga Publishing, Helsinki, 2008, pp. 7–10. Lauri Hannikainen refers to a tendency of "whitewashing of Finland", see Lauri Hannikainen, "Military Occupation of Eastern Karelia by Finland in 1941–1944: Was International Law Pushed Aside?", in Kjeitl Mujezinovic Larse, Camilla Guldaahl Cooper and Gro Nystuen

The most explicit sign of relevance of the histories of the Finnish trial are the recent legal actions that gained considerable attention in the media and public opinion. The events started with an annulment claim to the Supreme Court of Finland in 2008, on the basis of the general Finnish law on annulment of judgments or extraordinary appeals for procedural fault. Ilkka Tanner, grandson of the Social Democratic Party wartime minister Väinö Tanner, requested annulment of the 1946 judgment by which Väinö Tanner had been declared guilty of “misuse of official authority to the detriment of the nation”, as well as the annulment of his five and a half-year prison sentence. The Supreme Court of Finland rendered a detailed analysis of the law of 1945 as well as the trial. It unequivocally stated that the trial had violated many of the essential principles of the Finnish legal order. However, it emphasised that the establishment of the tribunal and its activity took place on exceptional grounds and in exceptional circumstances. The Court pointed out that the law of 1945 did not contain provisions on means of appeal, ordinary or extraordinary. Highlighting these special circumstances, the Supreme Court concluded that a retroactive examination of the judgment and the procedure leading to it on the basis of the law on annulment of judgments or extraordinary appeals for procedural fault was not within its competence.¹⁵

Ilkka Tanner brought the case before the European Court of Human Rights (‘European Court’). He based his claim on Article 13 of the European Convention of Human Rights (‘ECHR’), which sets out the “right to an effective remedy”, and on Article 2 of Protocol No. 7 on the “right of appeal in criminal matters”. The applicant claimed that since annulment of the war-responsibility judgment was not explicitly excluded in the law of 1945, the Supreme Court could have considered itself competent. The applicant further claimed that the lack of any means of appeal violated his rights.

In the wake of these domestic and European legal procedures, active public discussion followed, prompting the Ministry of Justice (‘Ministry’) to react. The Ministry considered various alternative ways to redress the situation, including legislative means to either open a

(eds.), *Searching for the Principle of Humanity in International Humanitarian Law*, Cambridge University Press, Cambridge, 2013, pp. 200–1.

¹⁵ Supreme Court of Finland, *Ylimääräinen muutoksenhaku – Tuomion purkaminen rikosasiassa Sotasyllisyysoikeus*, Decision no. 2008:94, 20 October 2008.

possibility for extraordinary appeal or directly annul the judgment.¹⁶ The Ministry ordered an expert report on the legal aspects of the past trial and the potential options for an official reaction to it outside the sphere of legal remedies, such as a public apology or a statement. In the meantime, the European Court, by a committee of three judges including the Finnish judge, declared the application inadmissible on 23 February 2010. The basis of incompatibility evoked in the decision was that of *ratione personae*, i.e. the appellant could not be considered a victim of a violation in the sense of Article 34 of the ECHR.

The report commissioned by the Ministry, published on 12 March 2010, offers a detailed and carefully balanced reading of the problematic situation it was requested to advise on. In the manner symptomatic of the sensibility of the topic, the report skilfully performs – in the language of figure skating dear to Finns – three salchows, a lutz and an axel, and then leaves the rink. At its boldest, it states without ambiguity that Finland’s military activity in the Soviet Union fulfilled the material elements of crimes against peace, as understood in international law at the time of the trial.¹⁷ The report, however, questions whether international law was already considered to supersede potentially contradictory national law at the time of the trial, and whether the London Agreement formed a sufficient basis for the individual criminal responsibility imposed on the eight accused in the Finnish trial in accordance with Article 13 of the Moscow Armistice. Oscillating between expressions of strong reservations and a literature analysis supporting a progressive view of international law at the time, the report hesitatingly concludes in the positive.¹⁸ At the same time, it dwells at length upon the serious breaches of the Finnish Constitution, as well as other highly problematic aspects of the trial.¹⁹

The Finnish trial and its polemic aftermath are by no means unique in Europe or globally. They highlight questions of collective memory and

¹⁶ “Väärät tuomiot sotasyllisyydestä ministeriön syytiin”, in *Helsingin Sanomat*, 5 February 2009. See also Lindstedt and Löytömäki, 2010, pp. 84–85, *supra* note 4.

¹⁷ Lindstedt and Löytömäki, 2010, pp. 82, 51, see *supra* note 4, the latter with reference to Hannikainen, 2013, see *supra* note 14.

¹⁸ Lindstedt and Löytömäki, 2010, pp. 51–57, see *supra* note 4. For a critical view on this, see Mikaela Heikkilä, “Suomen sotasyllisyysoikeudenkäynti ja kansainvälinen rikosoikeus”, in *Lakimies*, 2010, no. 4, p. 638.

¹⁹ See Lindstedt and Löytömäki, 2010, pp. 29–48, *supra* note 4.

its politics: What does the memory of the trial represent and to whom?²⁰ Why does the story of this trial matter so much? What sense does the judicial treatment of (legal) history have? Can the past be revisited in a court, and perhaps improved the second time? How should today's democracies look back to legally deficient past trials, if they revisit them at all? Should controversial judgments be annulled or public apologies presented, as is frequently proposed in Finland?²¹ If yes, which judgments among the many? As the report of 2010 emphasises, the war-responsibility trial is by far not the only controversial or questionable legal episode in Finnish history.²² That is among the reasons why the report cautions against using legislative means to retroactively redress the outcome of the war-responsibility trial. With regard to the other means, such as a public apology or a statement aimed at nullifying the judgment or other political reactions, the report does not advance a clear opinion.²³ As the report points out, the practice of expressing public apologies by the government is almost unheard of in Finland.²⁴ An exception took place in 2000, when Prime Minister Paavo Lipponen apologised publicly for the Finnish State Police handing over eight Jewish refugees, including two children, to the German authorities, all but one of whom died in Auschwitz.²⁵ Meanwhile efforts to 'render the honour' of the convicted, in one way or another, continue. In April 2012 the newly elected

²⁰ On collective memory, see Maurice Halbwachs, *La mémoire collective*, Albin Michel, Paris, 1997; Paul Ricoeur, *La mémoire, l'histoire, l'oubli*, Le Seuil, Paris, 2000; Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, Transaction Publishers, New Brunswick, 1997. See also Lebow, Kansteiner and Fogu (eds.), 2006, *supra* note 13.

²¹ Among the earliest powerful demands, see Yrjö Soini, *Toinen näytös - entä kolmas?*, Karisto, Ha meenlinna, 1968.

²² Lindstedt and Löytömäki, 2010, p. 88, see *supra* note 4. See also, Jukka Kekkonen, "Sotasyllisyys ja kansakunnan muisti", in *Helsingin Sanomat*, 10 March 1996, p. A2.

²³ Lindstedt and Löytömäki, 2010, pp. 81–88, see *supra* note 4.

²⁴ *Ibid.*, p. 85. However, Markku Jokisipilä, *Aseveljiä vai liittolaisia?*, Suomalaisen kirjallisuuden seura, Helsinki, 2004, p. 25 refers to an apology presented by the Finnish Council of State to the families of the convicted of 1946 war-responsibility trial, without further information on the occasion and time of the apology. The same information is repeated in a few academic works, such as Jouni Tilli, *Luovutuskeskustelu menneisyyspolitiikkana*, M.A. Thesis, Institute of Social Sciences and Philosophy, University of Jyväskylä, 2006, but is absent in Lindstedt and Löytömäki, and Tarkka, *Hirvunen asia*, WSOY, Helsinki, 2009. Upon my request in September 2014, the information service of the Council of State and the National Archive were unable to find a trace of such an apology.

²⁵ Elina Sana, *Luovutetut – Suomen ihmislouvatukset Gestapolle*, WSOY, Helsinki, 2003, pp. 15–16.

conservative President Sauli Niinistö was presented with a petition asking for a rehabilitation of the convicted.²⁶

Under these conditions and with the distance of time of 70 years, what is the sense of studying the Finnish trials today, in particular as part of a collective research effort into the “origins” of international criminal law? Several alternative approaches and historiographical choices present themselves. For example, is a history of the Finnish trial constructed as a description of a separate single event, or as a part of a chain of evolution of the principle of individual criminal responsibility in international law? Is it connected to a broader argument, such as the inherently political nature of international law or the limited sovereignty of small states in terms of *realpolitik*? Should a history told today in the context of the above-mentioned research objectives primarily address issues that can be considered to have relevance to current discussions on international criminal trials? An example of such a ‘useful’ focus would be to analyse the jurisdictional frame of the Finnish trial as a confrontation between an international legal obligation, on the one hand, and national legislation on the other, with its vernacular judicial culture. A comparative study on this could try to elucidate the potential limits of prosecuting large-scale leadership criminality in *ad hoc* justice established for specific situations, with a fixed jurisdictional slice in time and space, and a pre-set focus of prosecution.²⁷

The Finnish trial could also be approached as a case study on whether criminal justice is able to appease post-conflict societies and support their transition to peace-loving members of the “international community” with new, democratic governments. Did the trial bring closure and, if so, for whom? Whose interests did it serve? What are the perspectives of different actors, whether the accused, the judges, the new Finnish government, the Soviet or British governments? The political and practical difficulties encountered by the recent *ad hoc* tribunals or the International Criminal Court (‘ICC’) in the areas of their territorial jurisdiction, as well as the uncertainties about their legacy in the societies

²⁶ Veikko Saksi, *Sotasyylisten rehabilitaatio vai tuomioiden purku*, Kustannusosakeyhtiö Otava ja Karjalan Kuvalehti, Helsinki, 2012, pp. 205–6.

²⁷ I have touched upon this question in Immi Tallgren, “The Finnish War-Responsibility Trial in 1945–46: The Limits of Ad Hoc Criminal Justice?”, in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013.

concerned could be evoked in comparison. What difference does it make that – as a striking contrast to today’s international trials – the individual victims of Finnish aggression and occupation of the Soviet territories (civilian victims of casualties in combat, military victims, prisoners of war, civilians interned in Finnish concentration camps, owners of pillaged property, etc.) were not present, neither physically in the trial nor in a significant manner evoked in the discussions? Instead, the Soviet and British military and political representatives in the Allied Control Commission (‘Commission’) followed the trial, acting in the role of the “owners of the cause”. The *Rechtsgut* violated by the Finnish crimes appears to have been primarily understood as the sovereignty of the injured state (in this case, the Soviet Union) and its territorial integrity. Human suffering and losses of civil populations or the military were considered accessory. This interpretation could serve as a starting point for analysing the paradigm change of the position of the individual in international law that international law scholarship often situates in the post-Second World War period, in particular the Nuremberg and Tokyo trials and the Universal Declaration of Human Rights. In the Finnish trial, then, the new role of the individual was visible through the manner in which a few individuals, having exercised functions in the Finnish leadership, were personally held accountable for large-scale political and military actions undertaken over four years. Yet from the perspective of victims, the individual suffering and loss did not yet have relevance, and those individuals had no standing in the trial. A study on how the collective and individual victimisation by the crime of aggression has been understood in different past trials would have primary interest to today’s scholarship, considering the recent amendments to the ICC Statute to define the crime and to include it in the ICC jurisdiction, which is currently under ratification in many countries, including Finland.²⁸

My attention in this chapter is focused on yet another direction, less directly identifiable as “contributing to the development of international criminal law”,²⁹ an expectation towards research and researchers that I

²⁸ The jurisdictional revisions are yet to be confirmed by another conference. See, for example, Claus Kress and Leonie von Holendorff, “The Kampala Compromise on the Crime of Aggression”, in *Journal of International Criminal Justice*, 2010, vol. 8, p. 1179–1217.

²⁹ Centre for International Law Research and Policy, “The Historical Origins of International Criminal Law: Seminar 1 Concept and Programme”.

critically analyse in the foreword to this volume.³⁰ As with many other authors with their particular contributions in this volume, I had to face the challenge of presenting the Finnish trial at the length of a seminar paper, to an audience largely unfamiliar with either the big picture of Finland's history or the particular events of the Second World War in Finland, and thus unfamiliar with the political, sociological and legal context where the trial took place. Considering that in the case of small states the archive materials and an overwhelming majority of commentaries are available only in the national language not accessible to many, the researcher has no other choice than to assume the responsibility of both translating most of the references and trying to convey a dense academic and public discussion unknown by her readers. The inevitable need to simplify and condense, to offer background and yet to highlight issues that one personally finds most significant, based on one's education, professional background and view of the world in general, are practical demonstrations of the dilemmas of authorship and perspective in disciplinary histories that I problematise in the foreword.³¹ Such complexities and limits, emblematic of interdisciplinary research in legal histories in collective, comparative projects were never far in preparing this chapter. Communicating rich sediments of national historiographical and legal analysis in a few pages – a common method of work in these projects – can easily turn to serving snapshots of the past imagined by a local informant, trading historical anecdotes, worn-out clichés, ignorant “selfies” in the midst of popular polemics, all these served together as tiny portions of colourful tapas on the enlarging plate of “global history”.

The remedies with which I tried to cope when faced with those dilemmas are three-fold: 1) being open to these difficulties, by purposefully breaking any illusion of a single coherent story of the Finnish trial that I would be authorised, competent and able to deliver; 2) striving to provide some references to material published in other languages, even if the analysis in “short histories” or comparable may not always be at the level of precision and insight of the domestic ones – in order to avoid presenting only arguments on which there is no way for a reader unacquainted with the vernacular language to form an independent

³⁰ Immi Tallgren, “Foreword”, in *HOICL*, vol. 1, 2014, pp. xi–xxx.

³¹ *Ibid.*

opinion;³² 3) stating explicitly the direction in which my interest was focused in drafting the chapter, in the search for an aspect that could somehow have more general interest in today's analysis of criminal justice for crimes of an international nature, beyond the particularities of the Finnish context and its events and actors.

Now turning to the third point: the motivation in writing this chapter was to approach the Finnish story as a potential case study as part of a larger research effort tracing representations of heroism, martyrdom and sacrifice in international criminal trials.³³ In the case of the Finnish trial and its reception, the question posed was: What would a reading in terms of sacrifice or martyrdom bring to historiography of the trial? Whereas sacrifice can refer to heterogeneous ritual practices in different religions, it is here used in a non-specific cultural understanding, which

³² For general aspects of Finnish history in English, I have used: Fred Singleton and Anthony F. Upton, *A Short History of Finland*, Cambridge University Press, Cambridge, 1998; David Kirby, *A Concise History of Finland*, Cambridge University Press, New York, 2006. See also William R. Trotter, *The Winter War: The Russo–Finnish War of 1939–40*, Aurum Press, London, 2003. In German, Zägel and Steinweg's comparative study, 2007, see *supra* note 13, was very useful, and it also provides a bibliographical online resource. In French, a recent general presentation is Bernard Le Calloc'h, *Histoire de la Finlande*, Editions Glyphe, Paris, 2010. Earlier editions of Osmo Jussila, Seppo Hentilä, Jukka Nevakivi's much-used commentary, the latest original edition of which is *Suomen poliittinen historia 1809–2009*, WSOY, Helsinki, 2009, have been translated into several languages, see, for example, *Histoire politique de la Finlande - XIX^e–XX^e siècle*, Editions Fayard, 1999; *From Grand Duchy to a Modern State: A Political History of Finland since 1809*, Hurst and Co., London, 1999. See also Tuomo Polvinen, *Between East and West, Finland in International Politics 1944–1947*, Werner So derstro m Osabayhtio , Helsinki, 1986, that is an edited compilation of Polvinen's three-part study published in Finnish in 1979–1981.

³³ In my ongoing research project "Images of History", heroism, sacrifice and martyrdom are understood as broad cultural, anthropological and theological concepts. A detailed analysis of relevant literature is beyond the scope of this article; some references to commentaries evoking sacrifice and martyrdom in the context of international criminal trials are presented in the conclusions chapter. For examples of theological readings of international law, including analysis of sacrifice see, for example, Judith Grbich, "Secrets of the Fetish in International Law's Messianism", in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge, 2006, pp. 197–220; Anne Orford, "Trade, Human Rights and the Economy of Sacrifice", in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge, 2006; Jennifer Beard, "Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology", in *Australian Feminist Law Journal*, 2003, vol. 18, pp. 27–54; Jennifer Beard, *The Political Economy of Desire: Law, Development, and the Nation*, Routledge-Cavendish, London, 2006.

ranges from the metaphorically offering of individuals' lives or destinies to a higher purpose, to the selfless, voluntary good deeds for others in return for a greater long-term gain or higher cause. Sacrifice is understood as a performative ritual exercise, with potentially deep socio-psychological and cultural repercussions. Similarly, martyrdom can be understood beyond its specific meanings in different religions, in an extended metaphorical sense of a believer or one who has adopted an ideological cause and is called to witness for this belief or conviction, and on account of bearing witness endures negative consequences, such as criminal punishment, loss of honour and social status. My initial impression was that the Finnish trial presents aspects of both scapegoating sacrifice and martyrdom, depending on the point of time and perspective from which it is interpreted. In the commentaries on the trial, both terms appear very often either to describe how the Finns at the time or today feel about the convicted or as a personal opinion of the author, but the terms do not get further analysed.³⁴ To go beyond the intuition, in the following section I will briefly present the geopolitical and legal context of the trial and how that context, the trial and the convicted individuals have been and continue to be represented.

36.2. The Geopolitical Background of the Alleged Crimes and the Trial³⁵

When Stalin says “dance”, a wise man dances.³⁶

In 1938 the Soviet Union, threatened by Germany, started to pressure Finland with territorial claims to gain space for its defence, in particular

³⁴ See, for example, Zägel and Steinweg, 2007, p. 169, *supra* note 13; Lasse Lehtinen and Hannu Rautkallio, *Kansakunnan sijaiskärsijät*, WSOY, Helsinki, 2005; Jussila, Hentilä and Nevakivi, 2009, p. 225, *supra* note 32; Henrik Meinander, *Tasavallan tiellä: Suomi Kansalaissodasta 2000-luvulle*, Schildts, Espoo, 2012, pp. 254–55; Jouko Vahtola, *Suomen historia: jääkaudesta Euroopan Unioniin*, Otava, Helsinki, 2003, p. 382; Martti Turtola, *Risto Ryti: Elämä isänmaan puolesta*, Otava, Helsinki, 1994, p. 339; Niku, *Kahdeksan tuomittua miestä. Sotasyllisten vankilavuodet*, Edita, Helsinki, 2005, p. 229. As the compilation of materials reprinted in Rautkallio, 2006, see *supra* note 11, demonstrates, the terms were in use already at the time of the trial, in particular by Prime Minister and later President J.K. Paasikivi, see, for example, pp. 347, 358.

³⁵ This summary presentation follows in broad lines Jussila, Hentilä, Nevakivi, 2009, see *supra* note 32, and Singleton and Upton, 1998, see *supra* note 32.

³⁶ Nikita S. Khrushchev, in *Khrushchev Remembers*, cited by Trotter, 2003, unnumbered front page, see *supra* note 32.

to protect the city of Leningrad. At that point Finland had only been an independent state for 21 years, having previously been part of the Russian Empire as an autonomous territory until 1917. The early existence of an independent Finland had been marked by a violent civil war in 1918 where the industrial and agricultural working classes (the Reds) fought against the conservative government (the Whites), led by later war hero and president, Marshal Carl Gustaf Mannerheim and supported by a German military intervention. The civil war was followed by heavy judicial and extrajudicial repression of the lost party, the Reds.³⁷

It was not the first time in the short history of independent Finland that it had to negotiate about its territory with its huge Eastern neighbour. After Finland's independence in 1917, it took a few years before the border between Finland and Russia/Soviet Union became stabilised. Although the area of Eastern Karelia had been part of Russia since the Peace Treaty of Stolbovo between Sweden and Russia in 1617, Finland claimed the right to annex that area to its territory, arguing linguistic and ethnic proximity between Finns and the inhabitants of Eastern Karelia. An ideological motivation was to save the kindred populations from Bolshevik rule. Another motor was nationalism: in the late nineteenth- and early twentieth-century nationalistic movement leading to Finland's independence, that area had been projected as a place of mythical importance for the Finnish kindred peoples.³⁸ The Peace Treaty of Dorpat in 1920 was preceded by three military expeditions by the Finns, aimed at gaining positions in Eastern Karelia.³⁹ A declaration by the Soviet Russian government concerning the autonomy of Eastern Karelia was annexed to the Treaty of Dorpat, but the Russian government never applied it. In 1921 Finland brought the issue of the Eastern Karelian populations to the League of Nations, and an advisory opinion of the

³⁷ See Jaakko Paavolainen, *Politiittiset väkivaltaisuuudet Suomessa 1918. Osa 1: Punainen terrori*, Tammi, Helsinki, 1966; Paavolainen, *Osa 2: Valkoinen terrori*, Tammi, Helsinki, 1967; Jukka Kekkonen, *Laillisuuden haaksirikko. Rikosoikeudenkäyttö Suomessa vuonna 1918*, Lakimiesliiton Kustannus, Helsinki, 1991; Lauri Hannikainen, "The Finnish Civil War in 1918 and its Aftermath", in Lauri Hannikainen, Raija Hanski and Allan Rosas (eds.), *Implementing Humanitarian Law Applicable in Armed Conflicts, The Case of Finland*, Martinus Nijhoff, Leiden, 1992, p. 8.

³⁸ Jussi Niinistö, *Bobi Sivén, Karjalan puolesta*, SKS, Helsinki, 2001, pp. 16–21, 80–96, 220–38; Toivo Nygård, *Suur-Suomi vai lähiheimolaisten auttaminen*, Otava, Helsinki, 1978, pp. 50–85.

³⁹ See Jussi Niinistö, *Heimosotien historia 1918–1922*, SKS, Helsinki, 2005.

Permanent Court of Justice was sought. The Court declined to grant it for lack of jurisdiction.⁴⁰

In 1938 and 1939 the negotiations between the Finnish and the Soviet government were conducted in a tense atmosphere, with the Soviet side advancing repeated threats on Finland's territorial integrity. At that point of time, the Finnish government was not aware that the Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics, also known as the Molotov-Ribbentrop Pact, signed on 23 August 1939, included a secret protocol that divided the territories of Romania, Poland, Lithuania, Latvia, Estonia and Finland into Nazi and Soviet "spheres of influence" anticipating potential "territorial and political rearrangements" of these countries. In November 1939 the Soviet Union attacked Finland. Finland requested help from its Nordic neighbours and beyond. It received mainly moral or political support, including the exclusion of the Soviet Union from the League of Nations on 14 December 1939. Sweden assisted by delivering arms, material and volunteers, but did not want to commit itself to more direct involvement. Promises of military help by Britain and France did not materialise in time, partly because Norway and Sweden were unwilling to grant their troops the right of passage.⁴¹

The balance of power in the war that began was very unequal. Finland's population was 3.7 million, whereas the Soviet Union had a population of 180 million. Finland's army was small, unprepared and poorly equipped compared to the Red Army. The manner in which the population became united, despite its previous divisions during the Civil War, and managed to defend its territory with the scarce means is referred to as the "spirit of Winter War", a "mythical" miracle of national unity.⁴² By the end of February 1940, however, Finland was at the point of military collapse. On the Soviet side, 127,000 military personnel were dead or missing, and 190,000 wounded. On the Finnish side, some 23,000 military personnel were dead or missing, and 44,000 wounded.

⁴⁰ Permanent Court of International Justice, *Status of Eastern Carelia*, Advisory Opinion, 23 July 1923.

⁴¹ On the heterogeneous expressions of support and offers of help, see Trotter, 2003, pp. 194–202, *supra* note 32.

⁴² On these and other images of Winter War internationally, see Martti Julkunen, "Talvisodan kuva: Suomen hetki kansainvälisen huomion huipulla", in Markku Jokisipilä (ed.), *Sodan totuudet*, Ajatus, Helsinki, 2007.

Finland and the Soviet Union concluded the Moscow Peace Treaty in March 1940.⁴³ The Finns considered the conditions of peace extremely harsh.⁴⁴ Finland had to cede some 11 per cent of its territory and some 30 per cent of its economic assets, accept a Soviet military base on its coast, and evacuate and resettle over 400,000 persons from the lost territories. Despite the Peace Treaty, the Finnish government continued to keep the army on war alert. It undertook important fortification and rearmament projects, using up to 50 per cent of its budget on military spending.⁴⁵ As a result, Finland's military preparedness was remarkably higher soon after the Winter War than it had been before the war.

Following the Winter War, the Finnish government prioritised the establishment of good relations with Germany. Contacts and mutual visits on different levels intensified. The relations with the Soviet Union remained tense, with several minor conflicts arising from the implementation of the Moscow Peace Treaty or subsequent demands by the Soviets. In September 1940 an agreement with Germany was concluded, granting German troop transfers in Finland's territory, in order to supply the German troops in northern Norway. Finland started to secretly acquire arms and military material from Germany. At the latest in spring 1941 Finland was negotiating its participation in Germany's war effort on the Finnish front and thus preparing for the war. As will be discussed in the following section, the war was generally considered as a continuation of the Winter War, and it was regarded by many as an opportunity to seek compensation for the losses arising from the latter. The Finnish politicians and leaders of associations on the left that were considered too close to the Soviet Union were administratively interned based on the law on "protection of the nation".⁴⁶

⁴³ Suomen asetuskokoelman sopimussarja (Finnish Treaty Series) 3/1940.

⁴⁴ "Man hat den Frieden von Moskau das finnische Versailles genannt", wrote Väinö Auer and Eino Jutikkala, *Finnlands Lebensraum: das geographische und geschichtliche Finnland*, Metzner, Berlin, 1941.

⁴⁵ See Ohto Manninen and Kauko Rumpunen (eds.), *Risto Rytin Päiväkirjat 1940–1944*, Edita, Helsinki, 2006, where the period of 14 months of "peace in between", as it is called in Finland, is presented based on diaries and other materials by and on the Prime Minister and President Risto Ryti, accompanied with *post facto* commentaries by the editors, pp. 18–110.

⁴⁶ Similar detentions had already taken place during the Winter War. For personal histories on the conditions of detention, see Sari Näre, "Turvasäilöön ja keskitysleireille –

The Continuation War began in June 1941, in the official story, with Soviet bombardments of Finnish airports and other installations. The Finnish leadership took great care to present the beginning of the hostilities as a Soviet attack.⁴⁷ As is known today, Finland had in fact participated in the planning of the war for at least months, if not longer, and consented to Germany using Finnish territory and airspace as well as Finnish assistance in its attack on the Soviet Union on 22 June.⁴⁸ Finland's effort to declare itself neutral in the conflict between the Soviet Union and Germany was complicated by the radio declaration by Adolf Hitler on 22 June that Finland was fighting "in union", "*im Bunde*", with Germany. The Finnish offensive into Soviet territory started on 10 July, with an army of 450,000 soldiers and some 150,000 persons assisting the army. By September, Finland had reached its previous borders from the Dorpat Peace Treaty of 1920. In Eastern Karelia, Finnish troops crossed these borders to finally occupy a part of Soviet territory that it had been interested in since the first years of its independence. In major parts of the political and military leadership and the Finnish population, plans for a "Great Finland" had support; in others they caused concern and fear.⁴⁹ President Risto Ryti had started to prepare for a new eastern border for Finland in the spring of 1941, in the likely eventuality that the Soviet Union would soon be dismantled and governed by Germany and its allies. Historical, ethnographic and geographic studies were commissioned to support Finland's enlargement, not only to Eastern Karelia but also up the peninsula of Kola.⁵⁰ Two studies, entitled *Finnlands Lebensraum*⁵¹ and *Die Ostfrage Finnlands*⁵² were published in German.

In the occupied territories, the treatment of the civilian population that was considered as representatives of the kindred peoples of Finland

poliittisten vankien kohtelu sodan aikana", in Sari Näre ja Jenni Kirves (eds.), 2008, see *supra* note 14, p. 249.

⁴⁷ See, for example, Prime Minister Rangell's speech on 25 June 1941, "Tiedonanto eduskunnalle".

⁴⁸ See, for example, Jokisipilä, 2004, *supra* note 24; Manninen and Rumpunen, 2006, *supra* note 45.

⁴⁹ See Ohto Manninen, *Suur-Suomen ääriviivat*, Kirjayhtymä, Helsinki, 1980.

⁵⁰ *Ibid.*, pp. 133–37; Zägel and Steinweg, 2007, p. 153, see *supra* note 13.

⁵¹ Väinö Auer and Eino Jutikkala, *Finnlands Lebensraum: das geographische und geschichtliche Finnland*, Metzner, Berlin, 1941.

⁵² Jalmari Jaakkola, *Die Ostfrage Finnlands*, Söderström, Helsinki, 1941. See also Zägel and Steinweg, 2007, p. 153, *supra* note 13.

was preferential.⁵³ In order to separate the kindred from the foreign, studies on racial profiling were carried out. Soviet civilians of mainly Russian or Ukrainian origins were interned in concentration camps, with the purpose of creating “a racially clean regular population with an organic link to the Finnish people in Eastern Karelia”.⁵⁴ In historiographical research, it appears uncontroversial that the intention was not to exterminate, but to concentrate non-desired civilians for future transfers away from the Finnish occupied territories, potentially in exchange for kindred people elsewhere in the Soviet territory soon under German control, according to the plans of the time.⁵⁵ At their maximum height in 1942, the camps contained some 24,000 individuals, mainly children, women and the elderly. Hunger, illnesses and confinement took their toll; a total of some 4,000 to 7,000 camp inmates died. Occupation of the Soviet territories was condemned by several states that had previously been on friendly terms with Finland. The widespread international sympathy Finland had benefited from as the tiny victim of the Soviet aggression during the Winter War started to fade away. This development further isolated Finland internationally, thus making it even more dependent on Germany for food and military supplies. An additional cause of international criticism was the treatment of Soviet prisoners of war (POWs). Some thirty percent of the estimated 64,000 Soviet POWs died in Finnish prison camps, to which the International Committee of the Red Cross (ICRC) was not granted access.⁵⁶

⁵³ On the occupation in general, see Antti Laine, *Suur-Suomen kahdet kasvot, Itä-Karjalan siviiliväestön asema suomalaisessa miehityshallinnossa 1941–1944*, Otava, Helsinki, 1982; Zägel and Steinweg, 2007, pp. 154–56, *supra* note 13. See also Antti Laine, “Finnland als Okkupationsmacht in Sowjetkarelien und die Kollaboration der Karelier”, in Werner Röhr (ed.), *Okkupation und Kollaboration (1939–1945): Beiträge zu Konzepten und Praxis der Kollaboration in der deutschen Okkupationspolitik*, Hüthig, Berlin, 1994, pp. 319–33. On the occupation evaluated in terms of international law, see Hannikainen, 2012, *supra* note 15.

⁵⁴ On Mannerheim’s order, 9 July 1941, and its implementation, see Laine, 1982, pp. 116–25, *supra* note 53. On the deceptions the occupiers had to face with regard to the fantasised unity of the “Finnish kindred” peoples, see *ibid.*, pp. 302–14.

⁵⁵ See the references in *supra* note 58, in particular Laine, 1982, pp. 109–56. See also Manninen, 1980, pp. 184–197, *supra* note 49.

⁵⁶ See Lars Westerlund, “The Mortality Rate of Prisoners of War in Finnish Custody Between 1939 and 1944”, in Lars Westerlund (ed.), *POW Deaths and People Handed Over to Germany and the Soviet Union in 1939–55: A Research Report by the Finnish National Archives*, Kansallisarkisto, Helsinki, 2008, pp. 14–84. See also, Antti Kujala, “The Unlawful Killings of POW’s during the Continuation War, 1941–1944”, in Lars

After a two and a half-year standstill in the hostilities, during which Germany's future defeat started to become evident, the Soviet Union intensified its counter-offensive in the summer of 1944. Soviet troops drove the Finns back to behind the 1940 borders and forced Finland to accept an armistice. Finland had lost 66,000 military personnel and some 160,000 were wounded. On the Soviet side, some 200,000 military personnel were dead or missing, and almost 400,000 were wounded. The Moscow Armistice between the Soviet Union and Britain with Finland in September 1944⁵⁷ meant ceding Finnish territories even further than in the 1940 Moscow Peace Treaty, as well as massive reparations to be paid to the Soviet Union, the dismantling of Finnish "fascist-minded" organisations and the handing over to the Soviets of various categories of persons. The armistice also obliged Finland to actively disarm and remove German troops from Finland. In the "Lapland War" between Finland and Germany that followed from this obligation in 1944-1945, northern Finland was devastated.⁵⁸ The Paris Peace Treaty of 1947⁵⁹ confirmed the conditions of the Moscow Armistice.

36.3. Contradictory Interpretations

Forgetting, I would even go so far as to say historical error, is a crucial factor in the creation of a nation, which is why progress in historical studies often constitutes a danger for [the principle of] nationality. Indeed, historical enquiry brings to light deeds of violence which took place at the origin of all political formations, even those whose consequences have been altogether beneficial. Unity is always effected by means of brutality.⁶⁰

The character of the Continuation War is among the most controversial questions in the research of recent Finnish history, as well as in popular

Westerlund (ed.), *POW Deaths and People Handed Over to Germany and the Soviet Union in 1939-55: A Research Report by the Finnish National Archives*, Kansallisarkisto, Helsinki, 2008, pp. 85–93.

⁵⁷ Discussed already under 36.1., see *supra* note 5.

⁵⁸ On the "Lapland war" in English, see, for example, Polvinen, 1986, pp. 37–54, see *supra* note 32.

⁵⁹ See Suomen asetuskokoelman sopimussarja (Finnish Treaty Series) no. 20/1947.

⁶⁰ Ernest Renan, "Qu'est-ce qu'une nation?", in a conference at Sorbonne on 11 March 1882, printed in Homi Bhabha (ed.), *Nation and Narration*, Routledge, London, pp. 8–22.

conceptions of history in Finnish public opinion.⁶¹ My brief presentation was unable to delve into all of the problematic open questions and, in particular, into those relating to national politics. Was the war inevitable, with Finland irresistibly drifting into the war as a log in a river by the force of flowing water? Was Finland an ally of Nazi Germany or merely fighting a “separate war” on the side? In Jere Linnanen’s analysis, the treatment of these questions among historians and social scientists has taken place on two main horizons of understanding that have affected the constant interplay of argumentation and historical reconstruction. The first approach leans towards nationalism, in the sense of seeing the existence of Finland as a sovereign state and its attendant interests as the central criteria when evaluating past actions and actors. The second approach features a critique of nationalism, an orientation seeking to measure past actions and actors against broader standards, and in particular international law, international human rights, and their underlying political principles, such as the prohibitions of the use of force or the persecution of minorities, for example.⁶² In how far a third, value relativist or neutral, approach to that period has been possible in the past or is emerging today remains open to discussion.

The interpretation arguing for the inevitability of the war rests on the idea that Finland was the victim of the 1939 aggression by the Soviet Union, and the following years of the Second World War should be seen in this light. In that way of presenting the past, the geopolitical situation in 1940 and 1941 was simply too difficult for a young, tiny, pacific state caught in the middle of two dangerous giants: its communist neighbour, the Soviet Union, and its historical, cultural ally Germany, now ruled by an aggressive dictator. There were no alternatives to the Continuation War: it was a political necessity, a battle for survival of an independent

⁶¹ Research on the “drifting” of Finland into the war as a result of the general geopolitical situation versus an active stance by Finland in that direction has been vivid for decades, see, for example, Timo Soikkanen’s historiographical mapping, Timo Soikkanen, “Objekti vai subjekti? Taistelu jatkosodan synnystä”, in Markku Jokisipilä (ed.), *Sodan totuudet, Ajatus*, Helsinki, 2007. Heikki Ylikangas has suggested that a promise by Hermann Göring of a future recuperation of the lost territories together with the German ally was behind the reasons why Finland accepted the severe Moscow Peace Treaty in 1940. Thus a conscious plan on the Continuation War would have existed very early, see Heikki Ylikangas, *Tulkintani talvisodasta*, WSOY, Helsinki, 2001.

⁶² See Jere Linnanen, *Trauma, syyllisyys, armahdus – tarkastelussa sotasyllisyysasia, valvontakomission britit ja suomalainen historiankirjoitus*, M.A. Thesis, University of Helsinki, 2012, in particular pp. 8–15.

state of Finland. In this light the war begins to appear as a form of self-defence since, the argument goes, the Soviet Union (or Germany) would have attacked Finland in any case. The only principle guiding the action of the Finnish leadership or the Finns in general was thus the survival of Finland as an independent state.

The external view of Finland's actions at the time was much less nuanced. The Paris Peace Treaty of 1947 states unambiguously: "Finland, having become an ally of Hitlerite Germany and having participated on her side in the war against the Union of Soviet Socialist Republics, the United Kingdom and other United Nations".⁶³ Nevertheless, both in Finnish academia and in political discourse, the idea of a separate war has been and to some extent remains part of the dominant narrative about the geopolitical and historical context of the Second World War.⁶⁴ Proponents of this understanding maintain that while participating in the German invasion of the Soviet Union starting in the summer of 1941 (Operation Barbarossa), Finland was solely engaged in its own fight to restore the injustice and the lost territories of the Winter War. To support the claim that the war was separate, it is often stated that Finland did not sign the Tripartite Pact, unlike the Axis countries.⁶⁵ Of course, the Tripartite Pact did not contain any obligation to fight a common war as such. In any case, parts of the Finnish political and military leadership assisted in the planning of the German aggression of the Soviet Union and adhered to written and oral agreements on practical co-operation with Germany, and Finland also received some material and military guarantees subject to correspondence between Hitler and the Finnish President Ryti.⁶⁶ Whereas the exact scope and significance of these agreements remain controversial, Finland *de facto* acted as Germany's ally, allowing for the presence of some 200,000 Wehrmacht soldiers within its territory and

⁶³ Treaty of Peace with Finland, 10 February 1947, Preamble, 48 UNTS 2003.

⁶⁴ See President Mauno Koivisto's speech in 1993, referred to in Tarkka, 2009, pp. 360–61, *supra* note 24; the speech by President Tarja Halonen at the French Institute of International Relations (IFRI), 1 March 2005: "For us the world war meant a separate war against the Soviet Union and we did not incur any debt of gratitude to others".

⁶⁵ However, Finland signed the Anti-Komintern agreement, yielding to heavy pressure by Germany, see, for example, Manninen and Rumpunen, 2006, *supra* note 45.

⁶⁶ Manninen and Rumpunen, 2006, pp. 87–121, see *supra* note 45. President Ryti acknowledged when interrogated on 8 October 1945 to have received "3–4 letters from Hitler during his presidency", see *Sotasyllisyysoikeudenkäynnin asiakirjat, istunto*, 16 November 1945, pp. 15, 20–21.

participating in co-ordinated military activities. In return Finland received important material support, in arms, technology, food, energy and raw materials. Based on this, it has been maintained that as a military ally Finland's position can be qualified as an independent co-belligerent of Germany, not decisively different from Hungary, Italy or Romania.⁶⁷ It is striking to notice in comparison how similar the drive for arguing for the separateness of the war effort and a decisive “national specificity” of the participation in the war on the side of Hitler has been in several countries.⁶⁸

The thesis of a separate war also tacitly emphasises that for Finland's part, the war in co-operation with the Germans was “in conformity with international norms, as clean as warfare could be”⁶⁹ and that Finland had always kept a certain political distance to its brother in arms, Nazi Germany. In historiographical research, it appears uncontroversial that Finland was neither a totalitarian dictatorship like Nazi Germany, nor was it involved in formulating the latter's imperialistic territorial objectives or ideology of racial dominance aiming at destruction of others. Likewise, concerning the Nazi Holocaust and its potential repercussions in Finland, it appears uncontested that the Finnish government or administration generally refrained from participating in the Nazis' extermination campaign against Jews. Jewish citizens of Finland were integrated in society and were not subjected to discrimination, including in the army. Finnish Jews fought in the Finnish army together with the Germans during the Continuation War.⁷⁰ However, a number of foreign Jews, either refugees or Soviet POWs in Finnish custody, were transferred to the Germans or perished under Finnish control. The exact numbers and the particular causes of the treatment in individual cases are

⁶⁷ See Mauno Jokipii, *Jatkosodan syntyy*, Otava, Helsinki, 1987, pp. 625–28; Mauno Jokipii, *Hitlerin Saksa ja sen vapaehtoisiikkeet*, Suomalaisen kirjallisuuden seura, Helsinki, 2002, p. 46.

⁶⁸ On the national or nationalistic histories, see Markku Jokisipilä, “Toinen mailmansota ihmiskunnan kollektiivisessa muistissa”, in Markku Jokisipilä (ed.), *Sodan totuudet*, Ajatus, Helsinki, 2007, pp. 13–21. See also Uhl, 2006, *supra* note 13.

⁶⁹ Jokipii, 1987, pp. 398–99, see *supra* note 67.

⁷⁰ Even a field synagogue was active at the Finnish–German front. The picture was not always as idyllic as that, however; some discrimination and tension existed. Aee Hannu Rautkallio, *Suomen juutalaisten aseveljeys*, Tammi, Helsinki, 1989, pp. 124–66.

not established in research with sufficient clarity.⁷¹ Public and academic discussion of the treatment of Jews in Finland during the Second World War remains polemical, oscillating between picturing Finland as the rescuer (of the Finnish Jews) to be celebrated, or as the persecutor (of foreign Jews) to be either tacitly disguised or revealed for public scrutiny.⁷² Research into these questions has been subject to controversies and turbulence, also between academic historiography and other accounts of the past, demonstrating the complexity of memory politics.⁷³

A few post-war studies and some recent ones have forcefully questioned the “separate war” narrative, leading to a reorientation in dominant historiographical interpretation that is currently ongoing.⁷⁴ Other studies suggest that the walls separating Finland from its Nazi ally in military and executive activities may not have been as watertight as is often maintained.⁷⁵ Research on the latter theme has been scarce, and its

⁷¹ See, for example, Ida Suolahti, “POW Transfers During the Continuation War 1941–44”, in Westerlund (ed), 2008, *supra* note 56; Oula Silvennoinen, “The Transfers of Civilians to German Authorities”, in Westerlund (ed), 2008, *supra* note 56. For journalistic accounts that stimulated public discussion, see Elina Suominen, *Kuolemanlaiva S/S Hohenhörn – juutalaispakolaisten kohtalo Suomessa*, WSOY, Helsinki, 1979, and Sana, 2003, *supra* note 25. The numbers of Jews transferred to German authorities start from the notorious case of eight individuals (see my discussion on this *supra* pp. 498–99), up to some 80, whereas the highest estimations could amount to a few hundreds. The haziness of the figures appears to have many explanations, see Heikki Ylikangas, *Heikki Ylikankaan selvitys valtioneuvoston kanslialle, Valtioneuvoston kanslian julkaisusarja*, Helsinki, 2004.

⁷² See, for example, Hannu Rautkallio, *Holokaustilta pelastetut*, WSOY, Helsinki, 2004; Hannu Rautkallio, *Ne kahdeksan ja Suomen omatunto*, Weilin & Göös, Helsinki, 1985; Suominen, 1979, *supra* note 71; Sana, 2003, *supra* note 25.

⁷³ For an analysis of history politics that followed the publication of Sana, 2003, see *supra* note 25, see Tilli, 2006, *supra* note 24. For a general analysis on the historiographical controversies on Finland and the Holocaust, see Zägel and Steinweg, 2007, pp. 184–88, *supra* note 13.

⁷⁴ Among the major landmarks were Jokipii, 1987, see *supra* note 67 and Jokisipilä, 2004, see *supra* note 24. For analysis of historiographical evolutions, see Markku Jokisipilä, “Kappas vain, saksalaisia!”, in Markku Jokisipilä (ed.), *Sodan totuudet*, Ajatus, Helsinki, 2007; Soikkanen, 2007, *supra* note 61.

⁷⁵ For recent research on the co-operation between the Finnish and German security police during the Continuation War, implying the knowledge of and some participation of the Finnish State Police in the torture and execution of POWs, mainly Jews and communists by the German authorities, see Oula Silvennoinen, *Salaiset aseveljet: Suomen ja Saksan turvallisuuspoliisiyhteistyö 1933–1944*, Otava, Helsinki, 2008, also published in German as *Geheime Waffenbrüderschaft. Die sicherheitspolizeiliche Zusammenarbeit zwischen Finnland und Deutschland 1933–1944*, Wissenschaftliche Buchgesellschaft, Darmstadt, 2010. For a journalistic account of the handing over by the Finnish authorities to the

reception has been turbulent.⁷⁶ Another sensitive topic is to consider the extent to which Finland's own attack and occupation policies in the Soviet Union cast shadows on the idealised "clean" war of defence and survival. In the preceding short account, I was neither aiming to nor capable of bringing new elements to these historiographical controversies. They were evoked simply because of the evident connection between the historiographical interpretations of the Second World War in Finland and the evaluation of the acts and omissions addressed as crimes in the war-responsibility trial in 1945–1946 from the point of view of international law, as well as the role that representations and dogmas of history have played in the evaluation of the trial. Whether the war is presented as Finland's own war of defence and restitution, separate from Germany's criminal aggression in the Soviet Union, and whether the Finnish leadership is considered "clean" from assisting in or committing conduct that can be qualified as war crimes or crimes against humanity in international criminal law terms – these narratives figure as fundamental background dilemmas which no history of the Finnish war-responsibility trial can avoid touching upon, whether implicitly or explicitly, unconsciously or consciously. The fact that attention to the trial is exclusively directed toward crimes against peace at the political and diplomatic level is, at first sight, only natural, considering the interpretation that was given to Article 13 of the Moscow Armistice in the preparation of the Finnish law as well as within the trial itself. Yet the focus may also seem curious, in particular considering how most other Second World War trials addressed not only crimes against peace but also, or even in particular, war crimes and crimes against humanity. In Finland, the highest level political responsibility for acts that could qualify under those categories,⁷⁷ such as detrimental treatment of civilian

German authorities of POWs or other individuals, presumably based on various discriminatory grounds, see Sana, 2003, *supra* note 25. See also the research report Westerlund (ed.), 2008, *supra* note 56.

⁷⁶ See, for example, Seppo Hentilä, "Aseveljeyden nurjalla puolella: saksalaisten sotavankileirit Suomessa 1941–1944", in Pirjo Markkola (ed.), *Historiallinen aikakauskirja*, SHS and Historian ystävien liitto, Helsinki, 2009, pp. 346–49.

⁷⁷ In accordance with Article 6 of the IMT Charter, "(b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) crimes against

populations in the occupied territories, planned forced transfers of civilians potentially amounting to ethnic cleansing, and treatment of POWs has not been addressed. This pertinent silence has contributed to a purification of the convicted leaders, and it may, in the public imaginary, form an element in the construction of their sacrifice in the trial that I now proceed to discuss.

36.4. The Law on War-Responsibility and the Tribunal

When the Finnish government was faced with the obligation under the Moscow Armistice of September 1944 to “co-operate with Allied Powers to arrest and pass judgment on those accused of war crimes” (Article 13, see *supra* pp. 495, 498), Finland was not an occupied country. In comparison with several other countries required to assume similar obligations, this difference certainly was an important factor in how the war-responsibility issues were addressed. The legislative choices, the prosecution, the tribunal and the enforcement of sentences remained national, at least on the surface. However, the Allied Control Commission, established in Article 22 of the Moscow Armistice “to undertake the regulation and control of the execution” of the agreement “under the general direction and instructions of the Allied (Soviet) High Command, acting on behalf of the Allied Powers” that sat in Helsinki from September 1944 to September 1947 exercised strong influence in the war-responsibility issue, both in the period of over a year before the Finnish government finally acted upon its obligation and during the trial. The Commission consisted of a majority of Soviet officers, complemented by Britons.

Much controversy in historical research has related to the question of the exact role and position of the British members of the Commission. It appears that they were seen to represent the Western view on Finland’s choices in the war, in particular whether or not it identified as a Western democracy, a view that may persist in some contemporary readings. A recent analysis has highlighted great divisions in the interpretations of this

humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated” (https://www.legal-tools.org/uploads/tx_ltpdb/Charter_of_International_Military_Tribunal_1945_03.pdf).

question in Finnish commentaries.⁷⁸ What appears uncontroversial is that throughout its activity, the leadership of the Commission was in Soviet hands, and the British members of the Commission were not always informed of events. When they were, even if only retrospectively, it appears that the Britons generally supported the Soviet position.⁷⁹ Archive materials and autobiographical sources seem to demonstrate that the British members explicitly made the Finns understand that any hope of more favourable treatment from the Western powers was futile.⁸⁰ A recent and controversial claim contesting the existence of a palpable pressure on Finland to organise the trial relies on another interpretation. It argues that British representatives in the Commission actually had expressed support for the Finnish government's reluctance to organise the trial, with this attitude indicating the hollowness of Soviet threats of serious consequences on behalf on the Allies in case no satisfactory solution was proposed. The trial would then have been produced instead through internal political actors, and in particular the Minister of Justice Urho Kekkonen, manipulating the Finnish leadership and public opinion by claiming that there were external threats. Already in the polemic title of the book, the convicted leaders literally become the "scapegoats of the nation".⁸¹

The Allied demands for a trial created public controversy in post-war Finland. Parliamentary questions, authoritative legal opinions and committee reports addressed the issue.⁸² Overwhelmingly, the impossibility of such retroactive criminal trials in Finnish law and legal tradition was highlighted. However, there was also strong internal political support for clarification of political and legal responsibility for the war.⁸³ The Commission's impatience with the Finnish government

⁷⁸ See Linnanen, 2012, *supra* note 62.

⁷⁹ On the role of the Commission and its power constellations, see Tarkka, 2009, pp. 121–46, *supra* note 24; Tuomo Polvinen, *Jaltasta Pariisin rauhaan*, WSOY, Helsinki, 1981, pp. 147–48; H. Magill and Jukka Tarkka (eds.), *Tasavalta tulikokeessa: muistelmia Suomesta kuuman ja kylmän sodan vuosina*, Weilin & Göös, Mikkeli, 1981, pp. 99–124.

⁸⁰ See, for example, Magill and Tarkka, 1981, pp. 130–37, *supra* note 79; Tarkka, 2009, pp. 131–47, *supra* note 24; documents reproduced in Rautkallio, 2006, pp. 611–46, *supra* note 11; comparative literature analysis by Linnanen, 2012, pp. 32–45, *supra* note 62.

⁸¹ Lasse Lehtinen and Hannu Rautkallio, *Kansakunnan sijaiskärsijät*, WSOY, Helsinki, 2005.

⁸² For a summary, see Lindstedt and Löytömäki, 2010, pp. 19–22, *supra* note 4.

⁸³ See, for example, Jukka Nevakivi, *Zdanov Suomessa, Miksi meitä ei neuvostoliittolaistettu?*, Otava, Helsinki, 1994, pp. 154–69; Tarkka, 1977, pp. 73–95, *supra* note 6.

culminated after the approval of the London Agreement of 8 August 1945, containing its now famous Charter of the International Military Tribunal ('IMT Charter'). In response to escalating external and internal pressures, two weeks later the Finnish government presented the draft law on the responsibility for war.⁸⁴

The draft law follows the broad lines of the IMT example of the leadership crime of aggressive war by establishing the criminal responsibility of individuals who had, in their official capacity as state actors, "in a significant manner contribut[ed] in Finland's engagement in the war [...] or prevent[ed] peace" in 1941 to 1944. With the explicit temporal limitation included in the law, the trial could only address the Continuation War of 1941–1944. The preceding Soviet attack on Finland and the Winter War of 1939–1940 was left outside its scope. The draft law created a special tribunal to conduct the trial, consisting of the presidents of the Supreme Courts, a law professor from the University of Helsinki and 12 Members of Parliament ('MPs') appointed by the Parliament. The prosecution was to be carried out by the Chancellor of Justice. There was no mention of a right of appeal, but amnesty was made possible. The draft law contained no reference to the political and military context of the war, in the sense of Finland's alliance with Nazi Germany. The Chairman of the Commission later referred to this tactful omission as a sign of the extraordinary tolerance accorded to Finland in letting it organise its own trial.⁸⁵

The special character of the draft law was made evident in the government bill proposing the law in two main aspects. First, the law was to be adopted according to the special legislative procedure for the enactment of constitutional legislation (where a regular law is considered to deviate from the constitutional order). In essence this means applying the highest qualified majority voting rule (5/6). According to the bill, the deviations concerned the constitutional prohibitions of retroactive criminal law and of establishing special tribunals. Secondly, the bill, as well as the preamble of the draft law, made direct reference to Article 13 of the Moscow Armistice, thus positing the international legal obligation binding on Finland as the reason behind the proposal.

⁸⁴ Hallituksen esitys nro 54/1945 vp. laiksi sotaan syyllisten rankaisemisesta, 21 August 1945.

⁸⁵ See Polvinen, 1981, pp. 139–41, *supra* note 79.

Serious controversies persisted throughout the parliamentary procedure. Many of these concerned retroactivity: the draft law created the tribunal, established penal responsibility and defined the crimes *ex post facto*. The government bill acknowledged this retroactivity but referred to the example of the IMT Charter to argue that the responsibility for war could now entail individual criminal responsibility.⁸⁶ The general opinion and opinions of authoritative judicial or political actors were doubtful. The Supreme Court, following a request from the Constitutional Law Committee of the Parliament, declared that the draft contained so many fundamental deviations from the Constitution and the general principles of law that it could not be regarded as compatible with the Finnish legal order.⁸⁷ The Court returned to the initial confusion concerning the scope of Finland's obligations when it observed that Article 13 of the Moscow Armistice referred to "war crimes" that the IMT Charter defined as a separate category (Article 6(a)) from the "crimes against peace" (Article 6(b)). The wording of Article 13 could therefore not also cover the "responsibility for war" portion of the Finnish draft law, which was more properly understood as a crime against peace according to the logic of the IMT Charter.

A professor of constitutional and international law at the University of Helsinki, Kaarlo Kaira, argued that the wording "war crimes" in Article 13 of the Moscow Armistice had to be interpreted in a restrictive manner, to include only crimes against the laws and customs of war. Yet he acknowledged that a broader interpretation could not be totally excluded. In any case, he observed, the London Agreement could not be binding on Finland because it was concluded after the Moscow Armistice. Kaira also emphasised that although the London Agreement dealt with those guilty of aggressive war, this type of individual responsibility was novel in international law and should therefore be interpreted narrowly. The Constitutional Law Committee concluded that the London Agreement and the responsibility for crimes against peace concerned the leadership of the Axis only; it could not be applied to the political leadership of Finland.⁸⁸

⁸⁶ See Hallituksen esitys, *supra* note 84.

⁸⁷ Opinion of the Supreme Court to the Constitutional Law Committee, n 1488, 28 August 1945, 1945 Vp., reprinted in Rautkallio (ed.), 2006, pp. 674–78, see *supra* note 11.

⁸⁸ Opinion of the Constitutional Law Committee, n 40/1945, 4 September 1945, reprinted in Rautkallio (ed.), 2006, pp. 666–73, see *supra* note 11.

Just before the decisive vote in the Parliament, the Allied Control Commission published its view on the validity of the draft law in the major newspapers. It claimed that the Constitutional Law Committee and the Supreme Court had interpreted Article 13 of the Moscow Armistice erroneously and arbitrarily. It further argued that the Moscow Armistice superseded any contradictory Finnish legislation and therefore sufficed in itself as a necessary basis for the trial of leaders.⁸⁹ The Parliament finally accepted the logic of political necessity behind the government proposal and adopted the law.⁹⁰ The President ratified the law on 12 September 1945. The nomination of the members of the tribunal, pre-trial investigations and preparation of the charges began shortly thereafter.

36.5. The Accused and the Charges

The law was very succinct; it contained no special provisions on the rules of participation, *mens rea* or comparable aspects of criminal responsibility. It was understood that for these parts, the regular Finnish law in force was to be followed. The exceptional character of the trial is demonstrated by the fact that the indictments were prepared by the Council of State, and the prosecution was led personally by the Chancellor of Justice. The scope of the accused and the details of the charges largely followed the approach of the first investigatory committee on the matter, but in subsequent investigations the Minister of Justice Urho Kekkonen personally exercised an important role.⁹¹ The wartime President Ryti, six members of the government and the ambassador in Berlin were prosecuted. The military leadership was left out of the scope of the prosecutions entirely. The Allied Powers, and in particular the Soviet Union, played an important role in determining the scope of the

⁸⁹ See Polvinen, 1981, pp. 137–38, *supra* note 79; Tarkka, 1977, pp. 148–49, *supra* note 6.

⁹⁰ For an analysis of the decision-making in the Parliament, see, for example, *ibid.*, pp. 139–49.

⁹¹ For the conclusions of the Committee, see the memo by its chairman Onni Petäys 24 October 1945, OKV sotasyllisyyden asiakirjat 1945/1432, Ea 166 (KA). For an analysis of the preparation of the indictment, see Lindstedt and Löytömäki, 2010, pp. 35–39, *supra* note 4.

prosecutions. This influence may have been most obvious in the decision not to indict the wartime hero and post-war president, Mannerheim.⁹²

The prosecution detailed the charges in seven counts.⁹³ The first two covered the acts of engagement in the war. The accused were charged for having continued to keep the country in a state of war alert after the Winter War; having allowed the German forces to trespass and to settle in Finland; having *de facto* given a declaration of war to the Soviet Union; having occupied the previously Finnish territories lost in the Moscow Peace Treaty in 1940; and, finally, having penetrated into the Soviet territories in Eastern Karelia beyond the previous borders of Finland and having occupied those territories. The third count covered conduct by members of the government in relation to the state of war with Britain. These three first counts appear to correspond to what is normally understood as “crimes against peace” in the London Agreement.⁹⁴

The Finnish particularity starts with the latter four counts concerning the “preventing peace” part of the tribunal’s material jurisdiction. The interpretation given to “prevention of peace” by the prosecution consisted of heterogeneous decisions or acts, interpreted by the prosecution as having caused Finland to stay in the war from 1941 to 1944, despite several opportunities to seek a separate peace settlement. The counts singled out the following episodes. Diplomatic or informal contacts via the United States or other channels after August 1941 proposing peace negotiations with the Soviet Union were declined by the

⁹² On the pre-trial investigations and the choice of the accused, see Tarkka, 1977, pp. 157–77, *supra* note 6; Tarkka, 2009, pp. 206–13, *supra* note 24; Lindstedt and Löytömäki, 2010, pp. 35–39, *supra* note 4.

⁹³ The records of the trial, including also the investigation materials and transcripts of interrogations are available in the National Archives of Finland in Helsinki, part of the archives of the Chancellor of Justice, from Ea:166 to Ea:173. The charges were confirmed on 6 November 1945 and communicated to the tribunal in a document of 23 pages by the Chancellor of Justice Toivo Tarjanne. For a compilation of extracts, related documents and correspondence, see Rautkallio (ed.), 2006, *supra* note 11, in which the government’s official communication on the charges figures are on pp. 425–27. See also Tarkka, 1977, pp. 181–83, *supra* note 6.

⁹⁴ Charter of the International Military Tribunal, 8 August 1945 (http://www.legal-tools.org/uploads/tx_itpdb/Charter_of_International_Military_Tribunal_1945_02.pdf). 6 (a): “Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.

Finnish government. In 1943 a further effort to mediate a separate peace treaty between Finland and the Soviet Union was launched, but the Finnish government decided to communicate this effort to Germany. Unsurprisingly, Germany then urged the Finnish government to decline the negotiations. In the early spring of 1944 the government gave an insufficient mandate to the peace negotiators it sent to Moscow, and thereby caused a cessation of the negotiations. In summer of 1944 the Finnish government recommended giving an assurance to Germany that Finland would not seek peace separately with the Soviet Union. The assurance was signed by Ryti in his personal capacity.⁹⁵

The interpretation of these situations was strongly contested by the accused and their defence. Perhaps the most concerned was Väinö Tanner, leader of the Social Democratic Party. Tanner had been minister in several governments preceding and during the war, but not in the government that took the decision to go into war. In his powerful defence, Tanner was presented as a man who was firmly against the war since the beginning, and who did not rest in his efforts to find opportunities for peace.⁹⁶ Tanner dismissed one by one the nature of the events singled out in the charges as “opportunities for peace” that in his view were non-existent.⁹⁷ The tragic position of Tanner was accentuated by how he was, also in his own words, in disgrace with both the German and the Soviet governments.⁹⁸ Tanner himself appears to turn his disgrace into an ultimate sign of his independence and orientation towards Sweden or Britain, the lost landmarks of Finland. Also concerned was Risto Ryti who had been a long-time director of the Finnish Bank before becoming a Minister, Prime Minister and President of Finland. Ryti’s sacrifice in the public imaginary reaches its height in the events targeted in the last count: how he had to bind himself to sign the Ribbentrop agreement in the summer of 1944, in a tactical move to acquire additional German supplies so that the Finnish troops at the border of a collapse could still, for a short

⁹⁵ For Ryti’s point of view, see, for example, Manninen and Rumpunen, 2006, pp. 334–46, *supra* note 45. See also Zägel and Steinweg, 2007, pp. 157–58, *supra* note 13.

⁹⁶ On Tanner’s “fight” to defend himself, see also Jaakko Paavolainen, *Väinö Tanner 4: Patriootti, Elämäkerta vuosilta 1937–1966*, Tammi, Helsinki, 1989.

⁹⁷ See Väinö Tanner, *Väinö Tanner puolustuu*, Tampereen sos-dem kunnallisjärjestö, Tampere, 1946, see pp. 87–99, 106–7.

⁹⁸ *Ibid.*, pp. 57–59. See also Tuomo Polvinen, *Barbarossasta Teheraniin*, WSOY, Porvoo, 1979, p. 286.

while, resist the strengthened Soviet attack. Only if the Finnish troops halted the attack could peace be negotiated in tolerable conditions, keeping the risk of the occupation of the country at an arm's length, a goal accomplished by Ryti's selfless gesture to bind himself explicitly in the agreement with Ribbentrop.⁹⁹

That fact that crimes against peace are interpreted to consist also of decisions or acts by politicians or diplomats in the course of an ongoing state of war that result in preventing the conclusion of a peace agreement seems to depart from a standard understanding of the Nuremberg Charter Article 6(a). The logic of the Finnish legislator and prosecution seems to be that prolonging the war of aggression by not concluding peace, any kind of peace, as swiftly and unconditionally as possible, is comparable to waging the war. Such an interpretation appears to be a Finnish particularity. It can be questioned whether this special approach resulted from the efforts of the Finnish legislators and prosecution, faced with the international obligation to prosecute in a manner that would satisfy the expectations of the Allies, to dress the events in the predefined period of 1941–1944 retroactively to fit the new criminalisation of crimes against peace. Since some individuals in the circle of government members that were publicly already singled out by the Allies and the government as responsible for the war had actually entered the government only after the decisive steps of engagement to war, perhaps the only way to target these individuals was to also include acts committed after the start of war in 1941. More research would be necessary to elucidate how purposeful or manipulated the creative, broad reading of “crimes against peace” by the Finnish legislators and prosecutors really was. Arguments pointing to a strategy to deliberately adjust the scope of criminal responsibility to ‘catch’ particular individuals would certainly support the views of the trial as part of an orchestrated political transition, not a criminal trial. In any case, this Finnish particularity underlines the problems that retroactivity of criminal law and jurisdiction may typically cause.

⁹⁹ See, for example, Martti Turtola, *Risto Ryti: Elämä isänmaan puolesta*, Otava, 1994, pp. 280–307. Turtola refers to Ryti's “moral victory in the eyes of the Finnish people”, see unnumbered page with pictures after p. 320.

36.6. The Trial and Enforcement of Sentences

The trial was conducted in Helsinki, organised and carried out exclusively by Finns, but under the control of the Allied Control Commission which at several occasions interfered in the work of the tribunal. Its task was to make sure that Finland adequately fulfilled the terms of the Moscow Armistice, including the criminal responsibility for war. A failure by the Finns to do so was believed to lead to negative consequences, potentially the realisation of threats by the Chairman of the Commission, Andrei Zdanov: “We will take the matter out of its own hands, the list of accused will be prolonged, and the punishments hardened”.¹⁰⁰ In that sense, the function that the Commission exercised with regard to the trial may remind contemporary observers of the ICC context where the relationship of national and international jurisdiction in international crimes is referred to as the “complementarity” of international criminal jurisdiction. While the term is not used explicitly, the concept of complementarity is anchored in Articles 17 and 20 of the ICC Statute, and can be condensed as follows: the ICC may proceed with a case only if the state or states with jurisdiction are unwilling or unable to genuinely carry out the investigation or prosecution.¹⁰¹ In order to determine whether this is the case, independence and impartiality of national proceedings are evaluated, as well as whether the national proceedings or decisions were made with the purpose of shielding the person concerned from criminal responsibility. In the Finnish story, there is a presence of elements of a comparable evaluation exercised by the Commission and the Finnish executive, albeit awkwardly and illegally.

¹⁰⁰ See Nevakivi, 1994, p. 159, *supra* note 83, with reference to the Archives of the Allied Control Commission. Zdanov has also been reported to orally have threatened Finland with a new war, although the threat may have been rhetoric only, see Tarkka, 2009, pp. 127, 340–41, *supra* note 24.

¹⁰¹ See John T. Holmes, “The Principle of Complementarity”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, Martinus Nijhoff, The Hague, 1999, p. 41; William W. Burke-White, “Proactive Complementarity: The International Criminal Court and National Courts in the Rome System on International Justice”, in *Harvard International Law Journal*, 2008, vol. 49, p. 53. See also Immi Tallgren, “Completing the ‘International Criminal Order’ – The Rhetoric of Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court”, in *Nordic Journal of International Law*, 1998, vol. 67, p. 107. For the resolution of the Kampala Diplomatic Conference on Complementarity, see Resolution RC/Res. 1, 8 June 2010.

The nomination of the members of the tribunals – the Presidents of the two Supreme Courts, a law professor from the University of Helsinki and 12 MPs appointed by the Parliament – occasioned several manoeuvres and controversies, as well as claims of bias.¹⁰² The trial was public and the accused had defence attorneys. However, the defence were not granted access to all of the files they requested and they were only allowed to present the defence to a limited extent.¹⁰³ For example, no references to the Winter War and the Soviet aggression of Finland or the harsh conditions of peace of the Moscow Peace Treaty of March 1940 were allowed. According to the accused, this led to omitting essential parts of the context in which the subsequent acts amounting to Finland's entry into the Continuation War took place.¹⁰⁴ Such a restriction in the temporal causality of events demonstrates a more general problem faced by any *ad hoc* tribunals with a particular slice of time and place as their jurisdictional frame: what and whose actions can be considered relevant for the determination of the matters in the jurisdiction of the tribunal.

Major incidents of tension between the Commission, the Finnish government and the tribunal occurred. The decision of the tribunal to set four of the accused free during the trial, with the obligation to appear in its sessions, was a red flag to Zdanov. By virulent protestations, he succeeded in persuading the tribunal to reconsider its decision, and all but one were arrested again.¹⁰⁵ Zdanov also strongly criticised the soft and courteous “club-like” way in which the trial proceeded. The accused were allowed to interact with members of the public while entering and leaving the courtroom, receiving visible expressions of support, and in trial sessions they were always addressed respectfully with their previous official titles. Some restrictions were introduced at Zdanov's request. The respect and confidence with which the Finnish leaders were treated in the trial could be seen as one of the examples of the differences between trials in occupied or non-occupied countries after the war. But it also further supports the reading of the trial as a forum for the sacrifice and martyrdom of the Finnish leaders. This is underlined by the curious mixture of attitudes and behaviour. There were expressions of solemn

¹⁰² See Tarkka, 1977, pp. 178–81, *supra* note 6; Tarkka, 2009, pp. 215–20, *supra* note 24.

¹⁰³ See Tarkka, 1977, pp. 188–96, *supra* note 6; Tarkka, 2009, pp. 235–63, *supra* note 24.

¹⁰⁴ See, for example, Tanner, 1946, p. 56, *supra* note 97.

¹⁰⁵ See Polvinen, 1981, pp. 139–41, *supra* note 79; Tarkka, 2009, pp. 224–35, *supra* note 24.

respect and compassion to the accused in and after the sessions of the tribunal, which appears to point to a strong basis of resistance to the trials. Yet there was a total absence of any efforts to express the resistance in a manner that would disturb or impede the smooth proceedings against them.

The Commission's most flagrant interference in the trial concerned the Judgment. The Commission had previously signalled its expectations as to the gravity of the sentences. When the draft version of the Judgment was leaked to the Commission two days before it was due to be declared, the Commission was very disappointed. The draft Judgment convicted seven of the accused to prison sentences ranging from two to eight years to Ryti and the members of the government. Kivimäki, the ex-ambassador in Berlin, was acquitted. In the absence of Zdanov, it was his deputy Grigori Savonenkov who angrily protested against the fact that the Commission had not been consulted on the draft Judgment. The leadership of the Commission was appalled by the Finnish government's lack of control over the judicial proceedings – apparently a surprise for high Soviet officials – and requested that the announcement of the Judgment be postponed.¹⁰⁶ The British also exerted explicit pressure on the Finnish government to have the sentences toughened, both in London by diplomatic means, urgently relayed by the Finnish ambassador to London, as well as in Helsinki.¹⁰⁷

The Finnish government took the threatening interventions seriously and passed them on to the tribunal both formally and informally. After troublesome manoeuvres among the members of the tribunal to satisfy the demands of the Commission, the Judgment was rewritten.¹⁰⁸ In the revised Judgment delivered on 21 February 1946, all of the accused were found guilty.¹⁰⁹ The most severe sentence was given to Ryti – ten years' hard labour. The other accused were sentenced to prison sentences ranging from two to six years. Tanner was sentenced to five and a half

¹⁰⁶ For correspondence and Paasikivi's notes on the events, see the material compiled in Rautkallio, 2006, pp. 605–16, *supra* note 11.

¹⁰⁷ See Magill and Tarkka, 1981, *supra* note 79, p. 136–37; Rautkallio, 2006, pp. 617–19, 622–23, *supra* note 11.

¹⁰⁸ See Polvinen, 1981, pp. 145–48, *supra* note 79; Tarkka, 2009, pp. 264–74, *supra* note 24; Toivo T. Kaila, *Sotaansyylisemme säätöalossa*, Werner Söderström, Helsinki, 1946, pp. 224–26.

¹⁰⁹ The Judgment is published in Rautkallio, 2006, pp. 631–41, see *supra* note 11.

years' imprisonment. The most directly affected by the reversal of fates was Ambassador Kivimäki, acquitted in the original Judgment but now condemned to five years' imprisonment.

The enforcement of sentences took place in a prison in central Helsinki. The condemned had material conditions of relative comfort, considering the general deprivation and shortages in the post-war period. Generous food packages and other material support arrived at the prison in a regular and organised manner. The condemned were allowed to wear civilian clothing and had opportunities for sports and socialising. They used most of their time for literary and scientific work. Dozens of books were published by the group of convicts. Most of the work undertaken by them in prison was remunerated.¹¹⁰

As soon as the Commission left Finland in September 1947, paroles and pardons of the sentences began. They were granted in accordance with the law in force at the time. For those convicts with the shortest sentences this happened later than the normal application of the law would have meant. The last group of the condemned was pardoned by President Juho Paasikivi in May 1949, including Ryti, who was already hospitalised with a serious illness.¹¹¹ Those former convicts who were in good health were smoothly integrated back into society. Expressions of respect and new professional opportunities were presented to them. They received academic honours and leading posts in academia, for example, as professors or rector of the University of Helsinki. Tanner regained his position as the chairman of the Social Democratic Party. Two of the convicts were re-elected as MPs. When Ryti died in 1956, he was given a state funeral. Huge crowds of Finns were present in the centre of Helsinki to follow the funeral procession; the military, university students and scouts by the thousands in their attire formed the honorary corridor for the President's coffin, solemnly transported through the streets of Helsinki, lightly covered by the early snow of November. Most of the condemned are buried in the national honorary cemetery in Helsinki.¹¹²

¹¹⁰ This paragraph is based on a recent study by Risto Niku, *Kahdeksan tuomittua miestä. Sotasyyllisten vankilavuodet*, Edita, Helsinki, 2005, p. 47–108 and 167–95. See also Turtola, 1994, pp. 328–39, *supra* note 99.

¹¹¹ Niku, pp. 197–227, see *supra* note 110.

¹¹² *Ibid.*, pp. 229–40.

36.7. Conclusions: When a Trial for International Crimes Becomes a Sacrifice for the Nation

War responsibility cases have become actuality at the wake of the Second World War and are today highly fashionable, in certain circles. People who had to suffer all sorts of strains during the six years of war seem to long for some outlets for their repressed feelings. For this purpose, scapegoats are sought – real or imagined.¹¹³

Were the crowds in Helsinki mourning only the deceased President, or also the pains, losses or errors of Finland in the war? An observer today familiar with descriptions of the Soviet pressure on Finland throughout the Cold War may wonder how such a celebration of a national leader convicted to 10 years' hard labour for aggressive war was possible. Beyond the grief of those who personally knew Risto Ryti, the mourning appears as a powerful public ritual, a demonstration of Finland's political independence, after all. As David Kertzer writes, "rather little that is political involves the use of direct force".¹¹⁴ Public funerals or services in the memory of the dead are part of commemorating sacrifice or martyrdom. As Lloyd Warner argues in the American context, the Memorial Day in Newburyport, by focusing on the symbolism of death, acquires special force, converting the emotion generated by anxiety over death to common sentiments and actions uniting people with fellow community members. The martyrs worshipped "become powerful sacred symbols which organise, direct, and constantly revive the collective ideals of the community and the nation".¹¹⁵

If rituals are, as Clifford Geertz claimed, metasocial commentary, "stories that people tell themselves about themselves",¹¹⁶ what is the story told by the rituals of sacrifice in trials for international crimes? The

¹¹³ Defendant Väinö Tanner's first intervention in the trial, on 17 December 1945, reprinted in Tanner, 1946, p. 55, see *supra* note 97.

¹¹⁴ David I. Kertzer, *Ritual, Politics and Power*, Yale University Press, New Haven, 1998, p. 2.

¹¹⁵ Lloyd W. Warner, "An American Sacred Ceremony", in Russell E. Richey and Donald G. Jones (eds.), *American Civil Religion*, Harper and Row, New York, 1974 [1953], p. 111. On the Soviet use of the war deaths to foster national solidarity around the government, see Christel Lane, *Rites by Rulers*, Cambridge University Press, Cambridge, 1981, pp. 145–46.

¹¹⁶ See Clifford Geertz, *The Interpretation of Cultures*, Basic Books, New York, 1973, p. 448.

references to sacrifice in the context of international criminal justice relate to either victims or those held individually responsible for international crimes. The sacrifice of those victimised by international crimes is typically evoked in emotional, commemorative rhetoric, such as here by the United Nations Secretary-General Kofi Annan in 2004: “May the victims of the Rwandan genocide rest in peace. May our waking hours be lastingly altered by their sacrifice. And may we all reach beyond this tragedy, and work together to recognise our common humanity”.¹¹⁷ Regarding international humanitarian law (‘IHL’), Gregor Noll explains the fact that incidental loss of civilian life is considered legal under specific conditions with a reading on sacrifice: “the residual group of civilians which may be lawfully killed under IHL are a materialization of the scapegoating mechanism”.¹¹⁸

The sacrifice of the individuals accused in international criminal trials is more frequently evoked than that of victims. The sacrifice of the accused or convicted individuals has various dimensions in the different commentaries. When the individual accused is featured as a sacrificial victim offered for trial in the place of others more responsible or on behalf of a collective, such as a state, the reference to sacrifice expresses the perception of the selective or even random nature of individual criminal responsibility actually enforced in international trials, and the discrepancy between the immensity of the crimes and the limits of an individual agency.¹¹⁹ Such an interpretation of sacrifice may be seen to find concrete expression in the exemplary nature of severe punishments imposed on the individual, as suggested by Damien Scalia.¹²⁰ While rituals of international law in general could be understood optimistically as performances that present and emphasise the power of the norm and of the norm system and culture, the references to sacrifice typically occur as

¹¹⁷ Kofi Annan speaking at Memorial Conference on the Rwandan Genocide in New York in 2004.

¹¹⁸ Gregor Noll, “Sacrificial Violence and Targeting in International Humanitarian Law”, in Ola Engdahl and Pål Wrange (eds.), *Law at War: The Law as it Was and the Law as it Should Be*, Brill, Leiden, 2008, p. 9.

¹¹⁹ This is, in my interpretation, the general sense in which Edwin Bikundo in his interesting analysis refers to sacrifice, see Edwin Bikundo, *International Criminal Law: Using or Abusing Legality?* Ashgate, Farnham, 2014; Edwin Bikundo, “The International Criminal Court and Africa: Exemplary Justice”, in *Law and Critique*, 2012, vol. 23, no. 1, p. 21.

¹²⁰ Damien Scalia, *Le droit international penal à l'épreuve de la légalité des peines*, Bruylant, Brussels, 2011, pp. 277–80.

part of various critiques of international criminal justice, either in academic commentaries or by parties to an international trial. For example, the defence counsel in the ICC Lubanga trial argued that because international criminal justice is not able to prosecute all the subjects potentially guilty of the large-scale crimes in its jurisdiction, it attacks the individuals accessible as a proxy: “The accused then becomes or risks becoming a scapegoat”.¹²¹

The emphasis is different when sacrifice is evoked in a broader vision of the aesthetic and ritualistic aspects of international criminal justice. In an adaptation of Antoine Garapon’s analysis not related to international criminal justice,¹²² a trial for international crimes becomes a ritual of purification or expiation, exercising functions in expressing fundamental values in the concerned community or beyond.¹²³ In Edwin Bikundo’s view, the accused in international criminal trials are sacrificed for the cause – in critical analysis, the putative cause – of humanity, peace or justice, in international spectacle-trials where the exercise of justice takes on religious tones.¹²⁴ A distinct interpretation appears in Gerry Simpson’s reading of sacrifice in international criminal trials expressed in the post-Second World War intention, to quote Simpson, “to legitimate or [...] exculpate the culture which tries the criminal”; when “Nuremberg tells us that Nagasaki was not a war crime and that the Soviet invasion of Finland in 1941 [sic: 1939] was not aggression”.¹²⁵ In Guyora Binder’s

¹²¹ ICC Trial Chamber 1, *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-01/06, Transcript, 27 January 2009, p. 31 (https://www.legal-tools.org/uploads/tx_itpdb/doc623848_01.pdf).

¹²² Antoine Garapon, *L’âne portant des reliques: Essai sur le rituel judiciaire*, Centurion, Paris, 1985, in particular pp. 138–59.

¹²³ For a recent analysis on communication of values by international criminal law, see Diane Bernard, *Trois propositions pour une théorie du droit international pénal*, Presses de l’Université Saint-Louis, Brussels, 2014. For a critical analysis of criminal trials for international crimes as “ritual spectacles” (p. 8), “the liberalist human rights project that aims to choreograph the management of life without attention to those who are sacrificed in the process” (p. 6), see Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, Cambridge, 2009.

¹²⁴ See, for example, Bikundo, 2014, *supra* note 119, analysing critically how Africans, in particular, end up sacrificed in international criminal justice, and questioning the function of international criminal trials as morality tales, supposedly serving social catharsis.

¹²⁵ Gerry Simpson, “War Crimes: A Critical Introduction”, in Timothy McCormack and Gerry Simpson (eds.), *The Law of War Crimes: National and International Perspectives*, Kluwer Law International, The Hague, 1997, p. 23.

analysis, the trial of Klaus Barbie in France becomes a trial devoted to exculpating (or not) the French for alleged crimes against humanity in Algeria: “every noble ideal attributed to France in such a trial served to distinguish France’s repression of Algeria as more crimes of war because, after all, the French were not Nazis”.¹²⁶

What brings together the varying meanings given to sacrifice in Scalia’s, Bikundo’s, Simpson’s and Binder’s work, as well as Noll’s analysis on targeting in international humanitarian law, is a reference to René Girard’s famous theory of sacrifice and violence, even if it is not always specified how exactly Girard’s complex theory is intended to be read to support the argument. Girard based his original vision of sacrifice on a broader idea of religions as human responses to the problem of disorder, of violence that threatens to destroy a human community, finding resolution in the mechanisms of expiatory sacrifice. The hypothesis of mimesis explains, for Girard, both the origin and the progression of desire in social violence. In broad terms, sacrifice was a first type of response to end the violent cycle of revenge and retaliation, long before the establishment of legal and judicial systems. Parallel to myths, the sacrificial rites control the apparition of violence, they repeat what the victim has done to save the community, and the prohibitions prevent the actions attributed to the victim in its function of having caused the violence. By dissipating violence by way of the sacrifice, a new social order is produced. The society that ignores the mechanism in force makes of the victim the external reason of its new situation. The community remains terrified, and it sacralises the victim that has now become the reason for peace. The victim is sacrificed as the real cause of the evil that affects the community, not as a scapegoat. The mass never thinks of having transferred onto the victim its own conflicts. In always resolving violence through means of violence, the sacrifice only displaces it and postpones it.¹²⁷ Girard has afterwards developed and amplified his theory by analysing the fundamental impact of the Christian Revelation, which

¹²⁶ Guyora Binder, “Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie”, in *Yale Law Journal*, 1989, vol. 98, p. 1372.

¹²⁷ René Girard, *La violence et le sacré*, Editions Grasset et Fasquelle, Paris, 1972. René Girard, *Des choses cachées depuis la fondation du monde*, Grasset et Fasquelle, Paris, 1978. For analysis, see for example, Mario Roberto Solarte Rodriguez, “Mimésis et sacrifice à l’ère de la globalisation”, in *Dix-huit leçons sur René Girard*, Desclée de Brouwer, Paris, 2001, p. 345.

according to him constituted a rupture with the previous form and use of sacrifice.¹²⁸ Girard considers that the Revelation makes possible for the community to understand that the victim – Jesus Christ – is actually innocent.¹²⁹ This acknowledgement of the innocence of the scapegoat could also be seen as being a starting point for a more “objective” and “rational” approach of judicial systems.¹³⁰

As this analysis has demonstrated thus far, there is no historiographical or public consensus either of the events leading to the Finnish trial, the trial itself or its later meaning. Clearly there can be no single reading of the trial as sacrifice either. In this chapter, I am unable to engage in a structured and systematic analysis of anthropological or religious phenomena and disciplinary concepts such as sacrifice or ritual. A Girardian reading of the Finnish trial must be reserved for another occasion. In the context of the Finnish trial, a setting for what could in broad cultural terms be understood as sacrifice, scapegoating or martyrdom appears in a perspective that both concurs with some aspects of the above-referred interpretations in current or recent international criminal law and departs from them in important aspects. The multiple layers of complexity keep open possibilities for varying interpretations depending at what point of time and from which perspective the trial is analysed. My emphasis is on the core difference of the Finnish context with references to sacrifice in the current era of international criminal jurisdictions, a reading that may have broader bearing in understanding histories of other national trials for international crimes based on an international obligation, either in the past or today.

The difference culminates in *who* sacrifices and *for whom*. In terms of the main elements of sacrifice in the landmark study on the nature and social functions of sacrifice by Henri Hubert and Marcel Mauss, the sacrifice can be divided in the following main elements: the subject that makes the sacrifice; the object, animal or human being offered upon for sacrifice; and the immaterial but representable idea, being or deity to whom the sacrifice is made. An additional element is that of the intermediary, such as the priest. The relationships, intermediary roles and representations between these elements are complex. The “*sacrifiant*”, the

¹²⁸ René Girard, *Le bouc émissaire*, Editions Grasset et Fasquelle, Paris, 1982.

¹²⁹ René Girard, *Je vois Satan tomber comme l'éclair*, Editions Grasset, Paris, 1999, p. 181.

¹³⁰ Pascal Coulon, *René Girard: L'impensable violence*, Editions Germina, 2012, p. 151.

individual, community, family, clan, tribe, nation or secret society, providing the victim and making the sacrifice is the subject that “*recueille ainsi les bénéfices du sacrifice ou en subit les effets*”.¹³¹ A collective subject either collectively completes the sacrifice or delegates it in order to be represented by its member; a family by its head, a society by its judges. This subject gets transformed by the sacrifice, liberating itself from an unfavourable characteristic, or acquires a (religious) characteristic it did not previously have.¹³²

In the interpretations discussed above, the community making the sacrifice is either figuratively the “international community”, or in legal terms the United Nations (establishing the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) or the States parties to the ICC Statute, and, in the last example, the victorious Allies of the Second World War and France, in particular. The immaterial but representable idea, being or deity to whom the sacrifice is made in these examples could be expressed in idealistic terms as humanity, survival of humankind on Earth, international law, justice or peace. However, it simultaneously also melts into the defence of a certain status quo, the historical hegemonic position of a certain civilisation in international politics and international law. In contrast, the “*sacrifiant*” in the Finnish trial is the Finnish nation, represented by the Finnish judges in the special tribunal created for the purpose by the government and elites that take over after the war. Since Finland has lost the war and struggles for its existence, the trial is not a spontaneous sacrifice, but is rather forced from the outside. Yet the immaterial idea to which the sacrifice is made is not that of the “international community” with its universalist values that takes shape in the post-Second World War critical moments. It is rather that of the nation of Finland, both its immaterial ethnic, cultural and linguistic existence as well as its territory, constitution and independent government, the latter also symbolising its desire of identification as a sovereign “Western” democratic state.¹³³

¹³¹ Henri Hubert and Marcel Mauss, “Essai sur la nature et la fonction du sacrifice”, in Henri Hubert and Marcel Mauss (eds.), *Mélanges d'histoire des religions*, Librairie Félix Alcan, Paris, 1929, p. 11.

¹³² *Ibid.*

¹³³ On the ideology of nationalism, see Craig Calhoun, *Nationalism*, Open University Press, Buckingham, 1997.

The difference is also evident in how the function of the trial is understood. International or other transitional criminal trials are today pictured as “monumental spectacles”¹³⁴ that dramatise “the contrast between a totalitarian past and a democratic present”, representing “constitutional moments”¹³⁵ in the societies concerned. Capturing public imagination, they are believed to have an incontestable “impact on how the events and the period of history that they deal with are collectively remembered”.¹³⁶ The Finnish trial and its legacy until today in terms of sacrifice concurs with the latter in the sense of the lasting if not fundamental impact that the trial or its related Second World War traumas have occupied and, to some extent, may continue to occupy in the self-definition of Finns. Yet the events are remembered differently. The dramatic sacrificial “spectacle” in Helsinki does not appear to have been experienced by the contemporaries as a transition between a totalitarian past and a democratic present. The trial may be more plausibly interpreted as a strategy for returning to the democratic past (a reality or an illusion), in post-war conditions experienced as political and legal supremacy by a totalitarian foreign power. In that light, the sacrifice appears as an act of dissidence, as part of the struggle to liberate the country from foreign influence. Respecting fully the terms of the armistice signed in Moscow in 1944 was believed to be necessary in order to avoid a scenario where foreign powers could again interfere in Finland, at worst by a Soviet occupation. No matter the current appreciation of the post-war geopolitical situation, the hazards felt at the time of the trial were not minor: Finland was pressed in between two major totalitarian powers that had both had a decisive role in forming what the young state had become.¹³⁷ The trial had to follow the external forms of a judicial proceeding, in an atmosphere of general calm and dignity, to safeguard Finland’s integrity and constitution.

¹³⁴ Osiel, 1997, p. 3, see *supra* note 20.

¹³⁵ Susanne Karstedt, *Legal Institutions and Collective Memories*, Hart Publishing, Oxford, 2009, p. 2.

¹³⁶ *Ibid.*

¹³⁷ A further element is the strong exemplary role played by the legalistic culture of Sweden, Finland’s long-term “colonial” master, as an ideal of a Western democracy with a rule of law, often unattainable for Finland considering its strategic geographical position and its economical and political weaknesses. To resist the interpretation, prevalent in the trial, of the Finnish responsibility for war and too close relations to Nazi Germany is part of the Finnish post-war aspirations to identify as a state in the category of Sweden.

The sacrifice was thus solemnly carried out, but at the same time the rejection of the trial turned into an expression of, in Jürgen Habermas's terms, "constitutional patriotism".¹³⁸ As the preparation of the trial and its reception highlight, the resistance to the trial became a channel for Finns to define themselves in the defence of their achievements as members of a society founded on the rule of law and fundamental rights in the constitution. In a manner not foreign to Max Lerner's "fetishism of the Constitution", Finns may have used their constitution as "an instrument for controlling unknown forces in a hostile universe [...] to fix their emotions".¹³⁹ The continuous resistance to the trial and the commemoration of its 'victims' is then not only related to cherishing the past sacrifice as collective expiation of guilt but also a channel of celebration of the survival of the constitution and national legal system in general. Paradoxically to today's understanding of international criminal law as motivated by empathy for victims of international crimes, Finns may have been building their legalistic society by identifying with the fake outlawry, 'victims' of the "judicial murder".¹⁴⁰ For Finland the door towards a regained recognition in the family of nations was opened by the Peace Treaty of Paris in 1947 that allowed for Finland to become a member state of United Nations. In a reading of the trial as a sacrifice, one part of the price that had to be paid for Finland's reintegration was the convictions of 1946.

That there had been abundant internal violence in Finland's history, often dealt with in a manner in striking contrast with the rule of law or constitutional rights, paradoxically accentuates the logic of the sacrifice in the trial in 1945–1946. The horror of the criminal justice imposed on Finland by the Allies – presented as retroactive, selective, biased, political and, first and foremost, unconstitutional – was deemed outside interference dirtying what was regarded as sacred. The shameful trial by

¹³⁸ Jürgen Habermas, "Historical Consciousness and Post-traditional Identity", in Shierry Nicholsen (ed.), *The New Conservatism: Cultural Criticism and the Historians' Debate*, MIT Press, Cambridge, MA, 1989. On war crimes trials and dissidence, see Simpson, 1997, p. 139, *supra* note 125.

¹³⁹ Max Lerner, *Ideas of the Ice Age: Studies in a Revolutionary Era*, Viking, New York, 1941, p. 236.

¹⁴⁰ Speech by a close collaborator of President Ryti, L.A. Puntila at the funeral of Risto Ryti, see *Risto Ryti – Muistokirja Suomen tasavallan viidennestä presidentistä*, Otava, Helsinki, 1957, p. 21. On the outlawry and identification in international trials, see Gerry Simpson, *Great Powers and Outlaw States*, Cambridge University Press, Cambridge, 2004, p. xi.

its weight contributed to concealing how the nest had been dirtied so many times before: in the early years of independence marked by the wave of violence on both sides during the Civil War, and its legal aftermath by the Whites that respected few legal guarantees; in outbursts of right-wing political violence that preceded the war; in the internment of political opponents during the wars; in Finland's aggressive war in union with a totalitarian ally; and the racial occupation policies. As if burned away from the scope of relevance by the enormity of the trauma of the Second World War culminating in the sacrifice of the eight convicted leaders, those violent memories started to fade. In that sense, the sacrificial ritual in the trial and its continuous commemoration correspond to Max Gluckman's view on rituals not as expressive means to gain coherence, but expressions of social tensions and dynamics. All social systems have a zone of tension with ambiguities and ambivalences. Rituals canalise social contradictions and have thereby a cathartic, therapeutic character.¹⁴¹

In this analysis, the focus has been mainly on the eight accused collectively. Yet focus on individual histories would certainly add more pertinence and nuance. For example, Minister and party leader Väinö Tanner's "sacrifice for the nation" was also a sacrifice for his party. It may have been crucial in legitimising the Social Democratic Party as an independent and truly Finnish political force in post-Second World War Finland, in that sense clearly demarked from the Finnish communists.¹⁴² Risto Ryti's tragic fate as a culmination of the sacrifice stands out clearly in Finnish commentaries. The way he is represented emphasises his exceptional competence and selflessness, demonstrated also by the distinct historical moment of extreme devotion in the last moments of the war (see *supra* pp. 522–23). The image can be completed by him being sentenced to the heaviest punishment, his illness in prison and his untimely death, as well as the national grief expressed at his funeral. His personal aptitude to martyrdom is suggested by an anecdote of his attitude

¹⁴¹ See Max Gluckman, "Les rites de passage", in Max Gluckman (ed.), *Essays on the Rituals of Social Relations*, Manchester University Press, Manchester, 1962, pp. 1–52. See also Christoph Wulf and Jörg Zirfas, "Performative Welten", in Christoph Wulf and Jörg Zirfas (eds.), *Die Kultur des Rituals. Inszenierungen. Praktiken. Symbole*, Wilhelm Fink Verlag, Munich, 2004, p. 15.

¹⁴² See, for example, Prime Minister Paavo Lipponen's speech on 15 November 2001, available at <http://vnk.fi/ajankohtaista/puheet/puhe/fi.jsp?oid=102968>.

towards the trial, told by his close collaborator L.A. Puntila.¹⁴³ As the preparation of the war responsibly trial advanced, Ryti was shocked by the anti-constitutional special law. He declared to prefer to be delivered to an international jurisdiction to be ‘tried’ there (read: illegally, severely, perhaps in a harsh Bolshevik manner), rather than to accept that Finland was denying its legalistic traditions and its Constitution by enacting a retroactive special criminal law and tribunal. Like the soldiers that had died at the front to protect the territory of their country, Ryti consciously offered himself as the sacrificial lamb to canalise violence and lead it away from Finland. Although Ryti’s sacrifice was not realised in its extreme, he is at the centre of the commemorations.

In light of today’s tendency to view international criminal trials as parts of a transition and thus as rites of degradation that are “also important in delegitimizing the authority associated with the symbolism of leaders of the past”,¹⁴⁴ the history of the Finnish trial may represent a counter-example. The commemoration of the convicted and more broadly the Second World War events in Finland figure amongst other “rites of nationalism” that not only “foster a certain view of the political world” but also “a feeling of national solidarity”.¹⁴⁵ This does not necessarily imply that individuals share the same values or specific rationalisations by which they account for the commemoration.¹⁴⁶ To reiterate Maurice Halbwachs’ analysis, collective memories are pluralised and multiple, but they can also be constructed and stored in a process of establishing a common core.¹⁴⁷ In modern societies this is a task of legal institutions, archives, academic research, bureaucracies, museums, memorials and, to some extent, the media. For today’s commentators, law and legal institutions have an increasing share of the task, providing “legal blueprints” in constructing collective and broadly shared memories.¹⁴⁸ Establishing collective memories is, in Susanne Karstedt’s summary,

¹⁴³ See Puntila, 1957, pp. 20-21, *supra* note 140. See also Turtola, 1994, p. 321, *supra* note 99, interviewing President Ryti’s son Niilo Ryti.

¹⁴⁴ Kertzer, 1998, p. 28, see *supra* note 114.

¹⁴⁵ *Ibid.*, p. 73.

¹⁴⁶ In Ernst Cassirer’s view, the person participating in the ritual “lives a life of emotion, not of thoughts”. Ernst Cassirer, *The Myth of the State*, Yale University Press, New Haven, 1946, p. 24.

¹⁴⁷ Halbwachs, 1997, see *supra* note 20.

¹⁴⁸ Osiel, 1997, see *supra* note 20.

considered to imply “both that a shared meaning is given to events of the past, and that there are shared practices of their commemoration”.¹⁴⁹ Criminal trials, in particular, “give deeply ingrained meanings and interpretations to ‘facts’ by establishing guilt and innocence and meting out sentences and punishment as moral closure to these events”.¹⁵⁰

In Finland, “the shared practices of commemoration” (*idem*) are primarily directed elsewhere, in the commemoration of the heroic war efforts, victimhood and the sacrifice at the trial. The legal actions and petitions seeking an official re-evaluation of the trial, reversal of the judgment, and the rehabilitation of the convicts are efforts to confirm an official, shared meaning of history, and to thereby definitively exclude the attribution of any criminal responsibility to the Finnish leadership. This would represent a “moral closure” (*idem*) of a different kind, as a resistance to the criminal judgments. For the moment the story remains open-ended, inviting further interdisciplinary and comparative research on how in the aftermath of large-scale collective violence, political and social crisis, and a general loss of (national) securities, the rejection of a trial – past or present – for international crimes may sometimes turn into a channel of reinforcing the national or other collective narratives of the past and of national social solidarity, perhaps as a necessary “self-deception” providing the “moral safety” in the life of individuals and of a nation.¹⁵¹

¹⁴⁹ Karstedt, 2009, p. 4, see *supra* note 135.

¹⁵⁰ *Ibid.*

¹⁵¹ Leszek Kolakowski, “Amidst Moving Ruins”, in *Daedalus*, 1992, vol. 121, no. 2, p. 43.

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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.

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