

# The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp:

## Lessons for Today?

By  
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War Crimes Courts were established, not to right wrongs, as that is impossible, but to attempt to impose proper penalties upon proven wrongdoers. The evils of concentration camps and death marches cannot be dealt with by illegal methods. Our occupation policy will not tolerate perjured testimony in a War Crimes Court, or any Court. We do not want convictions at that price.<sup>2</sup>

To subject an enemy national to an unfair trial only outrages the enemy and hinders the reconciliation necessary to a peaceful world. We must insist that

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2. Memorandum from John K. V. Goff, Chief Judge for Upper Bavaria, to 770S War Crimes Group, APO 407, US Army, on Perjury Case against Adolf Kufner and Karl Gautsch (Apr. 8, 1948), *microformed on* Nat'l Archives Collection of World War II War Crimes Records, Records of the U.S. Army Commands, 1942-, Record Group 338, Microfilm Publication M1204 (16 Reels), United States v. Becker, Reel 12 [hereinafter Microfilm Publication 1204]. Three collections of primary sources were relied upon extensively in writing this article. The first are WWII-era documents collected in the aforementioned National Archives microfiche publications. These documents stem almost exclusively from U.S. Army officials involved in the war crimes prosecution program. Many of these documents were what lawyers would call “work product” – written, informally, for internal purposes and thus offer relatively uncensored thoughts and perspectives. The second source is the *Foreign Relations of the United States* series [hereinafter FRUS]. Within its volumes are collected diplomatic cables, communiqués, telegrams, etc., as well as other important U.S. government documents, such as internal memoranda and other papers which shed light on the inner workings of governments and allow one to look behind the curtain of diplomatic negotiations. The last source is Bradley F. Smith's collection of U.S. government documents, transcripts of telephone conversations, and notes relating to the development of the U.S. war crimes prosecution program. All three collections offer easy access to primary sources otherwise effectively inaccessible to the general public. I attempt to cite extensively to primary sources when possible in order to allow the reader to evaluate the information for him or herself.

within the confines of our jurisdiction the highest standards of conduct be applied to the trials of war criminals and to all matters connected therewith.<sup>3</sup>

## I. INTRODUCTION

When students of international law think of the significance of World War II (WWII), they think first and foremost of the International Military Tribunal (IMT),<sup>4</sup> a/k/a the "Nuremberg Trial," and the contemporaneous "Tokyo Trial." Some might remember that U.S. authorities immediately after the conclusion of the Nuremberg Trial began a series of twelve trials of leading Nazis. But few students know that from 1945 until 1947, the U.S. Army tried 1,672 alleged German war criminals in 489 cases in front of U.S. military tribunals at the former Dachau Concentration Camp (the *Dachau* trials).<sup>5</sup>

In the wake of WWII, the U.S. government, within an international framework, prosecuted members of the armed forces of the Axis Powers and others in a four-tiered structure depicted in Table 1.

TABLE 1

	Trial Administrators	Source of Jurisdiction	Number of Cases	Class of Defendants	Years of Operation	Initial Sentences
Nuremberg Trial/IMT	Allied Powers	The London Agreement	One	Twenty-two top-ranking Nazi leaders	Nov. 1945 – Oct. 1946	Twelve executions, three acquittals, seven sentences of imprisonment <sup>6</sup>
U.S. Nuremberg trials	Office of Military Government	Control Council Law	Twelve	185 2nd-tier Nazi leaders	Oct. 1946 – Apr.	Twelve executions, eighty-eight

3. Memorandum from Lt. Col. Wade M. Fleischer, Chief, Int'l Affairs Branch, to the Judge Advocate, Perjury Charges Arising out of the Flossenburg Case 3-4 (Oct. 27, 1947), *microformed on Microfilm Publication 1204, supra* note 2, Reel 12.

4. So called, even though it was primarily civilian in nature. EARL F. ZIEMKE, *THE U.S. ARMY IN THE OCCUPATION OF GERMANY: 1944-1946*, at 394 n.65 (1975).

5. Legal and Judicial Affairs (Cumulative Review), OMGUS Report No. 38 (Sept. 1, 1947 – Aug. 31, 1948) (Aug. 1948), in OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF STATE, PUBLICATION NO. 3556, *GERMANY, 1947-1949: THE STORY IN DOCUMENTS 118* (1950) [hereinafter OFFICE OF PUBLIC AFFAIRS].

6. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, OFFICIAL TEXT IN THE ENGLISH LANGUAGE, OFFICIAL DOCUMENTS 366-67 (1947) [hereinafter NUREMBERG].

	ment – U.S. (OMGUS)	No. 10 <sup>7</sup>			1949	acquittals, eight life sentences, seventy-seven sentences of imprisonment <sup>8</sup>
U.S. Army Tribunals/ <i>Dachau</i> trials	U.S. Forces – European Theater (USFET)	JCS 1023/10	3,887 (opened), 489 (tried), 3,029 (closed administratively), 369 (discontinued investigations) <sup>9</sup>	1,672 low-ranking war criminals <sup>10</sup>	June 1944 – early 1948	426 death sentences, 256 acquittals, 199 life sentences, 530 sentences of five years or less, 261 sentences ranging from six to fifty years <sup>11</sup>
German courts/ denazification trials	Federal Republic of Germany (FRG)	Control Council Law No. 10	unknown	unknown	unknown	unknown

This article will focus on the seemingly forgotten third level of the international war crimes prosecution effort, which accounted for the lion's share of German war criminals tried by the United States after WWII.

The popular focus on the IMT as the expression of justice in the wake of WWII's horrors has had a significant impact on contemporary thought. First, is the charge that the IMT and the International Criminal Tribunals for the Former

7. See *infra* APPENDIX 1.

8. Subsequent Nuremberg Proceedings, available at <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007074> (last visited Feb. 2, 2006).

9. LT. COL. C.E. STRAIGHT, JAGD, DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, EUROPEAN COMMAND, JUNE 1944 TO JULY 1948, 160, Appendix XVIII (1948).

10. Legal and Judicial Affairs (Cumulative Review), in OFFICE OF PUBLIC AFFAIRS, *supra* note 5; John Mendelsohn, *War Crimes Trials and Clemency in Germany and Japan*, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944-1952, at 226, 228 (Robert Wolfe ed., 1984). There is some disagreement about the exact numbers, see ROBERT SIGEL, IM INTERESSE DER GERECHTIGKEIT: DIE DACHAUER KRIEGSVERBRECHERPROZESSE 1945-1948, 38 (Campus Verlag 1992). Whatever the exact figures, this was a drop in the bucket of the overall judicial system created in the American zone of occupation. At its height, the judicial system consisted of 343 general, intermediate, and summary military government courts which had tried approximately 385,000 cases involving violations against the American occupation. LUCIUS D. CLAY, DECISION IN GERMANY 246 (1950).

11. STRAIGHT, *supra* note 9, Appendix XVIII. These are initial sentences, which often times were subsequently reduced.

Yugoslavia and Rwanda (ICTY and ICTR, respectively) are simply examples of “victor’s justice.”<sup>12</sup> In addition, a good deal of literature exists debating the merits of ad hoc international tribunals such as the ICTY and ICTR, permanent international tribunals such as the International Criminal Court (ICC), and hybrid international tribunals such as the Special Court for Sierra Leone.

This focus on the purely international level, however, risks overshadowing other potential avenues of punishment of international crimes such as national trials. One implicit and erroneous understanding of the successful operation of international tribunals is that only an extremely limited number of perpetrators, such as high level organizers and leaders, can be held accountable for crimes of vast magnitude. National tribunals are an explicit rejection of this notion as they have been used extensively to try international crimes. Their influence on the dispensing of international justice should not be relegated to the dustbin. In the instant case, American actors strongly influence the development of the IMT. In addition, the U.S. Army directive JCS 1023/10, which was the authorizing document for the *Dachau* trials, also served as the template for Control Council Law No. 10, one of the international agreements for the prosecution of war criminals.

The focus on international tribunals has created unnecessary problems in the dispensing of international justice as is exemplified by two contributors to this journal edition. The article by Laura Bingham entitled *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda* addresses the “Closing Strategy” of the ICTR.<sup>13</sup> Like most international tribunals, the ICTR has managed to prosecute only a relative handful of perpetrators of the Rwandan genocide. At the end of its existence, when it is obvious that many perpetrators have gone unpunished at the international level, the question becomes “now what?” The focus naturally has turned to the continuing prosecution of Rwandan genocide defendants at the national level.

Jennifer Landsidle, in her unpublished manuscript entitled *International Jurisdiction Over the Rwandan Conflict: the Costs and Benefits of Primacy*, addresses the relationship between international and national courts in prosecuting international crimes.<sup>14</sup> Specifically, she addresses the question of whether international courts should serve a complementary rather than primary function with respect to national tribunals. An understanding of national trials would benefit the discussions of prosecutions at the international level, and vice versa.

Part II of this article provides a brief numerical overview of war crimes

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12. Professor Martin Shapiro might well argue that this is a charge that can be leveled at all criminal trials due to the lack of defendants’ consent. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 6 (1981). He goes on to explain that most criminal defendants are likely to perceive supposedly neutral judges as seeking nothing more than to control them. *Id.* at 27.

13. 24 Berkeley J. Int’l L. 690 (2006).

14. (manuscript on file with author).

prosecution at the national level after WWII.<sup>15</sup> Part III outlines the development of the war crimes prosecution program (both within the international and U.S. contexts).<sup>16</sup> Part IV presents three war crimes prosecution case studies. Lastly, Part V distills lessons from the WWII war crimes prosecution program for possible application to the current operation of U.S. military commissions.

## II.

### A NUMERICAL OVERVIEW

In terms of the volume of war crimes cases, lesser known national tribunals conducted almost all of the trials in Germany and throughout Europe. Countries used three types of tribunals throughout the world: military, national and special tribunals. The following countries used military tribunals: Australia, Canada, China, France, the Netherlands, the United Kingdom and the United States.<sup>17</sup> Some countries employed the national judicial systems for the trial of war crimes committed on their territory: Austria, Belgium, Bulgaria, Denmark, France, Hungary, Italy, Norway, Romania and Yugoslavia.<sup>18</sup> Still others created special tribunals for this purpose: Czechoslovakia, Holland, Greece, Luxembourg and Poland.<sup>19</sup> In Europe, a total of 969 cases were tried, involving 3,470 defendants, which resulted in 952 death sentences, 613 acquittals and 1,905 prison sentences.<sup>20</sup>

Of special relevance to this article are the efforts by the other Allied powers to try German war criminals under their auspices. The Soviet Union, due to the extensive bloodshed which occurred on its soil, carried out the large majority of cases.

15. See also the fifteen volumes of the U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS (William S. Hein & Co., Inc. 1997), which covers war crimes trials from all the theaters of World War II [hereinafter LAW REPORTS].

16. This article does not describe exhaustively the history of the U.S. Army's war crimes prosecution program or the scandals that developed from it, such as the ones surrounding Ilse Koch, a/k/a "the Bitch of Buchenwald," and the Malmédy Massacre. See CLAY, *supra* note 10, at 253. For thorough treatments of these aspects, see generally FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946 - 1955 (1989); Sigel, *supra* note 10; William F. Fratcher, *American Organization for Prosecution of German War Criminals*, 13 MO. L. REV. 45 (1948); TOM BOWER, THE PLEDGE BETRAYED: AMERICAN AND BRITAIN AND THE DENAZIFICATION OF POSTWAR GERMANY (1982); JOSHUA M. GREENE, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR (2003).

17. *Id.*; U.N. WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 461-75 (His Majesty's Stationery Office 1948) [hereinafter UNITED NATIONS].

18. *Id.*

19. *Id.*

20. *Id.* at 515-18. In comparison, the Commission reported 1,024 cases in the Far East for the same time period, involving 2,794 accused and resulting in 685 death sentences, 1,694 sentences of imprisonment, and 415 acquittals. *Id.* Noteworthy is the fact that former Axis Power and allied countries also prosecuted war crimes. *Id.*

TABLE 2

	Location	Number of defendants	Sentences
France <sup>21</sup>	Rastatt	1,639	unknown (many to five years of imprisonment or less)
Soviet <sup>22</sup> Union	unknown	9,717	unknown
United Kingdom <sup>23</sup>	Hamburg & Brunswick	749	unknown

By the end of the 1950s, the western Allied powers had released all of the convicted German war criminals in their custody.<sup>24</sup> Often, politically motivated large-scale reviews and reductions of the original sentences handed down by the war crimes tribunals made this phenomenon possible.<sup>25</sup>

The 489 cases tried by U.S. military tribunals consist of four distinct groups: "parent" concentration camp cases; subsequent concentration camp cases, which involved defendants tried after the main cases had been completed or involving satellite camps of the main concentration camps; "flyer" cases, which had to do with war crimes committed against downed Allied airmen primarily by German civilians and policemen; and miscellaneous cases involving war crimes such as the Malmédy Massacre of American prisoners of war by the *Waffen-S.S.*, the *Hadamard Murder Factory* case and the *Skorzeny* case involving German soldiers fighting in American uniforms.<sup>26</sup>

21. Mendelsohn, *supra* note 10, at 254; UNITED NATIONS, *supra* note 17, at 515-18.

22. Another 3,815 individuals were being held in investigatory detention. GEORGE GINSBURGS, *MOSCOW'S ROAD TO NUREMBERG, THE SOVIET BACKGROUND TO THE TRIAL* 56 n.33 (1996). In comparison, at approximately the same time, the Soviet government stated that 1,847 Japanese convicted war criminals were serving sentences and another 971 were awaiting transfer to China to face war crimes charges there. *Id.* The statistics are silent as to the number of death sentences and acquittals handed out by Soviet tribunals. *Id.* Some interesting details on the extradition of war crimes suspects from U.S. to Soviet control are found in BOWER, *supra* note 16, at 218.

23. UNITED NATIONS, *supra* note 17, at 515. Interestingly enough, in 1946 the British had already tried 495 persons and were preparing to try another 3,913. *Id.*

24. Mendelsohn, *supra* note 10, at 254.

25. See generally Mendelsohn, *supra* note 10 (detailing the history of this aspect of the system); and BUSCHER, *supra* note 16, at 69-90 (detailing the history of this aspect of the system).

26. Mendelsohn, *supra* note 10, at 226-28; Introduction 2-3, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

TABLE 3 – TYPES OF CASES

	Number of cases	Number of defendants
“Parent” Concentration Camp Cases	Six	200
Subsequent Concentration Camp Cases	250	800
“Flyer” Cases	200	600
Miscellaneous Cases	unknown	unknown

The first and fourth types of cases include the two most well-known scandals arising out of the *Dachau* trials, respectively: the sentence reduction for the “Bitch of Buchenwald” and the *Malmédy Massacre* trial. The *Flossenburg* case study in this article is of the first type, as well.

### III.

#### THE INTERNATIONAL BACKDROP

The idea that Nazi war criminals would be put on trial was far from a foregone conclusion during the Second World War.<sup>27</sup> This uncertainty changed only with the signing of the London Agreement, at which the four Allied powers ratified the Charter for the IMT. The indecision on the question, and the resulting delay, had a fundamental impact on the eventual shape of war crimes prosecution efforts.

Various actors sought to influence the “policy for dealing with the major Nazi war criminals[which] was both a political and a legal question.”<sup>28</sup> On one end of the spectrum, the Soviet government and many governments-in-exile of countries occupied by the Nazis advocated trials and other means of punishment for war criminals.<sup>29</sup> On the other end of the spectrum, the British and U.S. governments were very reluctant to take any definitive position on what, if anything, should be done with war criminals.<sup>30</sup> Once the governments decided, however, that Nazi war criminals should be punished using legal means, the planning on how exactly this would occur took place primarily in Washington, D.C.<sup>31</sup>

27. BRADLEY F. SMITH, *THE ROAD TO NUREMBERG* 4 (1981).

28. *Id.* at 7.

29. *Id.* at 9.

30. *Id.*

31. *Id.* at 4. This book provides an excellent treatment of the development of the U.S. government’s policies in this field (and the influence of foreign actors on them).

Governments-in-exile and refugee groups were some of the most forceful advocates of strong punishments for Nazi war criminals.<sup>32</sup> This was natural, as their constituencies were in large part the victims of war and other crimes perpetrated by the Nazis. Largely in reaction to pressure exerted by these actors, the British and U.S. governments unwillingly acquiesced to the creation of the United Nations War Crimes Commission (UNWCC or “the Commission”).<sup>33</sup> Both governments viewed this agreement as an easy way to placate the demands of these groups.

Nonetheless, the British and U.S. governments did their best to marginalize the Commission.<sup>34</sup> It was relegated, among other functions, to receiving reports of war crimes, investigating them, and publicizing lists of war criminals.<sup>35</sup> The Commission lacked any adjudicatory or enforcement powers. It did, nonetheless, manage to contribute to the field of humanitarian law, urging the creation of a treaty-based international criminal court. The British and U.S. governments did not react favorably to this proposal:

General agreement has been tentatively reached [between the United States and U.K. governments] that (1) the United Nations War Crimes Commission plan for a grandiose international criminal court created by treaty is not practicable but some non-treaty tribunal must be provided and announced before any rejection of the War Crimes Commission proposal . . . .<sup>36</sup>

This limited support by two of the most important Western Allies would have a strong influence on the nature of the war crimes prosecution programs that did eventually arise and helps to explain their ad hoc nature and resulting shortcomings.

Due to the visceral ideological hatred between the Nazi Third Reich and the Soviet Government and the shocking scale of the bloodshed in Eastern Europe and the Soviet Union during WWII, the Soviets cared deeply about the treatment of German war criminals. Consequently, regarding the question of their punishment, “Soviet spokesmen were primarily responsible for setting the tone . . . within the ranks of the anti-Axis coalition.”<sup>37</sup> The Soviet government “support[ed] all practical measures . . . in bringing the Hitlerites and their accomplices to justice, and favor[ed] their trial before ‘the courts of the special international tribunal’ and their punishment in accordance with applicable

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32. BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944–1945* 6-7 (1982).

33. *Id.* at 6.

34. *Id.*

35. Memorandum from the Secretaries of State and War and the Attorney General for the President, Trial and Punishment of Nazi War Criminals (Jan. 22, 1945), in U.S. DEPARTMENT OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCE OF MALTA AND YALTA 1945* 403 (1955) [hereinafter FRUS – MALTA AND YALTA].

36. Telegram from Ambassador Winant in the United Kingdom to the Secretary of State (Apr. 7, 1945), in III FRUS, *EUROPEAN ADVISORY COMMISSION: AUSTRIA; GERMANY 1945* 1158 (1968) [hereinafter III FRUS].

37. GINSBURGS, *supra* note 22, at 50.



criminal law.”<sup>38</sup> Despite their misgivings, the British and U.S. governments signed the Moscow Declaration on war crimes in 1943. The Soviet Government quickly held the first trial of alleged Nazi war criminals in 1943, which led to disagreements among the signatories of the Declaration on whether such trials were permissible or not.<sup>39</sup>

The British government, unlike the Soviet and French governments,<sup>40</sup> did not support the international punishment of war criminals, intending rather that the liberated countries try the individuals responsible for war crimes committed in those countries.<sup>41</sup> This position reflected the general tenor of the Moscow Declaration. As British Ambassador Halifax explained to Secretary of State Hull:

The United Nations should . . . in the opinion of His Majesty's Government in the United Kingdom, not themselves assume any formal obligation in regard to the punishment of those responsible for such atrocities . . . nor should they impose upon the enemy any formal obligation to try them or surrender them for trial.<sup>42</sup>

Thus, consistent with their position on an international criminal court, the British government generally was unreceptive to the idea of post-war prosecution of war crimes, which perhaps explains the lower number of prosecutions under the British Royal Warrant in comparison to the other Allied powers.

In fact, the British government for most of the war opined that the wise and expedient solution was the summary execution of Nazi war criminals. As British Lord Chancellor Sir John Simon explained in a memorandum:

I am strongly of opinion that the method by trial, conviction, and judicial sentence is quite inappropriate for notorious ringleaders . . . . [T]he question of their fate is a political, not a judicial, question . . . .

A formula which might meet the Prime Minister's suggested views would be as follows: “. . . Upon any of these major criminals falling into Allied hands, the Allies will decide how they are to be disposed of, and the execution of this decision will be carried out immediately.”<sup>43</sup>

Thus, at least in part, Simon and like-minded people objected not for pragmatic reasons, such as the difficulty of gathering evidence, but rather based on the

38. Memorandum from the Secretaries of State and War and the Attorney General for the President, *in* FRUS – MALTA AND YALTA, *supra* note 35, at 408. The British also supported limited use of mixed tribunals. *Id.*

39. GINSBURGS, *supra* note 22, at 52, 54; ZIEMKE, *supra* note 4, at 170. For more information on these trials, see THE PEOPLE'S VERDICT – A FULL REPORT OF THE PROCEEDINGS AT THE KRASNODAR AND KHARKOV GERMAN ATROCITY TRIALS (1944).

40. SMITH, *supra* note 32, at 138. The French government also supported the idea of some kind of trial.

41. British Aide-Mémoire (Aug. 19, 1944), *in* I FRUS, GENERAL 1944 1351-53 (1966). This position was not unequivocal, however, as they occasionally did acquiesce to trials. See *supra* note 38.

42. *Id.*

43. FRUS, THE CONFERENCE AT QUEBEC 1944 91-93 (1972) [hereinafter FRUS – QUEBEC]. Roosevelt, at times, shared Churchill's preference for summary executions. ZIEMKE, *supra* note 4, at 172.

principled view that the resolution of war crimes was a political matter inappropriate for resolution by courts. Simon was even more explicit in regard to his preferred solution a year later:

[His Majesty's Government] assume[s] that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for the conduct. . . . It would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military Court unless the ringleaders are dealt with with equal severity.<sup>44</sup>

By addressing the issue of relative degrees of responsibility and concomitant sentences, Simon's thinking on the issue of war crimes prosecution displayed an insightfulness lacking to a certain degree among American planners. British fears in regard to the use of trials included long and convoluted proceedings, accusations of judicial proceedings constituting "show trials," impatient public opinion and condemnation of the whole endeavor as a farce.<sup>45</sup>

The end of the war, during which many of the Nazi leaders committed suicide or were killed, made British Secretary of State for Foreign Affairs Eden much more amenable to trials.<sup>46</sup> As is recorded in notes from a meeting attended by all the Allied powers,

the British understood that the normal military courts of the four Allies would be used to take care of the ordinary war crimes committed inside Germany. This would take care of a large number of cases. There would also be a large number of cases of criminals who would be returned to the country where their crimes were committed. . . . [Eden] felt that the smaller the number of people who were dealt with by a formal state trial, the better.<sup>47</sup>

Thus, the British government never completely abandoned the idea heavily limiting any war crimes prosecution efforts. Nonetheless, as indicated by the previous quotation, by May of 1945, the Allied powers generally agreed on the use of military tribunals to try war criminals. However, the principles of the Moscow Declaration, which called for the extradition of war criminals back to the countries where the crimes were committed, qualified the use of such tribunals.

#### A. The American Context

It was against this international backdrop that U.S. government policy on war crimes prosecution took shape at a very late point in the war. Time was of the essence because the end of the war was, as Secretary of War Stimson

44. SMITH, *supra* note 32, at 155-56.

45. Lord Chancellor Simon, the Argument for Summary Process Against Hitler and Co. (Apr. 16, 1945), in SMITH, *supra* note 32, at 155-57. These concerns were not only proven true – partially – but also have currency in the modern international trials.

46. Memorandum of Conversation Held in San Francisco (May 3, 1945), in III FRUS, *supra* note 36, at 1164.

47. *Id.*

famously wrote on August 23, 1944, "approaching on a galloping horse."<sup>48</sup> The challenge was to quickly transform "vague threats of full and just retribution" into concrete policies.<sup>49</sup> As then Acting Secretary of State Dean Acheson wrote to President Roosevelt on March 17, 1945, "[i]n as much as the war crimes program is more or less bogged down and in as much as we have assured the public that we have definite plans in mind, we should take prompt steps to get things moving in the right direction."<sup>50</sup> American planners rose to Acheson's challenge.<sup>51</sup>

The U.S. government hesitated in publicly charging ahead with an aggressive war crimes prosecution strategy for two reasons. First, officials, especially in the military, feared that such a policy carried out during the war might lead to reprisals against American prisoners of war in German custody.<sup>52</sup> Second, there was a tendency within the federal government to avoid potentially divisive political questions within it and the Allied coalition.<sup>53</sup>

Just as there were extreme positions in the international debate, the various federal bureaucracies involved, primarily the Departments of State, Treasury and Army, also held sharply differing views on the treatment of Nazi war criminals. Historian Bradley F. Smith famously coined this political infighting "[t]he Great German War on the Potomac."<sup>54</sup>

Perhaps the most infamous position was Secretary of the Treasury Morgenthau's "deindustrialization" and "pastoralizing" plan for post-WWII Germany, which entailed turning the country back into a pre-Industrial Revolution agrarian society.<sup>55</sup> In line with the British thinking on the matter of war criminals, Morgenthau had prepared a list of "arch criminals . . . whose obvious guilt is recognized," who would be executed summarily by firing squad.<sup>56</sup> He did plan, however, on lower level war criminals, who had perpetrated specific crimes "leading to or causing the death of persons," being tried by military commissions.<sup>57</sup>

The State Department, led by Secretary of State Hull, was concerned primarily with the long-term economic aspects of post-war Germany and its hoped-for role in the burgeoning cold war.<sup>58</sup> As such, the State Department

48. SMITH, *supra* note 27, at 11.

49. *Id.*

50. III FRUS, *supra* note 36, at 1155.

51. Nonetheless, the system they would create would be hampered by short comings such as lack of appeals procedures (discussed *infra*) and trained personnel. STRAIGHT, *supra* note 9, at 4.

52. Memorandum from Green H. Hackworth, Legal Advisor, to Dean Acheson, Assistant Secretary of State (Mar. 27, 1945), in III FRUS, *supra* note 36, at 1158.

53. SMITH, *supra* note 27, at 9.

54. *Id.* at 12.

55. ZIEMKE, *supra* note 4, at 102; SMITH, *supra* note 32, at 10.

56. Memorandum from Henry Morgenthau, Jr., U.S. Secretary of the Treasury, to Franklin D. Roosevelt, U.S. President (Sept. 5, 1944), in SMITH, *supra* note 32, at 27-28.

57. ZIEMKE, *supra* note 4, at 171.

58. Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 414 (2005).

played a swing role, early on siding with the harsher views of the Treasury Department,<sup>59</sup> but then later supporting the War Department's more moderate views.<sup>60</sup>

The War Department, under Secretary Stimson, played the most influential and moderating role within the U.S. government in the development of its war crimes policy. In one sense, it was natural that Stimson took a lead role on this question, as it was "his" U.S. Army, which would occupy and govern Germany, at least for the short term.<sup>61</sup> At first, Stimson did not outright reject the idea of summary executions, but at the very least wanted explicit policies. In his personal notes from the middle of 1944, he wrote "[p]resent instructions seem inadequate beyond imprisonment. Our officers must have the protection of definite instructions if shooting is required. If shooting is required it must be immediate; not postwar."<sup>62</sup> In this sense, Stimson agreed with the British position of having summary executions, but wanted it to proceed under clear guidelines.

As time passed, however, Stimson's thinking on the postwar treatment of German war criminals changed. In a memorandum to the president, he opposed Morgenthau's harsh policies, stating:

I do not mean to favor the institution of state trials or to introduce any cumbersome machinery but the very punishment of these men in a dignified manner consistent with the advance of civilization, will have all the greater effect upon posterity. Furthermore, it will afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its recurrence.

... I have great difficulty in finding any means whereby military commissions may try and convict those responsible for excesses committed within Germany both before and during the war which have no relation to the conduct of the war ... Such courts would be without jurisdiction in precisely the same way that any foreign court would be without jurisdiction to try those who were guilty of, or condoned, lynching in our own country.<sup>63</sup>

Although the Secretary viewed trials as problematic, he viewed them as beneficial for pragmatic reasons: it was both the best means of showing the U.S. government's "abhorrence" of the Third Reich and its crimes and also the best means of securing peace.<sup>64</sup> "The difference is not whether we should be soft or

59. SMITH, *supra* note 32, at 8; FRUS – QUEBEC, *supra* note 43, at 96.

60. SMITH, *supra* note 32, at 10.

61. *Id.* at 7.

62. Notes of Henry L. Stimson for a Conference with the President (Aug. 25, 1944), *in id.* at 20.

63. Memorandum of Secretary of War to the President (Sept. 9, 1944), *in* FRUS – QUEBEC, *supra* note 43, at 125. Even though Secretary Stimson's reference to lynchings was perhaps unique and definitely troubling, he was not alone in his unease about overly broad jurisdiction. Justice Jackson wrote, "[i]t has been a general principle of the foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants." Borgwardt, *supra* note 58, at 441.

64. Memorandum from Henry L. Stimson, U.S. Secretary of War, to Henry Morgenthau, Jr., U.S. Secretary of the Treasury (Sept. 5, 1944), *in* SMITH, *supra* note 32, at 30.

tough on the German people, but rather whether the course proposed will in fact best attain our agreed objective, continued peace.”<sup>65</sup> Thus, Stimson was less interested in the fate and rights of the defendants and more motivated by abstract policy concerns.

Once Stimson and like-minded individuals managed to secure agreement within the U.S. government, the Allied powers, and the United Nations that punishment of war criminals should take place within some kind of judicial mechanism, they were able to start developing their ideas. But what exactly were their goals for the trials of war criminals? It is important to understand the motivations of the architects in order to better understand their actions and the successes and failures of the trials.<sup>66</sup> The goals for the trials of war criminals consisted of a mix of pragmatic and idealistic concerns: punishment, rehabilitation and prevention.<sup>67</sup>

Professor Martin Shapiro would classify these goals as “conflict resolution and social control activities of courts.”<sup>68</sup> Among other administrative functions, courts in this capacity remind litigants they must consent to fundamental societal norms.<sup>69</sup> In the role of social controller, courts “operate to impose outside interests on the parties,”<sup>70</sup> in this case, the interests of the victorious Allied powers, specifically the United States. A particularly relevant method of social control identified by Shapiro is that of a “conqueror” imposing his own courts on “conquered territories” through the use of criminal law.<sup>71</sup> He does this in an effort to “recruit . . . support for the regime.”<sup>72</sup> Such local support is fostered through emphasizing the “conqueror’s” adherence to the rule of law over the rule of the sword and the moral righteousness of his cause. Both of these goals partly motivated the creation of the U.S. war crimes prosecution system.

The architects of the prosecution program considered the punishment of war criminals essential not only for the moral value thereof but also because of the very pragmatic concern that if left unpunished, Nazi leaders would spearhead a future Nazi revival.<sup>73</sup> They preferred judicial means not only because summary executions would “be violative of the most fundamental principles of justice, common to all the United Nations,” but they would also potentially turn those executed into martyrs.<sup>74</sup> Thus, the goals of the war crimes trials were not only to determine the individual guilt of defendants but also “social control.”

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65. Stimson (Sept. 15, 1944), in SMITH, *supra* note 27, at 12.

66. *Id.* at 7.

67. BUSCHER, *supra* note 16, at 2.

68. SHAPIRO, *supra* note 12, at 18.

69. *Id.* at 6.

70. *Id.* at 37.

71. *Id.* at 22.

72. *Id.*

73. Memorandum of Conversation, *supra* note 46, at 1163.

74. Memorandum from the Secretaries of State and War and the Attorney General for the President, in FRUS – MALTA AND YALTA, *supra* note 35, at 405.

Perhaps the most controversial goal of the trial proponents was rehabilitation. The historian John Mendelsohn stated the “democratic reeducation” of Germany required the prosecution of war criminals in order to underscore the evil and criminal nature of the Third Reich.<sup>75</sup> As Lieutenant Colonel Bernays, one of the primary architects of the trial system, explained, “[n]ot to try these beasts would be to miss the educational and therapeutic opportunity of our generation.”<sup>76</sup> Thus, at least one of the American planners of the program had goals for it above and beyond the determination of individual guilt.

Many officials also believed that another advantage of trials was the creation of an objective historical record, which would be beyond reproach, be educational and also contribute to preventing the reoccurrence of such events. Both the American and the British prosecutors at the Nuremberg Trial shared this optimism for the historical usefulness of war crimes trials.<sup>77</sup> Lastly, some individuals considered the punishment of war criminals through trials to be necessary for post-war security.<sup>78</sup>

A memorandum drawn up in the Assistant Secretary of War’s Office summarized the benefits and goals of trials as follows: since summary executions resorted to primitive practices, trials would act as a deterrent and raise international standards of conduct, and would not detract from the moral force behind the Allied cause and be more favorably looked upon by future generations.<sup>79</sup> As will be shown later, however, once the goals of trials move beyond determining guilt and morph into “social control,” they can have a significant impact upon the conduct and outcomes of trials.

A lawyer working in one of the many types of U.S. military courts operating in Germany after the war spoke of their social control functions. “These courts, which began as a device to protect the interests of the occupier, eventually became a guarantor of the fundamental rights of the inhabitants of the occupied area [and] played a[n] . . . important role in demonstrating democracy in action to the German people.”<sup>80</sup> Not only the designers of the judicial system, but also its implementers, were aware of the courts’ more abstract functions.

### *B. The U.S. Army’s War Crimes Prosecution Plan*

It was in this environment of international and national disagreement over how and whether to punish German war criminals that planners within the Army

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75. Mendelsohn, *supra* note 10, at 226.

76. Borgwardt, *supra* note 58, at 408-09.

77. 3 NUREMBERG, *supra* note 6, at 92; ZIEMKE, *supra* note 4, at 394.

78. SMITH, *supra* note 32, at 9; Memorandum from the Secretaries of State and War and the Attorney General for the President, in FRUS – MALTA AND YALTA, *supra* note 35, at 405.

79. Memorandum (Apr. 20, 1945), in SMITH, *supra* note 32, at 158.

80. Eli E. Nobleman, *United States Military Courts in Germany: Setting an Example and Learning Lessons*, in AMERICANS AS PROCONSULS, *supra* note 10, at 185.

created the blueprint for the U.S. war crimes prosecution system. It was natural for the U.S. Army to take a leading role in this area, as it would naturally have a primary role in its implementation of the system and the Secretary of War had been a leading advocate.<sup>81</sup> The planning proceeded on two different levels. On the inter-federal government departmental level, those responsible drafted the basic blueprint for the IMT, including the Bernays Plan. On another level, solely within the U.S. Army Judge Advocate General (JAG), officers drafted several document for what later became the *Dachau* trials, including the JCS 1023 and JCS 1067.

In late 1944, a flurry of activity ensued in the development of a war crimes trial policy. In September of 1944, Stimson ordered the creation of what would become the National War Crimes Office.<sup>82</sup> In a conversation that same month, Stimson sought the advice of the JAG, Major General Cramer, on the format of war crimes trials.<sup>83</sup> Stimson noted “[a] great many people think that the question of the guilt of some of these people is already decided. I’m taking the position that they must have the substance of a trial.” Stimson, nonetheless, wanted the process “cut down to its bare bones.”<sup>84</sup> “[T]he tribunal must be absolutely free of the restrictions of courts-martial. I understand that’s so from experience with the saboteur case. It can make its own rules.”<sup>85</sup> Cramer agreed that a simplified trial process, semi-military in character, with some basic procedural guarantees was possible, but he suggested that “the evidence should be taken down verbatim for future records . . . .”<sup>86</sup> Thus, both the Secretary of War and his chief legal advisor agreed that procedurally slimmed down trials were possible and desirable for policy reasons.

Stimson assigned the development of war crimes prosecution plans to “G-1,” the Special Projects Office of the Personnel Branch.<sup>87</sup> On September 15, 1944, the head of G-1 wrote a revolutionary memorandum (the aforementioned Bernays Plan), which solved two related problems facing proponents of war crimes prosecution: the vast number of potential defendants and the gathering of evidence.<sup>88</sup> It suggested the use of the legal concepts of conspiracy and criminal organizations to solve the problem of how to punish not just the

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81. SMITH, *supra* note 32, at 6.

82. ZIEMKE, *supra* note 4, at 172.

83. Telephone conversation transcript (Sept. 5, 1944), in SMITH, *supra* note 32, at 26.

84. *Id.* at 25.

85. *Id.*

86. *Id.* at 26.

87. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 2 n.9 (1949); SMITH, *supra* note 27, at 10.

88. Memorandum by Col. Murray C. Bernays, G-1, Trial of European War Criminals (Sept. 15, 1944), in SMITH, *supra* note 27, at 33-37; see also Memorandum from the Secretaries of State and War and the Attorney General for the President, in FRUS - MALTA AND YALTA, *supra* note 35, at 405 (“Witnesses will be dead, otherwise incapacitated and scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular offenses one of appalling dimensions.”).

relatively small number of Nazi leaders, but the enormous number of potential lower level war criminal defendants.<sup>89</sup> Bernays's superiors gave the plan cautious approval.<sup>90</sup>

In the JAG's approval of the Bernays Plan, he reiterated his earlier point for the need of a verbatim record, which he believed would show the fairness of the trial and be a useful historical record.<sup>91</sup> In the same memorandum, Cramer went on to discuss the possibility of prosecuting lower level war criminals. In order to do so, however, he noted the IMT would somehow have to be binding on the lower courts.

In his opinion, this could be done by either a treaty provision, which would make the IMT decisions binding on U.S. courts, or by Executive Order, which would make the IMT decisions binding on military tribunals.<sup>92</sup> The advantage of military tribunals, in Cramer's view, was that "[t]he procedure of the military commission is expeditious, and its rules of evidence are now relaxed; but the basic principle that the accused must be proved guilty on the evidence presented to the tribunal in the particular case still applies."<sup>93</sup> The basic idea for many involved in the planning, then, was to create a trial system with the absolutely lowest standards possible, which could still pass muster.

In a directive in December of 1944, the War Department ordered U.S. armies in the field to create subordinate war crimes investigation units with the explanation that "Mr. Stimson regards the investigation of war crimes as a subject of top importance."<sup>94</sup> Each unit had as "its primary function the investigation of alleged war crimes."<sup>95</sup> The U.S. Army in Europe implemented the directive on February 24, 1945.<sup>96</sup> Although the specific order was new, the western Allied forces had already included the arrest of war criminals as one of the objectives in their pre-D-Day orders.<sup>97</sup>

Beyond the objective and specific order, however, the Army lacked detailed instructions on the matter as it advanced eastward through France. Telford Taylor, who was U.S. Supreme Court Justice Jackson's successor as the chief American prosecutor at Nuremberg, noted that planning for the IMT overshadowed efforts to develop the U.S. Army's war crimes prosecution

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89. Memorandum by Col. Bernays, *supra* note 88, at 33-37.

90. Memorandum from Maj. Gen. Myron C. Cramer, Judge Advocate General, to the Assistant Secretary of War, Trial of European War Criminals, Comments on the Bernays Plan (Nov. 22, 1944), in SMITH, *supra* note 32, at 58-61; Memorandum from Col. Ammi Cutter, Assistant Executive Officer, Office of the Assistant Secretary of War, to Mr. McCloy, War Crimes (Oct. 1, 1944), in SMITH, *supra* note 32, at 37-38. Col. Cutter went on to become a Justice on the Massachusetts Supreme Court. *Id.* at 37 n.1.

91. Memorandum from Maj. Gen. Myron C. Cramer, *supra* note 90, at 58-61.

92. *Id.* at 60.

93. *Id.* at 59.

94. ZIEMKE, *supra* note 4, at 173.

95. STRAIGHT, *supra* note 9, at 18.

96. *Id.* at 18 nn.17, 18.

97. ZIEMKE, *supra* note 4, at 108, 170 (showing the existence of orders to arrest war criminals).



system.<sup>98</sup> Only in August of 1944 did the U.S. Army start drafting the first version of the document titled JCS 1023, which would later become known as the War Crimes Directive.<sup>99</sup> The Joint Chiefs of Staff (JCS) approved the third version of the directive, JCS 1023/3, on October 1, 1944 and forwarded it to the Combined Chiefs of Staff (CCS).<sup>100</sup> It languished there for over six months because decision makers at the highest levels of the federal government were considering the Bernays Plan and competing proposals.<sup>101</sup> Consequently, in April 1945, the JCS withdrew the directive, and the U.S. Army had no instructions other than to support the proposed IMT in apprehending defendants.<sup>102</sup>

The Joint Chiefs of Staff subsequently revised and re-approved the directive on July 15, 1945, and Eisenhower's command received it with considerable delay.<sup>103</sup> The tenth version of this directive, JCS 1023/10, provided both the inspiration and substance for what would later become Control Council Law No. 10, the U.S. Nuremberg Tribunals and the Office of the Chief of Counsel for War Crimes; in effect, it and the IMT were the nucleus of the entire U.S. war crimes prosecution system.<sup>104</sup>

Control Council Law No. 10, although intended to achieve uniformity among the four Allied zones of control, fell short of its goal: both the British and French governments proceeded to try war crimes under authority other than Law No. 10 and the U.S. government tried only the twelve subsequent Nuremberg cases under its authority.<sup>105</sup> On June 18, 1945, the British War Office released the Royal Warrant authorizing the prosecution of war criminals and prescribed the applicable procedure.<sup>106</sup> The French government-in-exile, primarily interested in war crimes committed within its borders, authorized the prosecution of war criminals in an ordinance dated August 24, 1944.<sup>107</sup>

Before JCS 1023/10 and Control Council Law No. 10 were in place, however, and in the absence of a detailed federal government policy on war crimes prosecution, the War Department issued two sets of internal instructions for its forces in the field: an interim directive on occupation policy dated August 21, 1944 and a handbook of instructions dated September 1, 1944.<sup>108</sup> The

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98. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 269 (1992); see also TAYLOR, *supra* note 87, at 2; ZIEMKE, *supra* note 4, at 170 (stating that people in Washington were doing little on this issue).

99. TAYLOR, *supra* note 87, at 1.

100. *Id.* at 2.

101. *Id.* at 2-3.

102. *Id.* at 3.

103. *Id.* at 4.

104. *Id.*

105. TAYLOR, *supra* note 98, at 276.

106. *Id.* at 270.

107. *Id.* at 270, 276.

108. Interim Directive for Military Government of Germany (Aug. 21, 1944), in SMITH, *supra* note 32, at 14; War Department Handbook of Military Government for Germany (Sept. 1, 1944), *id.* at 15-16.

problem, once again, was that both documents were vague on the issue of war criminals, calling only for their apprehension by U.S. forces.<sup>109</sup>

As a result, developments on the ground preceded the development of policy, and the U.S. Army carried out the first war crimes trial in Western Europe, with the exclusion of Italy, in April of 1945, near Aachen, Germany.<sup>110</sup> The second such trial, the *Back* case, took place on June 1, 1945, in which German police officers and civilians were convicted of having killed a downed Allied airman.<sup>111</sup> By the end of the summer of 1945, U.S. Army war crimes investigation teams had collected evidence on eight hundred such cases mostly involving German police and civilian defendants.<sup>112</sup> Pursuant to General Eisenhower's Ordinance No. 2, these trials took place in a court system consisting of three types of courts listed here from highest to lowest: General, Intermediate and Summary Military Courts.<sup>113</sup>

With the *Back* case having already gone beyond the traditional definition of war crimes because the defendants were not members of the German armed forces, General Eisenhower felt justified in asking the CCS for permission to prosecute concentration camp personnel.<sup>114</sup> He pointed out that the Moscow Declaration said nothing about United Nations victims inside Germany.<sup>115</sup> The trial, without delay, of such war criminals, General Eisenhower believed, would have "a salutary effect on public opinion both in Germany and in Allied countries."<sup>116</sup> On June 19, 1945, the CCS gave the general free reign in regard to trying war crimes "whether the offenses were committed before or after occupation . . . and regardless of the nationality of the victim."<sup>117</sup>

Another important U.S. Army directive was JCS 1067, released on May 10, 1945, which "set forth policies relating to Germany in the initial post-defeat period. As such it . . . [was] not intended to be an ultimate statement of policies of . . . [the U.S.] Government concerning the treatment of Germany in the post-war period."<sup>118</sup> It ordered the arrest of "all persons who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or

109. *Id.* at 6.

110. A German officer was convicted of having ordered the execution of two American POWs. ZIEMKE, *supra* note 4, at 391.

111. *Id.*

112. *Id.*

113. Sigel, *supra* note 10, at 35.

114. Cable from Eisenhower to AGWAR, for CC's, in SHAEF SGS 000.5/1 (Jun. 2, 1945), in ZIEMKE, *supra* note 4, at 391 n.58.

115. *Id.* Nonetheless, the declaration's focus on United Nations nationals perhaps explains why in the *Flossenburg* case the presence of United Nations POWs among the victims was specifically enunciated.

116. *Id.*

117. Cable from AGWAR, CCS, to Eisenhower, in SHAEF SGS 000.5/1 (Jun. 19, 1945), in ZIEMKE, *supra* note 4, at 391.

118. Directive to the Commander-in-Chief of the United States Forces of Occupation Regarding the Military Government of Germany, JCS 1067 (May 10, 1945), in OFFICE OF PUBLIC AFFAIRS, *supra* note 5, at 21, 22.

war crimes.”<sup>119</sup> It offered no further instructions and provided many loopholes through which this order could be avoided.<sup>120</sup> Even with its intended temporary and vague nature, JCS 1067 quickly became the semi-permanent guiding directive on the question of German war criminals.<sup>121</sup>

The JCS apparently had sent a version of JCS 1023 to the U.S. Commander-in-Chief by July 25, 1945. It stated:

Appropriate military courts may conduct trials of suspected criminals in your custody. In general these courts should be separate from the courts trying current offenses against your occupation, and, to the greatest practicable extent, should adopt fair, simple and expeditious procedures designed to accomplish substantial justice without technicality. You should proceed with such trials and the execution of sentences except in the following cases: Trials should be deferred of suspected criminals who have held high . . . positions . . . to ascertain whether it is desired to try such persons before an international military tribunal.<sup>122</sup>

This authorization for U.S. military tribunals embodied the American philosophy regarding war crimes trials: simple and quick.

With the issuance of JCS 1023/10, dated July 8, 1945, but not issued until September, the U.S. Army’s war crimes prosecution system underwent one final refinement. It was “[t]he first comprehensive directive issued by the Joint Chiefs of Staff” on the issue of war crimes prosecution.<sup>123</sup> The U.S. Army Theater Judge Advocate estimated that under the new directive potentially 100,000 criminals would need to be prosecuted, while others feared that the number of defendants might be five times higher.<sup>124</sup> Assuming he had 375 judges organized into three-member panels, and each defendant’s trial lasting one hour, the Theater Judge Advocate estimated that it would take four months to complete the assigned task.<sup>125</sup> After extended negotiations between the various U.S. entities involved in the war crimes prosecution effort, they concluded “that literal compliance with JCS 1023/10 is in practice out of the question.”<sup>126</sup> U.S. officials blithely decided that all pre-1944 cases would be turned over to the German courts as a “test of German regeneration.”<sup>127</sup>

Moreover, once it became clear that the IMT’s findings would not support subsequent war crimes trials based solely on membership in criminal

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119. *Id.*

120. *Id.*

121. Another interim directive was apparently sent to the U.S. Commander-in-Chief by the Joint Chiefs of Staff at some point before July 25, 1945. Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, *in* I FRUS – THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE) 1945 580 n.11 (1960).

122. *Id.* at 582.

123. STRAIGHT, *supra* note 9, at 23. For an in-depth review of the U.S. Army’s war crimes prosecution program, with a passing reference to the appeals stages, see generally STRAIGHT, *supra* note 9.

124. ZIEMKE, *supra* note 4, at 394.

125. *Id.*

126. *Id.* at 395.

127. *Id.*

organizations such as the Gestapo, U.S. officials decided that German courts would handle all “denazification” cases.<sup>128</sup> By the fall of 1945, just as the International Military Tribunal was gearing up for its one and only trial, the U.S. Army had clear instructions on how to proceed with its *Dachau* trials.

### C. *The Aborted International War Crimes Prosecution Effort*

Its difficult and abrupt birth meant that the IMT would enjoy only a short existence. U.S. government officials, not enamored by the idea of an international criminal court, envisioned the IMT would exist for only a brief period of time in order to lay the legal foundation for subsequent lower-level trials.<sup>129</sup>

The international negotiations leading up to the creation of the IMT also foreshadowed the difficulties it would experience. Justice Jackson, the American negotiator, reported that difficulties between the Soviet and Anglo-American sides were slowing down the negotiations.<sup>130</sup> Moreover, Jackson continued in the telegram, “[the] deep difference in legal philosophy and attitude . . . is difficult to reconcile and even after words are agreed upon we find them . . . to mean different things.”<sup>131</sup> He concluded that unless all parties adopted the American proposal for an IMT, they would simply have to agree on the fundamentals of the applicable law and proceed with their own trials. “This would be easier for me and faster. But [I] think [it] desirable [to] give [an] example [of] unity on [the] crime problem if possible.”

In general, Justice Jackson anticipated international cooperation in trying war crimes would be problematic as the Soviets might try to use it to settle political scores.<sup>132</sup> In various other aspects of the war crimes prosecution effort, such as extraditions, at the same time U.S. officials sought international cooperation and coordination, they developed their own independent, parallel structures and procedures.<sup>133</sup>

The great amount of time and energy it took to try the Nuremberg defendants in an international setting, as well as Soviet behavior during the trial, made the United States unreceptive to further international war crimes trials.<sup>134</sup> Additionally, a lack of American support for more trials, especially solely American ones, contributed to the IMT being convened only once.<sup>135</sup>

128. *Id.*

129. Memorandum from Green H. Hackworth, Legal Advisor, to the Secretary of State (Jan. 22, 1945), in FRUS – MALTA AND YALTA, *supra* note 35, at 402.

130. Telegram from Ambassador Winant in the United Kingdom, *supra* note 36, at 1167.

131. *Id.*

132. *Id.*

133. Sigel, *supra* note 10, at 32.

134. CLAY, *supra* note 10, at 251; HAROLD ZINK, THE UNITED STATES IN GERMANY, 1944-1955 146 (1957); TAYLOR, *supra* note 87, at 22-26.

135. TAYLOR, *supra* note 98, at 287-88.

### D. Critiques of the U.S. Army's War Crimes Program

The first head of the U.S. Military Government in Germany, General Lucius D. Clay, was never completely satisfied with the initial judicial system adopted as an "emergency measure."<sup>136</sup> He explained that "the dispensation of justice was too dependent upon the capacity and ability of the individual[,] . . . uniformity was lacking and there were instances of undue punishment."<sup>137</sup> The inadequate level of professionalism found in the judicial system largely resulted from U.S. Supreme Court Chief Justice Vinson's decision not to allow federal judges to work in Germany in response to the sharp criticisms aimed at Jackson's role at the Nuremberg Trial.<sup>138</sup>

The criticisms leveled at the judicial system created in the U.S. zone of occupation consisted primarily of charges of inadequate procedural protections. German defendants did not receive "democratic legal processes," the argument went, because of undue haste in the trials, lack of juries, and improper pre-trial investigations including the alleged use of questionable interrogation techniques in the Buchenwald and Malmédy cases.<sup>139</sup> As a result of these flawed trials, the critics charged, the rate of conviction was unreasonably high: for example, out of the 1,672 *Dachau* defendants, 426 initially were sentenced to death.<sup>140</sup>

In tracing the history of the U.S. Army's war crimes prosecution program, the repeated emphasis on lower standards from the very inception of the program is noticeable. Nor were the military planners alone in their thinking on this matter. Harvard Law School Professor Sheldon Glueck wrote an influential book in 1944 entitled *War Criminals: Their Prosecution and Punishment*, in which he argued for simplified standards of justice.<sup>141</sup> Justice Jackson, as well, held the view that the rules of procedure and constitutional protections available in U.S. trials should not govern the trial of accused German war criminals. "[T]he procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials."<sup>142</sup> Everybody agreed that trials were the appropriate response to German war crimes, but patience was in short supply.

### E. Post-trial Aspects of the U.S. Army's War Crimes Prosecution Program

For many involved in trying cases, one of the most troubling aspects of the procedures governing trials was the lack of an appellate structure.<sup>143</sup> This was a

136. CLAY, *supra* note 10, at 247.

137. *Id.*

138. *Id.* at 251.

139. ZINK, *supra* note 134, at 146, 148.

140. *Id.* at 146.

141. JAMES J. WEINGARTNER, *CROSSROADS OF DEATH: THE STORY OF THE MALMÉDY MASSACRE AND TRIAL* 258-59 (1979).

142. Report of Robert H. Jackson to the President, released by the White House on June 7, 1945, in DEPARTMENT OF STATE, PUBLICATION NO. 2420, *TRIAL OF WAR CRIMINALS* 3 (1945).

143. BUSCHER, *supra* note 16, at 159-60.

fundamental departure from the Anglo-American principles of justice, which these lawyers valued.<sup>144</sup> According to Professor Shapiro, systems of appeal are a means of “hierarchical political management.”<sup>145</sup> They assure that law is “uniformly administered”<sup>146</sup> and provide “an independent flow of information to the top on the field performance of administrative subordinates.”<sup>147</sup> In the end, according to Professor Shapiro, “appellate institutions are more fundamentally related to the political purposes of central regimes than to the doing of individual justice.”<sup>148</sup> As will be shown below, the ad hoc “appeals” system strongly supports his argument.

It seems that the war crimes prosecution program’s architects gave little thought to the post-trial treatment of convicted defendants.<sup>149</sup> Thus, the program had no way to equalize sentences for similar crimes or address inconsistent results.<sup>150</sup> Or, as Shapiro would state it, they lacked “a device for exercising centralized supervision over local judicial officers.”<sup>151</sup> As a result, often times early trials handed out more severe sentences than comparable, later trials: for example, the *Dachau Concentration Camp* case in late 1945 included 40 defendants, of whom 36 received death sentences and the remaining four either life or ten-year sentences of imprisonment; the *Nordhausen Concentration Camp* case in late 1947 resulted in one death sentence, fourteen sentences of imprisonment and four acquittals.<sup>152</sup>

As U.S. Army officials became aware of such disparities and inconsistencies in sentences, they sought recourse to executive review procedures.<sup>153</sup> They created clemency and review boards “for purposes of equalizing and modifying sentences for war criminals;” this unfortunately had the unintended and deleterious effect of appearing to be “mass clemency,” which, in turn, undermined the legitimacy of the war crimes prosecution program.<sup>154</sup> At the same time that executive review procedures were being implemented in the U.S. Army’s program, the U.S. Military Government’s Ordinance No. 11 codified a judicial appellate procedure, which only applied to the subsequent American Nuremberg Trials.<sup>155</sup>

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144. *Id.*

145. SHAPIRO, *supra* note 12, at 54.

146. *Id.* at 55.

147. *Id.* at 50.

148. *Id.* at 52.

149. Mendelsohn, *supra* note 10, at 226.

150. *Id.* at 160.

151. SHAPIRO, *supra* note 12, at 39.

152. Mendelsohn, *supra* note 10, at 229.

153. *Id.* at 226. For two excellent reviews of the executive appellate procedures created for war crimes cases, see generally Mendelsohn, *supra* note 10; BUSCHER, *supra* note 16.

154. Mendelsohn, *supra* note 10, at 226, 247.

155. Ordinance No. 11, art. 2, in OFFICE OF PUBLIC AFFAIRS, *supra* note 5, at 116 (“A joint session of the Military Tribunals may be called . . . to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals . . . [and] to review conflicting or inconsistent final rulings . . . . Decisions by joint

The account of a young U.S. Army lawyer who served on a court that tried common criminal and civil offenses rather than war crimes illuminates the short comings of the U.S. judicial system in post-war Germany. As he explained:

[M]any excesses were committed by the officers manning the courts. In many respects, defendants were treated no differently than they would have been in the old Nazi courts and, unfortunately, when they began transferring into the courts combat officers who had been through a lot of combat, the attitude of a regimental commander who was now operating as a court officer was: "Well, the hell with them – we were supposed to kill every German from the Rhine all the way east – so obviously he is guilty, he's German." This made it very uncomfortable for me, as a junior officer and the only lawyer on these courts, with a colonel on each side since I was a first lieutenant at the time. Fortunately, the review process enabled us to correct a lot of these errors.<sup>156</sup>

He quickly cast the efficacy of the review process into doubt, though, highlighting the lack of separation of powers within it. "[W]e had a bad situation because the local commander not only appointed the judges and the prosecutors but was also the reviewing authority."<sup>157</sup> Thus, although on paper the U.S. war crimes prosecution effort seemed to comport with basic concerns of fairness, this first-hand account casts doubt on the actual fairness of the trials.

A U.S. Army lawyer on the Malmédy prosecution team gave more ambiguous insight into officers sitting in judgment on war crimes defendants. "I did not like [the witness] McCown's testimony. That wasn't a question of a lawyer sitting on a bench evaluating his testimony. That was a question of one soldier who had been in combat evaluating another soldier who had been in combat."<sup>158</sup> The judge's background apparently influenced his courtroom judgment, perhaps to the defendants' detriment. At the same time, being judged by one's peers is a treasured principle of Anglo-American justice and thus officers judging war crimes defendants is seen by some as an assurance of fairness.<sup>159</sup> Nonetheless, there is a certain irony to the fact that American and German soldiers would sit in judgment on one another because they were each other's peers.

#### *F. Phase-out of the U.S. Army's War Crimes Prosecution Program*

The program can be divided into two phases. The first, "[t]he trial or punishment phase of the reeducation program for Germany," operated through 1948.<sup>160</sup> The subsequent "clemency" phase resulted from the convergence of two factors. First, the U.S. government desired to maintain good relations with

sessions of the Military Tribunals . . . shall be binding upon all the Military Tribunals.").

156. Nobleman, *supra* note 80, at 184.

157. *Id.*

158. WEINGARTNER, *supra* note 141, at 226.

159. Eric Metcalfe, *Inequality of Arms: the Right to a Fair Trial in Guantanamo Bay*, 6 EUR. HUM. RTS. L. REV. 573, 579 (2003); Lt. Col. Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. Rev. 1, 70 (2004).

160. Mendelsohn, *supra* note 10, at 226.

the new German state in the face of the developing cold war.<sup>161</sup> Second, both within the U.S. government and among the public, support diminished for the continued punishment of German war criminals due to, among other reasons, constitutional concerns and scandals arising out of the program.<sup>162</sup>

These constitutional and other legal concerns included the procedures created by the London Agreement, such as the lack of an appeals court, the clash with standard Anglo-American judicial procedures and inconsistencies in sentences and conflicts of interest, such as the Deputy Theater JAG serving as both prosecutor and first reviewer and the Theater JAG's presence on the War Crimes Modification Board.<sup>163</sup> The transition between the two phases of the war crimes prosecution program is best explained by the historian Frank Buscher, who explained that the punishment of war criminals "ceased to be a priority, and became instead a political burden in the 1950s."<sup>164</sup>

#### IV.

##### THREE EXAMPLES OF THE U.S. ARMY'S WAR CRIMES PROSECUTION PROGRAM

The *Hadamar Hospital* case which began on October 8, 1945, at the War Crimes Group's headquarters in Wiesbaden was the first of several concentration camp and mass atrocity war crimes trials.<sup>165</sup> It was the only case of its kind tried before a military commission, as all subsequent trials took place before special military government courts whose members served on them permanently and consequently built up experience trying such cases.<sup>166</sup>

As a memorandum by Colonel Leon Jaworski of later Watergate fame indicates,<sup>167</sup> U.S. Army officials likely tried the *Hadamar Hospital* case before a military commission rather than a military government court due to the latter's inexperience at that early time with war crimes trial procedures.<sup>168</sup> Whether

161. *Id.* at 251, 259; BUSCHER, *supra* note 16, at 2.

162. Mendelsohn, *supra* note 10, at 251, 259; BUSCHER, *supra* note 16, at 2.

163. BUSCHER, *supra* note 16, at 159-61.

164. *Id.* at 159.

165. ZIEMKE, *supra* note 4, at 393.

166. These special military government courts were distinct from regular military government courts which dealt with offenses committed during the American occupation. *Id.*; STRAIGHT, *supra* note 9, at 46, Appendix XIX – Order AG 250.4 JAG-AGO from Headquarters, U.S. Forces, European Theater, to Commanding Gens.: E. Military Dist., W. Military Dist., Military Commissions (Aug. 25, 1945), Appendix X – Order AG 000.5 JAG-AGO from Headquarters, U.S. Forces, European Theater, to Commanding Gen., Third U.S. Army Area, Trial of War Crimes Cases (Oct. 14, 1946). For an overview of the creation of regular military government courts, see Eli E. Nobleman, *American Military Government Courts in Germany*, 40 AM. J. INT'L L. 803 (1946).

167. Leon Jaworski, who would later gain prominence as the Watergate Special Prosecutor, was the Trial Judge Advocate in the *Hadamar Murder Factory* case. Special Order Number 265 from Headquarters, Seventh Army (Sept. 22, 1945); see also Introduction, *microformed on* Nat'l Archives Collection of World War II War Crimes Records, Records of the U.S. Army Commands, 1942-, Record Group 338, Microfilm Publication 1078, United States v. Klein, Reel 1 [hereinafter Microfilm Publication 1078].

168. Memorandum from Col. Leon Jaworski, JAGD, Executive, Trial Section, to Col. Miekclwait, Case No. 12-449, Hadamar 4 (Sept. 13, 1945), *microformed on* Microfilm Publication



this was the only motivation driving the choice of tribunal is questionable based upon a memorandum sent to Jaworski in which the benefits of military commissions were detailed:

A basic reason underlying the employment of military commissions . . . is . . . that in such cases . . . the execution of justice shall be as swift as is consistent with fairness . . . . They are governed by the restrictions imposed by the source of the authority. These restrictions are few . . . . The Commission may make its own rules of procedure – *ad hoc*.<sup>169</sup>

Once again, the emphasis is on the speed and simplicity of the trials.

Military commissions provided clear procedural benefits. Jaworski consequently “estimate[d] that it [would] . . . not take longer than four days to complete the trial.”<sup>170</sup> Another interesting note regarding this early case was the policy on publicity. In the same memorandum to Jaworski, the author explains, “such trials should be in camera, for reasons of security. The accused [a civilian] is *not* entitled to the privileges of a prisoner of war, and no notice of any sort will be furnished the protecting power or the International Red Cross.”<sup>171</sup> This policy on publicity, if enforced at all during the trial, was dropped in subsequent trials. Those in charge of the program evidently did not consider the emphasis on secrecy as important as and perhaps even counterproductive to the goal of publicizing the evils of the Nazi state.

Special military government courts, which did not come under the jurisdiction of the U.S. Military Government until March of 1947, tried Germans accused of war crimes.<sup>172</sup> Although special military government courts were more like military commissions than regular military government courts, which tried common offenses such as theft occurring during the occupation, their designation carried with it great procedural significance.<sup>173</sup> Military government courts, for example, did not operate under strict guidelines.<sup>174</sup> As the military government court regulations stated:

[R]ules may be modified to the extent that certain steps in the trial may be omitted or abbreviated so long as no rights granted to the accused are disregarded. Opening statements in particular may frequently be omitted. No greater formality than is consistent with a complete and fair hearing is desirable and the introduction of procedural formalities from the Manual of Courts Martial or from trial guides based thereon is discouraged except where specifically required by these rules.<sup>175</sup>

The historian Earl Ziemke observed that with such extensive powers, procedural flexibility and efficient prosecution of defendants based upon the theory of

1078, *supra* note 167.

169. Memorandum, General Observations on Military Commissions, *microformed on Microfilm Publication 1078, supra* note 167.

170. Jaworski, *supra* note 166, at 4.

171. General Observations on Military Commissions, *supra* note 167.

172. It must be noted that in the literature there is some confusion as to the exact name of these tribunals – Clay refers to them as “special military tribunals.” CLAY, *supra* note 10, at 253.

173. ZIEMKE, *supra* note 4, at 393.

174. *Id.*

175. *Id.*

“common design,” it came as no surprise that the *Dachau Concentration Camp* case, involving thousands of victims and forty defendants, required only four weeks to try.<sup>176</sup>

This judicial system designed for maximum efficiency resulted in two major international scandals that seriously damaged the legitimacy and shortened the lifespan of the war crimes program: they arose out of the *Buchenwald Concentration Camp* case and the *Malmédy Massacre* case.<sup>177</sup> U.S. authorities had tried and convicted Ilse Koch, the infamous “Bitch of Buchenwald” and wife of the Buchenwald Concentration Camp Commander, of, among other things, producing lamp shades made out of human skin.<sup>178</sup> Based upon a review of the trial record, General Clay decided that the evidence presented at trial did not justify her sentence and accordingly reduced it.<sup>179</sup> This produced an avalanche of criticism, culminating in a congressional investigation.<sup>180</sup>

It was the *Malmédy Massacre* trial, though, that would have a more harmful impact upon the U.S. war crimes prosecution system and foreshadow some contemporary debates. To a large degree, it was individuals with ulterior motives, such as the then relatively unknown Senator McCarthy, who created the *Malmédy* legacy.<sup>181</sup>

U.S. officials accused the approximately seventy defendants from the *Waffen-S.S.* of having killed approximately the same number of American prisoners of war.<sup>182</sup> The scandal erupted out of allegations of American improprieties committed during the investigation and prosecution of the case, such as the mistreatment of German POWs. Perhaps enabling this alleged abuse, a U.S. Army document detailed that the German prisoners had lost their POW status and had become civilian internees “in order to preclude the possibility of legal complications.”<sup>183</sup> Specifically, U.S. officials took this action in order to preempt any defense claims that the defendants should enjoy the same rights as U.S. nationals.<sup>184</sup>

The *Malmédy* defense team faced a host of problems. First, the lawyers only had one month to prepare their case, half of which they were forced to

176. *Id.*

177. The actual case names are *United States v. Prince Zu Waldec et al.* and *United States v. Berzin et al.*, respectively. For a provocative and thorough investigation of the Malmédy scandal, see WEINGARTNER, *supra* note 141.

178. Mendelsohn, *supra* note 10, at 247-49; CLAY, *supra* note 10, at 254-55.

179. CLAY, *supra* note 10, at 254-55.

180. *Id.* Additionally, she drew the ire of folksinger Woody Guthrie, who composed a song about her. Available at [http://www.woodyguthrie.org/Lyrics/Ilsa\\_Koch.htm](http://www.woodyguthrie.org/Lyrics/Ilsa_Koch.htm) (last visited Feb. 2, 2006).

181. Mendelsohn, *supra* note 10, at 249 n.41.

182. *Id.* at 248.

183. Internal Route Slip from Headquarters, U.S. Forces, European Theater, Discharge of German Prisoners of War (Apr. 26, 1946), in WEINGARTNER, *supra* note 141, at 98.

184. WEINGARTNER, *supra* note 141, at 98.

spend on bureaucratic matters.<sup>185</sup> Second, the German defense attorneys involved in the case faced significant barriers because of their inability to speak English and ignorance of Anglo-American judicial procedure.<sup>186</sup> Third, the presiding U.S. officer did not sever the trials of the defendants who had served in the same units, thereby hampering the use of incompatible defenses, such as *respondeat superior*.<sup>187</sup>

If this had been the extent of the claimed violations of the defendants' rights, then the *Malmédy* case likely would never have caught the attention of the public and the government back in the United States. Rather, the most damning attack against the conduct of the trial actually stemmed from the pre-trial investigation phase and alleged due process violations. The defendants claimed that U.S. Army personnel forced them to sign confessions and that the interrogators used improper interrogation techniques, including "physical and psychological [duress]," such as mock trials, other "psychological 'stratagems'" and physical abuse.<sup>188</sup>

Even if the goal of the trial simply was, according to one of the defense attorneys, to foster a "democratic nationalism" in Germany and the charges of impropriety went largely unproven, the damage had been done.<sup>189</sup> The U.S. Congress and others launched investigations, the American and German publics reacted with outrage and some U.S. newspapers like the Chicago Tribune called for the courts-martial of the investigation and prosecution teams.<sup>190</sup>

These *Buchenwald* and *Malmédy* scandals discredited the U.S. Army's war crimes prosecution program and put U.S. Army officials on the defensive.<sup>191</sup> From 1951 onwards, the program no longer sought to punish war criminals but rather to avoid criticism, both from Germany and the U.S.<sup>192</sup> This fact, then, puts into context the decision of General Handy to reduce the sentences of many convicted war criminals, including those from the *Malmédy Massacre* and concentration camp cases:

For four and a half years the execution of the sentences [in the *Malmédy* trial] has been delayed by a continuous and organized flood of accusations and statements made to discredit the trial . . . . However, the record is convincing that these men are guilty. Investigations carried on by Congressional Committees and the reviews by trained judges have failed to unearth any facts which support a reasonable doubt as to the guilt of these prisoners. . . . The commutation has been based upon other facts, which are deemed to mitigate in favor of less severe punishment than death . . . . The crimes are definitely distinguishable from the more deliberate killings in concentration camps. Moreover, these prisoners were of comparatively lower rank. . . . I cannot overlook the fact that the Army

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185. *Id.* at 97.

186. *Id.*

187. *Id.* at 100-01.

188. *Id.* at 117.

189. CLAY, *supra* note 10, at 253; WEINGARTNER, *supra* note 141, at 159, 249.

190. WEINGARTNER, *supra* note 141, at 196; Mendelsohn, *supra* note 10, at 249.

191. *Id.*; BUSCHER, *supra* note 16, at 3.

192. *Id.*

Commander, his Chief of Staff, and the Corps Commander are each serving only terms of imprisonment.

....

Although [some defendants] . . . participated actively in the brutalities of the concentration camps to which they were assigned for duty, their positions were relatively subordinate . . . [and] the records do not show that they went out of their way to add to the brutalities . . . . There is no question as to their responsibility for these murders. However, certain mitigating circumstances [exist], such as the excitement resulting . . . after heavy bombing, and the fact that their crimes did not show a pattern of their character.<sup>193</sup>

General Handy's lengthy explanation highlights several interesting aspects of the U.S. war crimes prosecution program in its closing phase. First, the program had come under extensive attack due to the previously mentioned scandals, which had put the program's administrators on the defensive. Second, Handy's view on the appropriate level of punishment is very forgiving of the defendants. This could have stemmed from the criticism leveled at the program from both Washington and Germany, which left the program administrators with little political support or appetite to be "tough" on German war criminals.

#### A. *The Flossenburg Concentration Camp Case Study*<sup>194</sup>

The U.S. Army's war crimes prosecution program is perhaps better understood through an in-depth analysis of one of the *Dachau* trials. *United States v. Becker* (also known as the *Flossenburg Concentration Camp* case or case number 000-50-46) was the longest concentration camp case tried at Dachau.<sup>195</sup> The charge and particulars accused several dozen relatively low-ranking individuals of complicity in the activities of the Flossenburg Concentration Camp. Throughout the entire process, U.S. authorities never forgot the public nature of the main trial and subsequent perjury trial. As a reviewing officer stated, "a report without a transcript of the perjury proceedings would be inadvisable. Anyone reviewing the matter in the future would want a transcript of the Court proceedings."<sup>196</sup> It appears that the officer not only anticipated the openness of the trial, but also implicitly welcomed it.

193. Decisions of Gen. Thomas T. Handy, Headquarters, European Command, Pub. Info. Div., EUCOM Release No. 51-91 (Jan. 31, 1951), in *LANDSBERG: A DOCUMENTARY REPORT 23-24* (Office of the U.S. High Comm'r For F.R.G., 1951).

194. The post-trial activities are referred to in this article as the "appellate process," "appellate procedures," or "review process." Technically, however, neither the prosecution nor the defense appealed the holdings of the trial court, nor were the findings and sentences ruled on by a higher court. Instead, they were automatically reviewed by several higher levels of authority (both legal and non-legal).

195. Sigel, *supra* note 10, at 107.

196. Memorandum from J.L.H. to Col. Bresee (Apr. 16, 1948), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

### 1. Jurisdiction

The JCS Directive 1023/10 authorized the creation of the Flossenburg tribunal.<sup>197</sup> Under this grant of authority, the Commander in Chief (CIC), United States Forces, European Theater (USFET), in turn, empowered the commanding generals of the Eastern and Western Military Districts to establish military commissions for the trial of war crimes and set forth the rules of procedure.<sup>198</sup> USFET headquarters shortly thereafter rescinded this order, consolidated the war crimes prosecution system under its direct control and issued regulations for the organization of and procedures governing war crimes tribunals.<sup>199</sup>

Although the authorities issued these regulations after the beginning of the *Flossenburg* trial, similar rules likely governed the trial. At the same time, General Orders No. 3 from the Deputy Theater Judge Advocate's Office (DJAO) created the unit within the U.S. Army charged with bringing to trial the war crimes cases.<sup>200</sup> The *Flossenburg* tribunal was a "General Military Government Court appointed by paragraph 36, Special Orders No. 123, Headquarters, Third United States Army"<sup>201</sup> "for the trial of such persons as may be properly brought before it."<sup>202</sup>

### 2. A Description of the Concentration Camp

The U.S. Army defined Flossenburg as a "Category III" concentration camp, which meant that its facilities included quarries and a factory in which inmates performed hard labor.<sup>203</sup> The inmate population contained some German nationals and Allied POWs, but consisted mostly of Eastern Europeans.<sup>204</sup> The S.S. operated the camp, although some individuals employed at the camp were not S.S. members.<sup>205</sup>

197. Introduction, *supra* note 26, at 2.

198. Order AG 250.4 JAG-AGO from Col. H.F. Newmann, Acting Adjutant Gen., to Commanding Gens.: E. Military Dist., W. Military Dist., Military Commissions (Aug. 25, 1945), in STRAIGHT, *supra* note 9, Appendix XIX.

199. See APPENDIX 2.

200. See APPENDIX 3.

201. United States v. Becker, Case No. 000-50-46, Review and Recommendations from Deputy Judge Advocate's Office 1 (May 21, 1947), *microformed on* Nat'l Archives Collection of World War II War Crimes Records, Records of the U.S. Army Commands, 1942-, Record Group 338, Review of U.S. Army War Crimes Trials in Europe, 1945-1948, Microfilm Publication M1217 (5 Reels), Reel 5 [hereinafter DJAO Review]. This document is also available as part of a book. See U.S. JUDGE ADVOCATE'S OFFICE: WAR CRIMES GROUP; REVIEW & RECOMMENDATIONS; CONCENTRATION CAMP CRIMES.

202. 1 Record of Testimony 11-12, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 2.

203. DJAO Review, *supra* note 201, at 4.

204. *Id.* at 4-5.

205. *Id.*

TABLE 4: Flossenburg Concentration Camp Statistics (1942 to April of 1945)

(numbers are approximate)<sup>206</sup>

	Number of Arriving Prisoners	Number of Deaths	Death Rate
Total	94,200	25,300 (including 2,000 executions)	Twenty-seven percent
Men	78,200	24,300	Thirty-one percent
Women	16,000	1,000	Six percent

The fifty-two defendants can be divided as follows:<sup>207</sup> fifty-one were indicted,<sup>208</sup> thirty-three were relatively low-ranking members of the S.S., such as guards, “Operators of the Camp” and “Work Detail Leaders”,<sup>209</sup> sixteen were inmates such as “Capos” and “Block Eldest”; and two were civilians.

Four different categories of U.S. Army personnel made the *Flossenburg* court function. Although the number of judges varied from six to seven, the presiding judge held the rank of colonel and the “Law Member” the rank of major.<sup>210</sup> The prosecution team consisted of the chief prosecutor with the rank of lieutenant colonel, a technical sergeant and two civilians.<sup>211</sup> The defense team had a chief defense counsel with the rank of lieutenant colonel, a major and two civilians.<sup>212</sup> Lastly, administrative personnel, such as interpreters and court reporters, also worked in the courtroom.<sup>213</sup>

The Manual for Trial of War Crimes and Related Cases, prepared by the Deputy Judge Advocate’s Office, 7708 War Crimes Group, European Command, laid forth the procedural details for the *Flossenburg* court.<sup>214</sup> The

206. *Id.* at 11.

207. *Id.* at 2-4; Table of Statistics, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12; Introduction, *supra* note 26, at 4.

208. The prosecution, having insufficient evidence regarding a Ukrainian defendant and lacking a Ukrainian interpreter, decided not to charge him. Introduction, *supra* note 26, at 6.

209. The highest ranking defendant was an S.S. major, a Flossenburg deputy camp commandant. DJAO Review, *supra* note 201, at 23.

210. Special Orders No. 123, Extract (May 17, 1946), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

211. *Id.*

212. *Id.* Several of the defendants were also represented by German counsel. DJAO Review, *supra* note 201, at 19.

213. Record of Testimony, *supra* note 202, at 4.

214. See generally APPENDIX 4. For a useful comparison of the powers of tribunals and of the rules under which U.S. military tribunals tasked with hearing war crimes cases throughout the various theaters of operation (such as Italy, Germany, the Pacific Rim and China) worked, see LAW REPORTS, *supra* note 15, 111-24; for a complete version of the rules under which military tribunals operated in Germany, see OFFICE OF MILITARY GOVERNMENT FOR GERMANY (U.S.), MILITARY

manual allowed for the presiding judge's involvement in the proceedings. He could become involved actively if one of the parties was unfamiliar with common law proceedings and would do so "to the extent necessary to protect the interests of the accused and to bring out all the facts relating to the issue being tried."<sup>215</sup>

The reasons for the court's modified form, and its effects on the fairness of the outcome, are unknown. A possible explanation is that occupied Germany was a civil law country, and officials anticipated that many local defense attorneys would take part in the proceedings yet be unfamiliar with Anglo-American procedure. Their relative ineffectiveness is demonstrated by a failed attempt to impeach a witness who, it later turned out, had already been imprisoned for committing perjury.<sup>216</sup>

The most telling sign of the overall nature of the court and proceedings, however, is Section 270(c)(5), which stated "[c]ourts will to the greatest possible extent apply expeditious and non-technical procedure." This was perhaps a pragmatic acknowledgment of the unusual nature of a war crime, the circumstances of a court run by the occupying power in the wake of WWII and individuals lacking legal training presiding over the proceedings. Nonetheless, the emphasis on "expeditious and non-technical procedure" does not speak well for questions of procedural and substantive fairness.

There is at least one example where this procedural urgency undermined a defendant's due process rights. As a German defense attorney wrote in a letter to U.S. Army officials:

It had been desired to finish the trial as quickly as possible. It has also been requested that the presentation of evidence be out as short as possible. I complied with this desire and told [my client] Brusch that I did not consider it necessary for him to take the witness chair in view of the statements of the witnesses Schippel and Osswalt.<sup>217</sup>

The attorney went on to state that this decision had negatively affected the outcome of the trial.

### 3. *The Various Stages of the Flossenburg Trial*

A typical *Dachau* case proceeded along the following lines:

- Pre-trial Investigation
- Indictment
- Trial
- Post-trial Branch Review

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GOVERNMENT REGULATIONS: TITLE 5: LEGAL AND PENAL ADMIN. (Berlin, Mar. 27, 1947), especially sections 5-390 to 5-394.

215. See APPENDIX 4.

216. Memorandum from Lt. Col. Wade M. Fleischer, Chief, International Affairs Branch, to Col. Harbaugh, Perjury Charges in Flossenburg Case (Sept. 16, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

217. Petition for Review from W. Wacker, Defense Council for the accused, to Military Ct., Dachau 1 (Apr. 12, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

- War Crimes Review Board
- Commander in Chief Approval
- Subsequent Recommendations
- Review Committee
- War Crimes Modification Board<sup>218</sup>

Those individuals involved in the *Flossenburg* case, however, skipped or reversed several steps in this process. The War Crimes Review Board seems to have at first not reviewed the trial court's findings at all and then examined only a handful of the sentences after the perjury trial.<sup>219</sup> Apparently there is no evidence of any action taken by the War Crimes Modification Board.<sup>220</sup>

#### 4. The Trial Chronology

The main *Flossenburg* trial took place at Dachau, Germany, from June 12, 1946, to January 22, 1947.<sup>221</sup> On December 17, 1946, the Deputy Theater Judge Advocate for War Crimes (Deputy Judge Advocate or DJA) ordered the court to enter a *nolle prosequi* against six of the defendants.<sup>222</sup> On January 20 and 22, 1947, the court announced its findings and sentences.<sup>223</sup> On May 21, 1947, the DJAO, 7708 War Crimes Group, issued its Review and Recommendations of the court's findings and sentences.<sup>224</sup>

From that date until September 10, 1947, the findings and sentences proceeded through several additional layers of administrative review and approval. This process included a third-party review of one defendant's sentence prior to August 28, 1947.<sup>225</sup> On September 10, 1947, the CIC USFET approved the DJAO's modified findings and sentences.<sup>226</sup> Thereafter, reviewing authorities modified several defendants' sentences.

On August 25, 1947, a defendant's relative informed the Deputy Judge Advocate of the ongoing perjury trial in a German court against two of the prosecution's witnesses for their testimony in the *Flossenburg* case.<sup>227</sup> This

218. An untitled document listing data in table-format for some of the accused (name, age, rank, position, length of service), as well as actions taken by reviewing bodies, can be found, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 [hereinafter Table Data].

219. *Id.*; Rep. of War Crimes Bd. of Rev. No. 1 (May 24, 1948), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 [hereinafter Board].

220. *Id.*

221. DJAO Review, *supra* note 201, at 1.

222. *Id.* at 2.

223. *Id.*

224. *Id.* at 1.

225. Internal Route Slip from Col. J.L. Harbaugh, Jr., JA EUCOM, to S/GS EUCOM, No. 3, ¶ 1, Tab A, Analysis by Maj. J.C. Duvall (Aug. 21, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 [hereinafter Duvall].

226. Internal Route Slip No. 6 from Lt. Col. Earl W. Smith, JA Liaison, to JA EUCOM, Attn: Int. Affairs Branch 2 (Aug. 28 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

227. Memorandum from Lt. Col. C.E. Straight, DJA for War Crimes, APO 407, to JA, EUCOM, APO 757 (Sept. 9, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel



precipitated an in-depth internal review and discussion regarding the possible consequences for the sentences in the *Flossenburg* trial. Major dates include September 18, 1947, when the Judge Advocate, European Command, conducted an initial review of the case in light of the perjury charges and stayed the execution of several sentences.<sup>228</sup> U.S. authorities transferred the perjury trial from German to U.S. jurisdiction, and on April 7, 1948, a U.S. Military Government Court issued its findings and sentences against the two accused perjurers.<sup>229</sup> On May 24, 1948, a War Crimes Review Board reviewed the findings and sentences of some of the *Flossenburg* defendants in light of the perjury trial.<sup>230</sup>

### 5. The Pre-Trial Stage

The U.S. military swiftly began its pre-trial preparations for the *Flossenburg* trial, including the collection of evidence. Already on May 6, 1945, the Third United States Army appointed eleven "Investigator-Examiner[s to] investigate all war crimes coming to . . . [their] attention."<sup>231</sup> These orders came in response to a letter from the Twelfth Army Group Headquarters, dated April 30, 1945 and titled "Establishment of War Crimes Branches and Investigations of War Crimes."<sup>232</sup> This swift action was extremely important to the relatively accurate and complete collection of evidence for use in the trial, as the chaos of WWII quickly made accurate reconstructions impossible through the dispersion and destruction of evidence. The Deputy Judge Advocate noted in a summary report the difficulties experienced by investigators in gathering evidence in war crimes cases, such as the unavailability of victims through death or dispersion, and defendants trying to elude capture.<sup>233</sup>

Even before their official appointments, these investigator-examiners began to collect evidence. They took the witness statements of some local inhabitants and victims as early as April 30, 1945.<sup>234</sup> In addition, the investigator-examiners collected statements and interrogation reports from German POWs.<sup>235</sup> The first U.S. Army personnel who entered the Flossenburg

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228. Internal Route Slip from Col. J.A. Harbaugh, Jr., JA DIV EUCOM, to CinC thru C/S, EUCOM (Sept. 18, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

229. Goff, *supra* note 2.

230. Board, *supra* note 219.

231. Order AG 092-GNHCF from Lt. Col. R.W. Hartman, Assistant Adjutant Gen. (May 6, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1. One of the interpreters was Benjamin B. Ferencz, who would later gain fame as a prosecutor at the American Nuremberg trials. See Report from Milos Kucera & Karel Prochaska, Short History of the Concentration Camp at Flossenburg 6 (Apr. 30, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1 (showing Ferencz's signature on an oath taken by interpreters).

232. Hartman, *supra* note 231.

233. STRAIGHT, *supra* note 9, at 35-36.

234. Kucera & Prochaska, *supra* note 231.

235. Report From Captured Personnel and Material Branch, Military Intelligence Div., U.S. War Dep't 2 (May 18, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

Concentration Camp supplemented this evidence with their own affidavits.<sup>236</sup>

In a memorandum, two investigator-examiners detailed their research conducted from May 28, 1945 to June 1, 1945.<sup>237</sup> They collected evidence regarding the evacuation march of prisoners from Flossenburg to Dachau in April of 1945. Their investigative report and techniques were typical and consisted of collecting testimony from a wide variety of witnesses through the use of sworn affidavits.<sup>238</sup>

Another report presented a detailed history and description of the Flossenburg Concentration Camp and included “[p]hotographs of some of the SS personnel of Camp Flossenburg . . . [a]trocidity scenes [and an incomplete] list of perpetrators.”<sup>239</sup> Even in regard to photographs, the investigator-examiners took care to comply with rules of evidence by preserving the chain of custody through the submission of affidavits by U.S. Army photographers.<sup>240</sup>

After a year of such pre-trial activities, on May 14, 1946, a Military Government Court published the charge sheet for the *Flossenburg* trial, which gave the names of the accused and the charge and particulars.<sup>241</sup> The only

236. Affidavit of Capt. Elijah C. Carter (Oct. 18, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

237. Memorandum from 2nd Lt. Patrick W. McMahon to Commanding Gen., Twelfth Army Group, APO 655, U.S. Army (July 2, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

238. “The testimony of all witnesses examined in the course of this investigation was secured through the use of an interpreter, after the witness had been sworn by the Investigator-Examiner . . . . The testimony of the witnesses examined was obtained through the use of affidavits. Each witness who could write, wrote his statement and signed the same in his own hand, and executed the same in the presence of the Investigator-Examiner, under oath. The remaining witnesses dictated their statements to the interpreter, said statements being read back to the witness in their native tongue, and they executed the same under oath, in our presence. It was impracticable to obtain the testimony of the witnesses in question and answer form. The use of a stenographic reporter and the use of an assistant investigator-cross-examiner were impracticable . . . . Photographs of the victims disinterred in the vicinity of Schwarzenfeld on 24 April 1945 are being prepared and will be forwarded as a supplement to this report.” *Id.* at 1-2.

239. Memorandum from 2nd Lt. John J. Reid to Commanding Gen., Third United States Army, APO 403 (June 21, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

240. One such document explained that the affiant “had been assigned to taking [sic] photographs . . . ; that he personally photographed the scene shown on [the] photograph . . . [which] bears his personal signature; that said photograph was taken on the 30th day of April 1945 at Flossenburg Concentration Camp in Germany; that it is a true and correct reproduction of and accurately depicts the following scene as it appeared at said time and place.” Affidavit re Authenticity of Still Photograph from Howard E. James, PFC (Sept. 1, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

241. The particulars read as follows: “In that [the defendants], German nationals or persons acting with German nationals, acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses and indignities, did, at or near the vicinity of Flossenburg Concentration Camp, near Flossenburg, Germany and at or near the vicinity of the Flossenburg out-camps . . . and with transports of prisoners evacuating said camps, all in German or German-controlled territory at various and sundry times, between the 1st of January 1942 and the 8th of May 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of . . . stateless persons . . . [and] non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the then German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then Germany Reich . . . the exact names and numbers of such persons

charge consisted of the "Violation of the Laws and Usages of War." The particulars laid out the specific acts which each accused individual allegedly had committed "in pursuance of a common design." On May 17, 1946, "Service of Charges was made upon the . . . accused in the Flossenburg Concentration Camp Trial" by the prosecution.<sup>242</sup>

### 6. The Trial

This paper will not focus on the actual trial, as this would require an article all of its own. It is noted, however, that all fifty-one defendants whom the U.S. Army tried pled "not guilty" to the charge and particulars.<sup>243</sup> The trial lasted approximately six months, produced a trial transcript approximately 9,500 pages in length and on January 20 and 22, 1947, the court issued its findings and sentences.<sup>244</sup> The sentences were as follows:

TABLE 5: Overview of the Sentences

Sentences	Number
Death Sentences	Fifteen*
Imprisonment for Life	Eleven
Imprisonment for Thirty Years	One
Imprisonment for Twenty Years	Four
Imprisonment for Fifteen Years	Four
Imprisonment for Ten Years	Three
Imprisonment for Three and One-half Years	One
Imprisonment for One Year	One
Not Guilty	Five
<i>Nolle Prosequi</i>	Six
Not Tried	One

\*"The DJAWC [Deputy Judge Advocate for War Crimes] recommend[ed] the reduction of two of these sentences to life imprisonment."<sup>245</sup> Exactly half of the fifty-two accused received life imprisonment or death sentences. Whether these sentences were appropriate for low-ranking defendants from "a factory dealing in death" is arguable.<sup>246</sup> In eighteen subsequent trials, an additional

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being unknown, but aggregating many thousands." Charge Sheet from Col. Howard F. Bresee (May 14, 1946), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

242. Certification of Stephan F. Pinter, Prosecutor (June 10, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

243. DJAO Review, *supra* note 201, at 2-4.

244. Introduction, *supra* note 26, at 18.

245. Memorandum from W.M.F. to Col. Harbaugh 1 (July 12, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 [hereinafter W.M.F.].

246. Reid, *supra* note 239, at 3.

forty-two defendants had to face the same charge and particulars.<sup>247</sup>

### 7. *The Rules of Evidence*

A more in-depth analysis of some of the relevant rules of evidence allows the reader to better understand the nature of the *Flossenburg* trial. Sections 270 of the Manual for Trial of War Crimes and Related Cases states the applicable rules of evidence.<sup>248</sup> In order to be admissible, evidence had to either be of “assistance in proving or disproving the charge, . . . have probative value [or] aid in determining the truth.”<sup>249</sup> Section 270(a) explained these admissibility standards were “not contrary to the . . . Articles of War [because p]ersons charged with the commission of a war crime [we]re not ‘persons subject to military law’ within the meaning of the Articles of War and are not entitled to their benefit.”

This standard of admissibility could have caused some *Flossenburg* defendants to have been found guilty solely based upon the sheer amount of evidence, which, although not directly relevant to their guilt, supported the general charge of having acted “in pursuance of a common design.” This possibility was ruled out, though, in one of the reviews.

Section 270(c)(2) required “the production of the best evidence reasonably available. However, this principle is not to be confused with the ‘best evidence rule.’ The latter is definitely not applicable.” The court’s low standard was an explicit acknowledgment of “the difficulties involved in procuring evidence” in post-World War II Germany, which were described in Section 270(d). The only apparent check on the admissibility of evidence was discussed in this section, as well. “[T]he court need only satisfy itself that . . . the accused will not unreasonably be prejudiced by admission of such evidence.”

In line with the weakened best evidence rule, Section 270(b) plainly stated that “[h]earsay evidence is admissible.” The court further “presume[d] under Section 270(c)(4)], subject to being rebutted by competent evidence, that sworn statements . . . from accused and witnesses were voluntarily made.” In addition, Section 273 did not limit the scope of cross-examination, perhaps making defendants more reluctant to take the stand.

## *B. The Review Procedures*

### *1. Introduction*

The review process in the *Flossenburg* case consisted of several formal and informal steps. Excluding actions taken in regard to allegations of perjury stemming from the trial, there appears to have been one significant review of the entire case. In addition, officials conducted numerous informal reviews and

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247. Sigel, *supra* note 10, at 109.

248. See APPENDIX 4.

249. *Id.* §§ 270(a)-(b).

recommendations of certain aspects of the case. It is unknown whether these officials simply did not adhere to the review process, or whether insufficient records exist.

In addition, although the perjury allegations lengthened and intensified the review process, it is uncertain to what exact degree this is the case. Would the CIC USFET and others have otherwise paid such great attention to the details of the case?

## 2. *The Judge Advocate's Memorandum*

An undated memorandum by the Judge Advocate was one of the best informal reviews of the trial.<sup>250</sup> He first considered the charge:

This case was tried on the theory of "common design," which legal theory had been employed previously in the Dachau and Mauthausen Concentration Camps. While not exactly similar to the legal theory of conspiracy it is substantially the same inasmuch as it imputes to all who participated in the common design the guilt of anyone. The Court found the majority of the accused guilty as charged, that is, participating in a common design to kill, murder, etc. . . . In my opinion the evidence before the Court warranted such a finding . . . However, in imposing sentences the Court did not apply this theory but based its sentences almost wholly [sic] upon the actual atrocities committed by an individual accused. There are several exceptions to this . . . The President of the Court in his rulings almost uniformly ruled in favor of the accused. . . . To again weigh this evidence is impossible. We must trust . . . the judgment of the Court . . . Inasmuch as the offenses charged are in violation of the rules of war a sentence of death in each case is legal.<sup>251</sup>

This thorough review was unexceptional except for one apparent act of self-censorship. In an apparent draft version of the document, the Judge Advocate drew a line through the following sentence: "I am unwilling to arrive at a decision in direct conflict with that of the Court but I do think the sentences in these [two] cases should be commuted to life imprisonment."<sup>252</sup> It is unknown how widespread such self-censorship was and how much the review process suffered as a consequence.

The Judge Advocate continues the memorandum by expanding upon his critique of the two cases mentioned in the crossed-out sentence:

It is hard to determine the theory upon which the Court imposed death sentences in [these two] cases . . . I am inclined to the view that so far as these particular executions were concerned they were not convinced they were executing illegal orders. If the sentence is to be sustained at all it must be sustained on the theory that knowing the whole operation of the Concentration Camps was illegal and wrongful, any act that they did in connection therewith must have been known to them as wrong.<sup>253</sup>

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250. Memorandum from J.L. Harbaugh/wdb, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

251. *Id.* at 1-2, 4.

252. *Id.* at 3.

253. *Id.* at 4. Both death sentences were carried out. See Legal Form No. 16 from Gen.

Thus, the Judge Advocate falls back on the legal theory of “common design” in order to uphold the sentences. The two defendants in question were executed on October 3 and 15, 1947 or 1948.

### 3. *The Deputy Judge Advocate’s Office’s Review*

On May 21, 1947, the DJAO completed and published the only significant and formal review of the court’s findings and sentences. A captain and a civilian attorney in the Post Trial Branch of the DJAO wrote the report, which the Deputy Judge Advocate, a colonel, approved after reviewing the trial record.<sup>254</sup> The report was seventy-three pages in length, cited the trial record extensively, and was organized into the following sections:

- basic trial information
- the charge and particulars
- the general findings and sentences
- a statement of the evidence for the prosecution (nine pages in length)
- a statement of the evidence for the defense (two pages in length)
- a review of trial motions
- several sections devoted to the court’s jurisdiction
- a conclusion regarding the overall conduct of the trial
- a section devoted to the issue of *respondeat superior*
- a section constituting the bulk of the report, which spelled out the findings and sentences against all of the defendants individually
- a conclusion regarding all of the sentences handed down by the court

### 4. *The DJAO Review – Jurisdiction*

The DJAO examined the question of the court’s jurisdiction in three separate sections: jurisdiction in general, jurisdiction over the victims, and jurisdiction over the accused. In regard to general jurisdiction, the DJAO noted that pursuant to orders the court had been properly constituted and

[i]t is well settled by accepted international law that members of an enemy armed force, or civilian nationals of an enemy country, may be punished by properly constituted courts established by the occupying power for crimes against the laws and usages of war committed prior to the cessation of hostilities.<sup>255</sup>

In support, the report cited a U.S. military manual, several U.S. cases and the *Mauthausen Concentration Camp* case.<sup>256</sup> This reliance on U.S. military and federal court sources and precedent from within the war crimes prosecution

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Clay to Director, War Criminal Prison (Aug. 16, 1948), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12; Introduction, *supra* note 26, at 8.

254. DJAO Review, *supra* note 201, at 73.

255. *Id.* at 16.

256. *Id.*

program indicates that the DJAO was not simply a “rubber-stamp” authority but went about its task diligently.

The DJAO noted the court could exercise jurisdiction over the victims, as well. Accordingly, the U.S. Military Government Court had the authority to try individuals accused of war crimes against nationals of allies or co-belligerents of the United States. The report cited the *Dachau Concentration Camp* case and various authorities listed in a U.S. military manual. In addition, the DJAO stated the court had jurisdiction *a fortiori* as the victims included American POWs, again citing the *Dachau* case and a U.S. military manual.<sup>257</sup>

Even though no one raised the issue at trial, the DJAO examined the issue of jurisdiction over the accused, specifically nationals of the Netherlands and Yugoslavia, which were members of the United Nations, that is, not aligned with the Axis powers.<sup>258</sup> Analogizing war crimes to piracy, for which the DJAO cited a treatise on international law, the report noted similar jurisdiction had been exercised in other concentration camp cases. There, the DJAO opined, the authorities so strongly assumed universal jurisdiction to exist that they did not even feel the need to discuss it. Moreover, the report stated that with some exceptions, U.S. Military Government Courts had jurisdiction over all nationals in their zones of occupation.

#### 5. *The DJAO Review – Due Process*

The report also reviewed the adherence to due process standards. The report noted that all the accused were represented by competent American counsel, one member of the court was a legally trained officer, sufficient interpreters were present, full rights of cross-examination were available, most of the accused exercised their right to testify on their own behalf and the court approved all findings of guilt with a two-thirds vote. Thus, the DJAO concluded, “[t]he trial was conducted with fairness to all convicted accused.”<sup>259</sup>

Apparently, the DJAO did not feel that the following short-comings were significant. First, the accused-to-counsel ratio was very high. Second, it seems indicative of more fundamental inequalities that in the report, the statement of the prosecution’s evidence was nine pages in length, whereas that of the defense was only two pages long.

#### 6. *The DJAO Review of the Defense’s Motions*

The DJAO report reviewed the five motions made by the defense at the outset of the trial.<sup>260</sup> The Post Trial Branch lawyers concluded in the report that the five defense motions had been properly ruled on by the court. The one

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257. *Id.* at 16-17.

258. *Id.* at 17.

259. *Id.* at 19.

260. *Id.* at 15-19.

motion upheld by the court was a motion to exclude all potential witnesses from the courtroom prior to the initial questioning of the defendants.

One of the motions denied by the court sought severance of the defendants' trials. The DJAO accepted this ruling because it was within the court's "sound discretion," as severance was neither a right nor a privilege.<sup>261</sup> The DJAO then went on to state that in war crimes trials, "the test is whether an injustice would result to [the] accused and not whether [the] purported substantial rights of [the] accused would be violated, if the motion were overruled, because accused have no right in this connection."<sup>262</sup> This reasoning regarding severance demonstrates the potential effect of the emphasis on speedy, non-technical procedures employed by the military tribunals.

### 7. The DJAO Review – The Theory of *Respondeat Superior* & Its Conclusion

The DJAO then responded to the defense of *respondeat superior*. It stated that compliance with superior orders was not a defense to the charge of having committed a war crime and cited Congressional documents, a treatise on international law, a law journal, two prior war crimes cases, "anglo-american jurisprudence," and a U.S. military manual.<sup>263</sup> The DJAO nonetheless allowed that compliance with superior orders could, when it met a three-part test, constitute a mitigating factor in the sentencing phase.<sup>264</sup> In its discussion of superior orders, the report also cited the London Agreement, several books, and other materials.<sup>265</sup>

After reviewing the defendants' individual findings and sentences, the DJAO summarized the trial. Finding no error with the court or the trial, the report recommended approval of all but two of the sentences.<sup>266</sup>

### 8. Post-DJAO Reviews

After the DJAO reviewed the trial, several other authorities reviewed both the trial record and the DJAO's report. In a short memorandum from the Chief of the International Affairs Section to the Judge Advocate, the former suggested that the sentences of several additional defendants be reduced on grounds of insufficiency of the evidence and the defense of superior orders;<sup>267</sup> these suggestions seem to have had no impact upon the decisions of the Judge

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261. *Id.* at 19.

262. *Id.*

263. *Id.* at 21.

264. *Id.*

265. *Id.*

266. "An examination of the entire record of trial fails to disclose any error or omission which resulted in injustice to the accused and discloses that the evidence is legally sufficient to support the findings of the Court. Accordingly, it is recommended that the findings of the Court be approved as to all the accused and . . . that the sentences to death by hanging as to [two] accused . . . be approved, but commuted to imprisonment for life and as commuted ordered executed." *Id.* at 72.

267. W.M.F., *supra* note 245.



Advocate. He seconded the approval of the report by the Deputy Judge Advocate for War Crimes and urged that a third sentence not mentioned by the Chief of the International Affairs Section be commuted as well.<sup>268</sup>

Interestingly, the Chief of Staff did not initially agree to the commutation of this third sentence and urged the Judge Advocate to reconsider.<sup>269</sup> He ordered a third-party review of the sentence at issue. The reviewer agreed with the Judge Advocate that "[a]fter reviewing sentences heretofore ordered in cases involving low-ranking soldiers in War Crimes acting pursuant to direct orders issued by superior officers then present, it is believed that the sentence of death is unnecessarily harsh and excessive."<sup>270</sup>

Subsequently, the Judge Advocate reiterated his initial view in a detailed memorandum to the Chief of Staff.<sup>271</sup> On August 28, 1947, the Chief of Staff agreed to the Judge Advocate's position and allowed the amended DJAO's report to be forwarded to the CIC for review.<sup>272</sup> The CIC confirmed the findings and sentences on September 10, 1947.<sup>273</sup>

The architects of the U.S. Army's war crime prosecution program intended the review process to take into account petitions for clemency and review filed by defendants and other interested parties. In the *Flossenburg* case, many petitions were filed but will not be addressed in this article as they seemed to have had only a marginal impact on the process. This is exemplified by the reaction of the Judge Advocate to one such petition. "The petition for clemency presented by the brother of the accused is not grounded on the existence of pertinent new evidence or predicated upon any other compelling considerations which warrant [sic] further investigation. It is merely a plea for mercy."<sup>274</sup> Many petitions did try to advance arguments based on evidence, but either the evidence was not new or the Judge Advocate and others did not consider the arguments persuasive. One petition submitted by a German counsel argued that procedural errors had prevented his client from testifying on his own behalf, thereby violating his due process rights.<sup>275</sup> The petition had no noticeable impact.

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268. Internal Route Slip from JA EUCOM APO 757 to Commander in Chief Thru Chief of Staff No. 1 (Aug. 4, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

269. Internal Route Slip from Secy GS-EUCOM to JA, No. 2 (Aug. 7, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

270. Duvall, *supra* note 225, at 9.

271. Memorandum from Col. J.L. Harbaugh, Jr., JA EUCOM, to S/GS EUCOM ¶ 7 (Aug. 21, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

272. Internal Route Slip from Secy GS EUCOM to JA EUCOM, No. 4 (Aug. 28, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

273. Smith, *supra* note 226.

274. Internal Route Slip from Col. J.L. Harbaugh, Jr., to CINC, No. 1, § 3 (Sept. 4, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

275. Wacker, *supra* note 217, at 1; *see also* note 4, at 393 (the regulations governing the operation of the courts encouraged efficiency).

### 9. The Perjury Trial

One petition submitted by a defendant's nephew did, however, have an enormous impact upon the course of the trial, insofar as it was "predicated upon . . . [a] compelling consideration." On August 25, 1947, the nephew sent a letter to the 7708 War Crimes Group requesting that his uncle's execution be postponed, as he had filed a suit against two prosecution witnesses for having committed perjury while testifying in the *Flossenburg* trial.<sup>276</sup> The Office of Military Government – Bavaria (OMGB), pursuant to Military Government – Germany, Law No. 2 (German Courts), Article VI, Paragraph 10a, prevented the German courts from exercising jurisdiction.<sup>277</sup> The nephew's letter triggered an investigation into the underlying charges.

By September 15, 1947, the War Crimes Group had recommended to the Judge Advocate that the execution of the defendant's death sentence be suspended until the perjury charges had been dealt with by the military courts.<sup>278</sup> On September 18, 1947, the Judge Advocate, in a memorandum to the CIC, recommended the temporary suspension of several sentences related to the possibly perjured testimony.<sup>279</sup> The Judge Advocate intended this suspension to be in effect until the conclusion of both the perjury investigation and the determination of whether any sentences needed to be altered. The CIC approved this suspension on September 22, 1947.<sup>280</sup>

On April 7, 1948, an Intermediate Military Government Court in Munich announced its findings in the case of the two prosecution witnesses accused of perjury in the *Flossenburg* trial.<sup>281</sup> In its opinion, the court addressed the question of its jurisdiction.<sup>282</sup> Interestingly, once again the persons involved in

276. Straight, *supra* note 227.

277. Memorandum from Lt. Col. Wade M. Fleischer, Chief, International Affairs Branch, to Col. Harbaugh (Sept. 22, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12; *see also* Military Government – Germany, Supreme Commander's Area of Control, Law No. 2, German Courts, Article VI, Change 18 (Jan. 22, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 (stating "no German Court shall assert or exercise jurisdiction in the following cases or classes of cases: (a) Criminal cases involving: (1) Any of the United Nations").

278. Memorandum from Lt. Col. Wade M. Fleischer, Chief, Int'l Affairs Branch, to Col. Harbaugh (Sept. 15, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

279. Harbaugh, *supra* note 228.

280. Letter from Brigadier Gen. C.K. Gailey, GSC Chief of Staff, to Gen. White (Sept. 22, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

281. The court made clear that "[t]his is a common trial for convenience and not a joint trial." Goff, *supra* note 2, at 3.

282. "No question of general jurisdiction or 'War Crimes' rather than MG [Military Government] jurisdiction has been raised, but the Court comments on this point, in passing, for the benefit of subsequent reviewers of the case, as follows: (a) The case has been cleared with the Chief of 7708 War Crimes Group and EUCOM and the Legal Division, OMGUS, have been advised of the commencement of these proceedings and the execution of the sentence imposed upon [the defendant] has been indefinitely stayed pending the conclusion of this case. (b) The jurisdiction of MG Courts is unlimited and extends to the persons involved, as accused, the crimes charged, and the evidence adduced. (c) War Crimes Courts were of limited jurisdiction and might well be held legally here to punishing perjury as a matter of contempt, only. In any case, War Crimes Courts at Dachau have been discontinued, so trial by those courts is impossible." *Id.* at 1-2 (emphasis added).

the review process were conscious of the fact that it would be an open record. The court stated that it commented "on . . . [its jurisdiction] for the benefit of subsequent reviewers of the case." The judge acquitted one defendant and found the other one guilty and sentenced him to six years of imprisonment.<sup>283</sup>

In a memorandum written before the end of the perjury trial, a reviewing officer discussed its effect on the *Flossenburg* defendants.<sup>284</sup> The only option, the memorandum concluded, was to review the original findings and sentences in order to determine whether the sentences needed to be commuted. As a result, after the perjury trial, a member of the War Crimes Group reviewed the findings and sentences of five of the *Flossenburg* defendants.<sup>285</sup> Specifically, the reviewer considered whether the non-perjured evidence was sufficient to uphold the findings and sentences. He concluded it was for all five defendants, including ironically the one whose relative had triggered the entire perjury investigation.

On May 24, 1948, the War Crimes Board of Review No. 1 issued its report regarding the findings and sentences for several of the defendants.<sup>286</sup> In coming to its conclusions, the Board examined the record of the *Flossenburg* trial, the Review and Recommendations of the Deputy Judge Advocate for War Crimes, the record of the perjury trial, the Deputy Judge Advocate's memorandum of April 30, 1948, and petitions which the reviewing officers had previously not taken under consideration.<sup>287</sup> The Board described the scope of its inquiry in the following manner:

This War Crimes Board of Review in this report is concerned with two questions only. First is the evidence in the record of trial in the above captioned case, excluding entirely from any consideration the evidence given by [the witness convicted of perjury], legally sufficient to support the findings and sentences of the court with respect to the several accused mentioned by this witness in his testimony? Second, have the various petitions with supporting documents, raised issues or presented equities which call for revision of findings and sentences as they now stand?<sup>288</sup>

The Board answered the first question in the affirmative and the second one in the negative.<sup>289</sup> Thus, although the Board found that perjured testimony had been introduced in the *Flossenburg* trial, it concluded that it did not unjustly affect the outcome of the trial.

283. *Id.* at cover sheet.

284. Fleischer, *supra* note 3.

285. Memorandum from Capt. Mueller to DJAWC, APO 407 (Apr. 30, 1948), *microformed on Microfilm Publication 1204, supra* note 2, Reel 12.

286. Board, *supra* note 219.

287. *Id.* at 1-2.

288. *Id.* at 3.

289. "The petitions are without merit. The evidence in the record of trial, with no weight given to the testimony of the [perjured] witness . . . is legally sufficient to support the findings and the sentences." *Id.* at 11.

### 10. The Flossenburg Sentences

Of the thirty-three members of the S.S. whom the court tried, it convicted twenty-seven, acquitted one and entered *nolle prosequi* against five.<sup>290</sup> Of those the court convicted, eight defendants received death sentences, ten received life sentences and nine received lesser sentences.<sup>291</sup> Of the sixteen inmates tried by the court, twelve were convicted and four were acquitted.<sup>292</sup> Of the twelve convicted by the court, four received death sentences, three received life sentences and five received lesser sentences.<sup>293</sup> Of the two civilians tried, the court sentenced one to death and the other received a *nolle prosequi*.<sup>294</sup>

U.S. Army officials carried out the death sentences on October 3 and 15, 1947 or 1948.<sup>295</sup> A Polish war crimes court sentenced to death one of the defendants extradited by the U.S. Army.<sup>296</sup> Of the six defendants against whom the court entered *nolle prosequi*, subsequent U.S. military tribunals tried and convicted two of them in *United States v. Heerde*.<sup>297</sup> One received a life sentence and the other a death sentence. In the following *Flossenburg 1 & 2* trials, *United States v. Degner* and *United States v. Wodak*, respectively, the court acquitted one defendant and sentenced the other to death.<sup>298</sup> The U.S. Army apparently did not retry the two remaining defendants.<sup>299</sup>

An undated document in table-format gives an overview of what happened to twenty-six of the defendants after they received their initial sentences.<sup>300</sup> Two defendants had their initial sentences reduced from death to life sentences by the Deputy Judge Advocate for War Crimes.<sup>301</sup> The War Crimes Review Board initially conducted no reviews of the findings and sentences.<sup>302</sup> Two other defendants had their sentences reduced from death to life sentences by the CIC.<sup>303</sup> Interestingly, the CIC, in his third review, commuted the sentence of the defendant whose nephew had triggered the perjury trial.<sup>304</sup>

“Subsequent HQ Recommendation[s]” were given by War Crimes Review Boards No. 1 and 2 in regard to three defendants.<sup>305</sup> For the first defendant, “WCRB No. 1 recommended clemency consideration.” For the second

290. Table of Statistics, *supra* note 207.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. Introduction, *supra* note 26, at 8.

296. *Id.*

297. *Id.* at 6.

298. *Id.* at 7.

299. *Id.*

300. Table Data, *supra* note 218.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

defendant, the “WCRB No. 2 recommended 15 yrs,” as opposed to the initial life sentence. As for the third defendant, whose relative had sparked the perjury trial, “WCRB No. 1 recommended reaffirmation of death sentence [thereby overturning the CIC’s decision]; WCRB No. 2 recommended commutation to life.” If these three defendants can serve as any indication, reviewing authorities tended to reduce the initial sentences handed down by U.S. military tribunals.

Presumably not more than ten years after the initial sentences were handed down, the Review Committee reduced almost all of the remaining sentences.<sup>306</sup> The War Crimes Modification Board made no recommendations as to these twenty-six sentences.<sup>307</sup>

Additional light is shed upon the *Flossenburg* sentences by a document prepared by the National Archives. From December of 1950 to January of 1951, the War Crimes Modification Board reviewed the sentences of the remaining twenty-six defendants, commuting sentences either to “time served as of February 1951” or to other shorter sentences.<sup>308</sup> U.S. officials also released early or granted parole to several defendants.<sup>309</sup> They granted the last defendant parole in 1957 and remitted his sentence on June 11, 1958, approximately thirteen years after the war crimes investigators-examiners began their work.<sup>310</sup>

## V.

### U.S. MILITARY COMMISSIONS AT GUANTANAMO BAY – ECHOES OF THE PAST?

As the history of the U.S. Army’s war crimes prosecution program demonstrates, its architects sought to do much more than just resolve questions of individual guilt or innocence in putting on the *Dachau* trials. Professor Shapiro, though, warns against using trials for non-legal purposes, such as social control:

Where social control is the dominant mode, as in criminal law, all sorts of shifts in the balance of proof may be made for policy reasons . . . . Presumptions, burdens of proof, and per se rules are the standard form for manipulating factual issues to achieve policy goals.<sup>311</sup>

His fear came true in the *Dachau* trials, where politics, at least in part, steered the judicial cart. A military regulation cited in the DJAO report plainly stated:

The purpose of proceedings in Military Government Courts . . . [is] the advancement of the political, military and administrative objectives declared by the Control Council and the Theater Commander . . . . Proceedings will be conducted with a view to the attainment of this purpose to the fullest possible extent. Technical and legalistic view points will not be allowed to interfere with

306. *Id.*

307. *Id.*

308. Introduction, *supra* note 26, at 8-9.

309. *Id.*

310. *Id.*

311. SHAPIRO, *supra* note 12, at 47.

such a result.<sup>312</sup>

This is not to say that the *Dachau* trials were rife with injustice; they were not. If justice in an individual case conflicted with larger policy objectives, however, then justice did not prevail. The reduction of many sentences in the latter phase of the war crimes prosecution program due to outside pressures is one example of the triumph of policy over justice. The scandals surrounding the *Malmédy* and *Buchenwald* trials are perhaps two others.

Are the policy pressures bearing down on the U.S. military commissions at Guantanamo Bay comparable to the ones existing at the time of the *Dachau* trials? For instance, are the procedural rules crafted in such a way as to make a specific outcome more likely? President Bush authorized the establishment of a U.S. military commission system in his Military Order of November 13, 2001, which Secretary of Defense Rumsfeld implemented in Military Commission Order No. 1 on March 21, 2002.<sup>313</sup> The procedural rules applied by such commissions, according to Rumsfeld, will “ensure . . . [that a trial] is handled in a measured, balanced, thoughtful way that reflects our country’s values.”<sup>314</sup> He gave several reasons why military commissions are preferable to civilian courts, largely echoing the language and ideas behind the *Dachau* trials.<sup>315</sup>

Rumsfeld’s first reason was security concerns for those involved in trying “unlawful belligerents.”<sup>316</sup> Against such a backdrop, “[m]ilitary commissions would permit speedy, secure, fair and flexible proceedings.”<sup>317</sup> Second, federal rules of evidence, which reflect “public policy reasons . . . have no application in a trial of foreign terrorists.” Consequently, “military tribunals can permit more inclusive rules of evidence . . . allow[ing] those judging the case to hear all probative evidence.”<sup>318</sup> These justifications for the standards employed by military commissions are almost identical to the ones offered almost sixty years ago, and arguably the standards will have similar effects today.

Some commentators, such as the American Bar Association (ABA), have been relatively neutral on the question of U.S. military commissions. On the one hand, the ABA states, “[m]ilitary commissions probably will not afford the same procedural protections as civilian courts.”<sup>319</sup> On the other hand, the report goes on to state, “[i]f conducted under reasonable procedures . . . military commissions can deliver justice with due process.”<sup>320</sup> The question is whether

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312. DJOA Review, *supra* note 201, at 20.

313. Bialke, *supra* note 159, at 77.

314. Sec’y of Def. Donald H. Rumsfeld and Deputy Sec’y of Def. Paul Wolfowitz, Prepared Statement: Senate Armed Services Committee “Military Commissions” (Dec. 12, 2001), available at <http://www.dod.mil/cgi-bin/dlprint.cgi?http://www.dod.mil/speeches/2001/s20011212-secdef.html> (last visited Nov. 20, 2005).

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions*, 2002-MAR ARMY LAW. 8, 15.

320. *Id.*

today's procedures are, in fact, "reasonable."

Other commentators stake out more partisan positions than that of the ABA. One argues that military commissions "in their current form . . . are patently unjust and, in particular, offer no hope of an independent or impartial tribunal."<sup>321</sup> He goes on to explain that the "[procedural] safeguards are . . . necessary but not sufficient conditions for the provision of a fair trial."<sup>322</sup> Moreover, the commentator views the military commissions as insufficiently independent and impartial, as "detainees subject to trial by military commission are entirely in the hands of the executive branch of government."<sup>323</sup> Thus, the argument goes, adequate procedural safeguards will be insufficient to insulate the trials from policy concerns emanating from the executive branch, which has the duty of policing itself.

Those who believe military commissions will give "full and fair" trials counter such criticisms.<sup>324</sup> This is the view held by Lieutenant Colonel Bialke. His motivation for trying crimes in front of U.S. military commissions is that "[t]here can never be a lasting peace without justice. Just as important, opposing forces are not deterred when . . . [the Law of Armed Conflict] is not enforced."<sup>325</sup> Lieutenant Colonel Bialke's ideas partially echo those of Lieutenant Colonel Fleischer from roughly sixty years earlier. As he explained, "[t]o subject an enemy national to an unfair trial only outrages the enemy and hinders the reconciliation necessary to a peaceful world."<sup>326</sup> Bialke seems to stop short, though, of adopting the second part of Fleischer's argument that "[w]e must insist that within the confines of our jurisdiction the highest standards of conduct be applied to the trials of war criminals and to all matters connected therewith."<sup>327</sup>

Bialke repeats many of the arguments put forth by Rumsfeld.<sup>328</sup> In light of them, he explains, "U.S. military commission rules of evidence, in limited circumstances, are crafted with more flexibility and less procedural formality."<sup>329</sup> These rules take into account the difficulties presented by war, in which "acquiring evidence in the battlefield environment is completely different from traditional peacetime law enforcement evidence gathering."<sup>330</sup> Bialke assures the public that a "special [civilian] independent review panel" would automatically review every sentence for "material errors of law."<sup>331</sup> This is

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321. Metcalfe, *supra* note 159, at 576.

322. *Id.* at 581.

323. *Id.* at 582-83.

324. See generally Frederic L. Borch, III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to Military Commissions: Trying American Justice*, 2003-NOV ARMY LAW. 10; Bialke, *supra* note 159.

325. Bialke, *supra* note 159, at 68.

326. Fleischer, *supra* note 3.

327. *Id.*

328. Bialke, *supra* note 159, at 73-74.

329. *Id.* at 75.

330. *Id.* at 76.

331. *Id.* at 79-80 n.81.

definitely an improvement on the review process in the *Dachau* trials, but doubts remain.

These doubts are fed by the controversy surrounding the resignation of two military prosecutors involved with the Guantanamo military commissions.<sup>332</sup> The prosecutors accused their colleagues of “ignoring torture allegations, failing to protect exculpatory evidence and withholding information from superiors.”<sup>333</sup> One of the former prosecutors described “a process that appears to be rigged” and recounts being told “that the panel sitting in judgment on the cases would be handpicked to ensure convictions.”<sup>334</sup> Assuming these allegations to be accurate, policy seems to be influencing not only the procedural rules but the entire prosecution system at Guantanamo Bay.

The same policy considerations and procedural shortcomings that plagued the *Dachau* trials, then, seem to be influencing the functioning of today’s military commissions. Can a firewall be erected to insulate these judicial proceedings from external, non-judicial influences? Historian Frank Buscher, in reflecting upon the *Dachau* trials, offered one possible solution. He argued that war crimes trials should be limited solely to punishment, and not focus on other goals.<sup>335</sup> All courts like to think that this is what they do: they focus on questions of individual culpability, and nothing more. This article’s examination of the *Dachau* trials, however, casts some doubt upon this supposition. Military tribunals, because they are deeply enmeshed within a large institution of the executive branch of government, are perhaps insufficiently independent to be able to resist outside political influences.

## VI. CONCLUSION

Just as trials can complement non-legal means for dealing with international crimes, so can national tribunals support the efforts of international bodies. Each, however, comes with its own set of problems. The shortcomings of international tribunals are well documented. The inadequacies of national tribunals, however, in addressing international crimes are different in nature, as is demonstrated by this article.

The historian Bradley F. Smith, writing about the U.S. WWII war crimes prosecution program, noted the “special quality of excess in American foreign relation in the postwar years that, when combined with an inclination toward overmoralizing . . . often produced serious difficulties.”<sup>336</sup> These problems

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332. Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1.

333. *Id.*

334. *Australian govt backs US Guantanamo military trial despite 'rigged' claims*, AFX NEWS LIMITED, Aug. 2, 2005, available at <http://www.forbes.com/afxnewslimited/feeds/afx/2005/08/02/afx2166436.html> (last visited Dec. 23, 2005).

335. BUSCHER, *supra* note 16, at 164.

336. SMITH, *supra* note 27, at 259.



included the “blur[ing of] the line between moral condemnation and possible legal redress.”<sup>337</sup> British Lord Chancellor Sir John Simon seemed to recognize this distinction when he termed dealing with Nazi war criminals a political, not a judicial, problem.<sup>338</sup> The American planners of the war crimes prosecution program rejected this view. Unless the line between moral condemnation and legal redress is respected, however, political considerations will infuse military legal proceedings. If this is the case, military tribunals will lack the necessary judicial independence to operate properly, and the justice they dispense will be distorted beyond recognition.

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337. *Id.* at 253.

338. *See* FRUS-QUEBEC, *supra* note 43.

APPENDIX I  
CONTROL COUNCIL LAW NO. 10

Article I

The Moscow Declaration . . . and the London Agreement . . . are made integral parts of this Law.

Article II

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace . . .

(b) War Crimes . . .

(c) Crimes against Humanity . . .

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or . . . .

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment. (b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

Article III

1. Each occupying authority, within its Zone of occupation,

(d) . . . . Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorized by the occupying authorities.

2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945. *Microformed on Microfilm Publication 1204, supra note 2, Reel 1.*

APPENDIX 2  
AG 000.5 JAG-AGO

5. General

As a matter of policy, such cases involving offenses against the laws and usages of war or the laws of the occupied territory or any part thereof, commonly known as war crimes, committed prior to 9 May 1945, as may from time to time be determined by the Deputy Theater Judge Advocate for War Crimes, will be tried before specially appointed Military Government Courts, except where otherwise directed by the Theater Commander.

6. Procedural Matters Before Trial

c. United Nations Observers . . . [T]he Deputy Theater Judge Advocate for War Crimes will determine those United Nations, if any, which in his judgment should be invited to send observers to the trial.

d. Appointment of Courts. The courts will be appointed by this headquarters and will be composed of officers within this command. General Military Government Courts and Intermediated Military Government Courts appointed as contemplated herein will consist of not less than five and not less than three members, respectively, and the senior member present at each trial will be the president and presiding officer of the court. The orders appointing such courts will detail at least one officer with legal training as a member of such courts. The Deputy Theater Judge Advocate for War Crimes will assign one or more prosecutors and defense counsel but they will not be formally designated in the orders appointing the courts.

7. Trial

b. The trial will be conducted according to pertinent Military Government directives and instructions, except that no person will be convicted or sentenced except by the concurrence of two-thirds of all the members present at the time the vote is taken.

c. The effective date of prison sentences will be as provided for other Military Government Courts. Sentences imposing death will provide for the execution thereof by hanging. Confinement without "hard labor" will not be imposed, providing, however, that sentences heretofore or hereafter imposed which do not include the words "hard labor" will be construed to require hard labor as a part of the punishment.

8. Post-trial action

b. The prosecuting officer will be responsible for the preparation of the record of trial, which, after being properly authenticated will be forwarded to the Deputy Theater Judge Advocate for War Crimes, who will prepare a written Review and Recommendations for submission to Theater Judge Advocate.

c. In taking the action prescribed in subparagraph b, above, the Deputy Theater Judge Advocate for War Crimes will take into consideration and include in the Review and Recommendations any Petition for Review or request for clemency filed on behalf of the accused.

d. Except as hereinafter provided in this subparagraph, no sentence will be carried into execution until the sentence has been approved by the Theater Commander after having received the recommendations of the Theater Judge Advocate as to the views expressed in the Review and Recommendations. The Theater Judge Advocate is hereby authorized and directed to exercise all of the powers of the Theater Commander in cases where no sentence of death has been pronounced.

10. Permanent Filing of Records.

After final action the case record of all trials will be forwarded to the Deputy Theater Judge Advocate for War Crimes for permanent file.

12. Mass Atrocity Subsequent Proceedings.

b. With regard to subsequent proceedings against accused other than those involved in the initial or "parent" mass atrocity cases heretofore or hereafter tried involving charges and particulars substantially similar to those described in subparagraph a, above, it is prescribed as follows.

Order AG 000.5 JAG-AGO from Lt. Col. Peter Peters, Assistant Adjutant Gen., Headquarters, US Forces, European Theater, Trial of War Crimes Cases (Oct. 14, 1946), *microformed on* Microfilm Publication M1204, *supra* note 2, Reel 1; STRAIGHT, *supra* note 9, Appendix X.

APPENDIX 3  
GENERAL ORDERS NO. 3

I. General.

Recommends promulgation of procedures for collection and perpetuation of war crimes evidence and rules of procedure for the trial of war crimes involving American nationals as victims and mass atrocities committed in the American Zones of Occupation in Germany and Austria.

VI. Prepares Reviews and Recommendations for reviewing authority.

1. Prosecution Section.

Initiates promulgation of rules of procedure and policies for tribunals.  
Initiates appointment of tribunals.

2. Post-Trial Section.

Maintains records of findings and sentences.

Drafts Reviews and Recommendations for reviewing authority.

VII. Dachau Detachment.

2. Counsel Section. Takes final steps to prosecute or defend cases assigned . . . Prosecutes and defends cases, supervises preparation of records of trial and prepares and presents necessary petitions for review and clemency requests.

Memorandum from DJAO, 7708 War Crimes Group, U.S. Forces, European Theater, APO 178, *microformed on* Microfilm Publication M1204, *supra* note 2, Reel 1. Of note is the requirement that the prosecution was responsible for compiling the trial record which seems to indicate that these trials were meant to be formally reviewed and even made public. Most of the documents on microfiche were declassified in the early 1950s.

APPENDIX 4  
MANUAL FOR TRIAL OF WAR CRIMES AND RELATED CASES

PART II, POWERS AND PROCEDURE

SEC 201, General Directives.

Reference is made to: (a) Military Government Regulations, Title 5, Legal and Penal Administration. (b) Letter of this Headquarters, file AG 000.5 WCB-JAG, subject, "Trial of War Crimes Cases," dated 14 October 1946.

SEC 210, Personnel of the Court.

General Military Government Courts and Intermediate Military Government Courts shall consist respectively of not less than five (5) members and not less than three (3) members, and, in addition, personnel of the prosecution and defense . . . .

Whenever deemed necessary, a Military Government Court may, on its own motion or the request of the accused, appoint an impartial adviser to assist . . . as an expert on German law, local customs, business practices, or technical matters. Such an adviser may be invited to sit with the court but will not participate in the court's deliberations or in its decisions.

SEC 220, Duties of President as Presiding Officer.

a. General.

The practice in continental countries is for the presiding judge to conduct the examination of the accused and witnesses and generally to take a leading part in the proceedings. However, this should be done in these trials only when it appears that the prosecutor, defense counsel, or the accused are not familiar with common law procedures. In such event the presiding judge should conduct the proceedings to the extent necessary to protect the interests of the accused and to bring out all the facts relating to the issue being tried.

b. Interrogations by Court.

[T]he interrogation of the accused by the court at the time of pleading is discretionary. For the purpose of obtaining from the accused sufficient information to determine whether he has the intention of admitting the elements of the charge or denying it, the court will arrange to be provided with a dossier of the case against the accused, prior to the trial, such dossier to contain a summary of all documentary evidence and testimony of the prosecutor's witnesses . . . . It will be used as a basis for such examination but not regarded as proof of the statements it contains which will have to be established in evidence in the usual way . . . . The accused's statements made upon the interrogation will form part of the record, and anything he says may be used as evidence for or against him.

c. Interrogations by court in war crimes trials.

[T]he suggestions in MGR [Military Government Regulations, Title 5] concerning the questioning of the accused by the court primarily relate to ordinary cases in which the court is sitting in a capacity similar to that of a committing magistrate as contrasted with war crimes trials in which adequate

prosecution and defense counsel are present.

SEC 230, Prosecutor.

a. Qualifications of prosecutor.

Any qualified officer, enlisted or civilian lawyer may serve as prosecutor.

SEC 240, Defense Counsel.

a. Qualifications of defense counsel.

Any lawyer not debarred from appearing by the Military Government may appear as defense counsel.

SEC 250, Powers of the Court.

a. General.

A General Military Government Court may impose any lawful sentence including death. An Intermediate Military Government Court may impose any lawful sentence except death, imprisonment in excess of ten (10) years, or fine in excess of 100,000 Reichsmarks.

A Military Government Court shall have power to summon as a witness any person . . . .

[He] may be ordered to bring with him any document or article [and]

he [may] be detained as a material witness . . . . The Court shall have power to order trial in camera.

b. Sentences.

A military Government Court shall have the power to hold in contempt any person . . . who offend[s] the dignity of the court, in any manner or disregards its orders.

SEC 260, Voting on Rulings and Verdicts.

If the members of the court agree, all interlocutory questions arising during the trial may be decided by the president subject to objection by any member of the court . . . . [Otherwise, all questions] will be determined by a majority vote . . . . A two-thirds vote of the members present is required to convict, and to assess a punishment on the accused.

SEC 270, Rules of Evidence.

a. Non-applicability of AW 25 and AW 38.

A directive to a military tribunal charged with trial of offenses against the laws of war to the effect that it will admit "such evidence as in its opinion will be an assistance in proving or disproving the charge, or such as in (its) opinion would have probative value in the mind of a reasonable man" is not contrary to the provisions of Article 25 or Article 38 of the Articles of War. Persons charged with the commission of a war crime are not "persons subject to military law" within the meaning of the Articles of War and are not entitled to the benefit (in re YAMASHITA, #61 and #672, Sup. Ct., October 1945).

b. Non-applicability of rules of evidence for Courts-Martial.

Hearsay evidence is admissible.

c. General rules of evidence.

2. [T]he "best evidence rule" . . . is definitely not applicable.

3. Evidence of bad character of an accused shall be admissible.

4. War Crimes tribunals will not require foundation evidence.

5. Courts will to the greatest possible extent apply expeditious and non-technical procedure, and shall admit any evidence which they deem to have probative value.

f. Rights of witnesses.

An accused has no privilege against self-incrimination. He will not be warned that he is not required to answer when questions are put to him. . . . If he refuses to answer any questions put to him, the court may draw an unfavorable inference from his refusal to answer.

Manual for Trial of War Crimes and Related Cases, *microformed on Nat'l Archives Collection of World War II War Crimes Records, Records of U.S. Army Commands, 1942-*, Record Group 338, *United States v. Geiger* (July 9 – Aug. 5, 1947), Microfilm Publication M1191 (Ebensee Outcamp Case) (2 reels), at Reel 1; STRAIGHT, *supra* note 9, Appendix XX.

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