The United States and the Concentration Camp Trials at Dachau, 1945-1947

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This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.
It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

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Summary of Dissertation: The United States and the Concentration Camp Trials, 1945-1947

After much debate during the war years over how best to respond to Nazi criminality, the United States embarked on an ambitious postwar trial programme in occupied Germany, which consisted of three distinct trial sets: the International Military Trial at Nuremburg, the Nuremberg Military Tribunals, and military trials held at the former concentration camp at Dachau. Within the Dachau military tribunal programme, were the concentration camp trials in which personnel from the Dachau, Mauthausen, Buchenwald, Flossenbürg, and Dora-Mittelbau concentration camps were arraigned.

These concentration camp trials at Dachau represented the principal attempt by the United States to punish Nazi crimes committed at the concentration camps liberated by the Americans. The prosecutors at Dachau tried 1,045 defendants accused of committing violations of the 'laws of war' as understood through 'customary' international and American military practice. The strain of using traditional military law to prosecute the unprecedented crimes in the Nazi concentration camps was exposed throughout the trials. To meet this challenge, the Dachau concentration camp courts included an inventive legal concept: the use of a 'criminal-conspiracy' charge—in effect arraigning defendants for participating the 'common design' of the concentration camp, 'a criminal organisation'.

American lawmakers had spent a good deal of time focused on the problem of how to begin the trials (What charges? What courts? Which defendants?) and very little time planning for the aftermath of the trials. Thus, by 1947 and 1948, in the face of growing tensions between the United States and the Soviet Union, the major problem with the Dachau trials was revealed –the lack of long term plans for the appellate process for those convicted. After two scandals that captured the press and the public's attention, the United States Congress held two official investigations of the entire Dachau tribunal programme. Although the resulting reviews, while critical of the Army's clemency process, were largely positive about the trials themselves, the Dachau trials faded from public memory.

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List of Abbreviations

CROWCASS: The United Nations Central Registry of War Criminals and Security Suspects.

IMT: International Military Tribunal, commonly known as the ‘Nuremberg Trial’.

JAG: The Judge Advocate General Corps, the legal branch of the U.S. Air Force, Army, Coast Guard, and Navy.

NMT: Nuremberg Military Tribunals, commonly known as the ‘Subsequent Nuremberg Trials’

OMGUS: Office of Military Government, United States.

SHAEF: Supreme Headquarters, Allied Expeditionary Force.

USHMM: The United States Holocaust Museum Memorial, USA.

Introduction

In April 1945, as the American army marched ever deeper into Germany, soldiers stumbled upon the sites of the Nazi concentration camp system. Ohrdruf, a sub-camp of Buchenwald, discovered by the 4th Armoured Division of the Third Army on 4 April 1945, was the first camp that contained prisoners (and corpses) to be liberated by the Americans. On 12 April, Generals Dwight Eisenhower, George Patton, and Omar Bradley toured the camp. Eisenhower famously remarked, 'We are told that the American soldier does not know what he is fighting for. Now, at least, he will know what he is fighting against'.[1] The day before, 11 April 1945, the 6th Armoured Division (Third Army) liberated approximately 700 people, and over 3000 corpses, at Dora-Nordhausen V-2 labour complex, and around 21,000 people at the Buchenwald concentration camp. On 23 April 1945, Flossenburg was liberated by the 90th Infantry Division. On 29 April 1945, the Seventh Army arrived at Dachau, the first concentration camp established by the Nazi regime, liberating 32,000 inmates. On their way into the camp's main entrance, American soldiers passed a silent train outside the camp, which contained approximately 2000 dead inmates from a final evacuation from Buchenwald.[2]

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[1] Omar N. Bradley, *A Soldier's Story* (New York: 1951), 539; see also Dan Stone, *The Liberation of the Camps: The End of the Holocaust and Its Aftermath* (New Haven, CT: Yale

[2] Wolfgang Benz and Barbara Distel (eds.) *Dachau and the Nazi Terror, 1933-1945: Volume II, Studies and Reports* (Dachau: *Comite International de Dachau*, Brussels, 2002), 16.

Photo 1. American soldiers view the Dachau death train. Courtesy of the USHMM Photo Archives.

The Third Army, 11th Armoured Division, liberated Mauthausen on 5 May 1945. In May 1945, embedded reporters sent pictures and newsreels home arousing strong public support for war crimes trials. The United States Congress sent a bipartisan committee to tour the camps at Buchenwald, Nordhausen, and Dachau. At the end of their tour, the committee produced a report for Congress entitled *Atrocities and Other Conditions in Concentration Camps in Germany*,[3] which concluded:

> It is the opinion of your committee that these practices [in the administration and operation of the concentration camps] constituted no less than organized crime against civilization and humanity and that those who were responsible for them should have meted out to them swift, certain and adequate punishment…
>
> With reference to the punishment of those guilty of war crimes, which an indignant world will expect and demand, we desire to report that at the present time various agencies are actively and comprehensively engaged in the

[3] *Atrocities and Other Conditions in Concentration Camps in Germany, Report of the Committee requested by Dwight D Eisenhower through the Chief of Staff General George C Marshall to the Congress of the United States* (Washington, DC: United States Government Printing Office, 1945). The members were Senators Alben W. Barkley, Mr. Walter F. George, Elbert D. Thomas, C. Wayland Brooks, Kenneth S. Wherry, Leverett Saltonstal and Representatives R. Ewing Thomason, James P. Richards, Ed. V. Izac, John M. Vorys, James I.V. Mott, and Dewey Short.

> gathering of evidence throughout the regions where these atrocities were committed.[4]

The congressional report mentioned both 'crimes against humanity' and 'war crimes' as two distinct sets of crimes. As the concentration camp trials held at Dachau, the subject of this dissertation, were based entirely on arraigning its defendants for war crimes (based on American military laws and 'customary' international 'laws of war'), as opposed to 'crimes against humanity' (based on a newly codified international law) used at the International Military Tribunal, (commonly known as the 'Nuremberg Trial' or IMT) and Nuremberg Military Tribunals (or 'Subsequent Nuremberg Trials' or NMT),[5] it is important at this early stage to note the major differences between the two.

War crimes can only be committed during wartime and can be committed by an individual, either with or without the approval of his government. War crimes were violations of the 'laws of war' – a code of generally accepted rules that all belligerents were required to follow. There was no single list of war crimes, but a list of generally unacceptable behaviours began to be defined in the modern era during the American Civil War of 1861-1865 in the 'Lieber Code'. Francis Lieber, a Prussian-American, was a legal scholar and historian. He first presented his ideas in a series of lectures entitled 'The Laws and Usages of War' at the Columbia Law School in October 1861, followed by *Guerrilla Parties Considered With Reference to the Laws and Usages of War* (a 6,000-word report, replete with historical examples, which was distributed widely to Union generals), and finally, in April 1863*, Instructions for the Government of Armies of the United States in the Field, General Order No. 100*, which was issued by President Lincoln to all American armies.[6] The Lieber code was influential on the codification of war crimes in international agreements: the Hague Conventions of

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[4] Ibid, 15.

[5] For more on the use of 'Crimes against Humanity' at the IMT see United Nations War Crimes Commission, *Law Reports of Trials of War Criminals, vol. XV: Digest of Laws and Cases* (London: His Majesty's Stationary Office, 1949); Robert Jackson, *The Case Against the Nazi War Criminals: Opening statement for the United States of America and other documents* (New York: Alfred A. Knopf, Inc., 1946); Robert H Jackson, *The Nurnberg Case* (New York: Alfred A. Knopf, Inc, 1947); Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992).

[6] See Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Transaction Publishers, 1985) and John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (Free Press, 2013).

1899 and 1907 and, later, the Geneva Convention of 1929. According to these internationally recognized agreements, during the Second World War, war crimes included the following: mistreating prisoners of war, refusing treatment to the wounded, attacking hospital ships, using poisons and gas weapons, using soft-point bullets, bombing from balloons 'or by other new methods of a similar nature'[7], killing enemy combatants who have surrendered, looting, attacking undefended towns, forcing inhabitants of occupied territories into military service, and using collective punishment on prisoners or occupied peoples.

In contrast, 'crimes against humanity' can be committed during war or peace and are committed with the approval of the government or authorities. Although the term 'crimes against humanity' was used sporadically before the London Charter of 1945 (for example in a 1890 pamphlet describing King Leopold II's actions in the Congo, in the preamble to the Hague Conventions, and in an Allied statement in 1915 condemning the Ottoman Empire's actions against the Armenians)[8], it was after the Second World War that 'crimes against humanity' was defined and proscribed. Article 6, paragraph 6 (c) of the London Charter defined 'crimes against humanity' as:

> Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[9]

The IMT and the NMT arraigned defendants for 'crimes against humanity' (as well as 'crimes against the peace' and, a few, for 'war crimes') while the Dachau trials only used 'war crimes' – a legal difference between the two sets of trials.

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[7] Both the United Kingdom and the United States opted out of this clause of the treaty, thus their use of airplanes for bombing throughout the Second World War, technically, was not a war crime according to the standing treaties.

[8] See Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice, Third Edition* (New Press, 2007); M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011); Willem-Jan van der Wolf (ed.) *Crimes Against Humanity and International Criminal Law* (The Hague: International Courts Association, 2011); and, for a examination of the personalities involved in the development of these legal terms see Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (Knopf, 2016).

[9] *Trials of the Major War Criminals before the International Military Tribunal, Volume 1: Official Documents* (Nuremberg, 1947), 11.

The governments of newly liberated countries and the Allied occupation authorities in Germany, chief among them the U.S. army, needed an official line on alleged German crimes. Spontaneous retribution against 'war criminals' and 'collaborators' (real and imagined) was widespread in the waning days of fighting, as locals took justice into their own hands –for example in France some 10,000 people were killed in extrajudicial proceedings, while in Italy 15,000 were killed.[10] In 1945, the Americans, other occupation authorities, and new governments needed a comprehensive judicial programme in order to deal with, as Tony Judt wrote, 'the legacy of the discredited wartime regimes'.

> The Nazis and their friends had been defeated, but in view of the scale of their crimes this was obviously not enough. If postwar governments' legitimacy rested merely on their military victory over Fascism, how were they better than the wartime Fascist regimes themselves? It was important to define the latter's activities as crimes and punish them accordingly.[11]

But how should suspected war criminals be punished for their crimes? What form of justice should be used? Summary executions? Courts-Martial? Local courts? International tribunals? If legal legitimacy was paramount, what laws should be cited? How should the crimes be defined? Would existing laws cover the particularly horrendous nature of Nazi crimes, such as those committed in the concentration camps? For the Allies, and the Americans in particular, how would trials fit into larger occupation plans for postwar Germany? While there was never a complete consensus on American war crimes policy (government agencies and individuals fought bitterly over the issue), three trial programmes emerged in Europe, the International Military Trial (IMT) at Nuremburg, the Nuremberg Military Tribunals (NMT), and the American military trials at Dachau. After spending the war engaged in rhetoric promising retribution for Nazi crimes, the United States embarked on an ambitious postwar trial programme in Europe.

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[10] Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin Books, 2005), 42. Judt has an excellent overview of this subject in his chapter 3 'Retribution' (pages 41 – 62). Also see Pieter Lagrou, *The Legacy of Nazi Occupation: Patriotic memory and national recovery in Western Europe, 1945-1965* (Cambridge: Cambridge University Press, 2000) and discussions in Istvan Deak, Jan T. Gross and Tony Judt (eds*.), The Politics of Retribution in Europe: World War II and its aftermath* (Princeton, NJ: Princeton University Press, 2000).

[11] Judt, *Postwar,* 41.

The European trials were part of an extensive American justice programme at the end of the war in both Europe and the Pacific region. Huge numbers of cases and defendants were involved. In the Pacific region alone, at least 426 cases involving over 1,230 defendants were conducted from 1945 to 1948. At Yokohama, a major American base during the occupation of Japan, 814 war criminals were tried in 297 cases. Of 744 convictions, 113 were sentenced to death and 49 to life imprisonment. In China and the Philippines, 108 cases were heard, involving 290 defendants, of whom 262 were convicted and 102 were sentenced to death. In Guam, 108 defendants were heard in 20 cases. 100 were convicted and 29 sentenced to death. In Tokyo, the International Military Tribunal for the Far East (IMTFE), 'comparable to the Nuremberg International Tribunal in theory and jurisdiction',[12] heard one case involving 25 defendants. All 25 were convicted, and seven were sentenced to death. Sixteen were sentenced to life imprisonment, and the remaining two to lesser terms.[13]

In Europe, the American military held trials on the grounds of the former concentration camp at Dachau from November 1945 until December 1947; 1,672 defendants were tried resulting in 1,416 convictions from 489 trials. The concentration camp trial portion involved 240 trials and 1,045 defendants from the ranks of personnel from the concentration camps at Dachau, Mauthausen, Flossenburg, Buchenwald, and Dora-Nordhausen. The Dachau trials were held concurrently with, but entirely separately from, the International Military Tribunal at Nuremberg (IMT) and the Nuremberg Military Tribunals (NMT). The IMT was established through quadripartite agreement (The London Agreement, 8 August 1945, followed by the more instructive London Charter) by representatives of the United States, the USSR, France, and Great Britain, for the purpose of trying war criminals whose offenses had no particular geographical location. Only one trial was conducted before the IMT. All twenty-two major war criminals were top German, Nazi, or military leaders. Nineteen were convicted, three acquitted. Twelve of the nineteen

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[12] *Conduct of the Ilse Koch War Crimes Trial: Interim Report of the Investigations Subcommittee of the Committee on Expenditures in the Executive Departments*, (Washington DC: United States Government Printing Office, 1948), 3.

[13] Statistics for full trial programmes found in the US Senate's *Conduct of the Ilse Koch War Crimes Trial: Interim Report*, 3-4. For the Pacific trials see Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (The University of Kentucky, 2001) and John W Dower's Pulitzer prize winning book, *Embracing Defeat: Japan in the Wake of World War II* (New York: WW Norton and Company and New Press, 1999).

were sentenced to death, three to life imprisonment, and four to lesser imprisonment for varying terms of years. Additional Nazi war criminals were tried at Nuremberg before 'courts appointed by the United States military governor and composed of civilian judges',[14] the Nuremberg Military Tribunals (or, more commonly, the 'Subsequent Nuremberg Trials'). Twelve cases were tried with 177 men indicted; 97 were convicted and twelve men were sentenced to death. The cases, in chronological order, are known as (1) The Medical (or Doctors') Case, (2) The Milch Case, (3) The Justice Case, (4) The Pohl Case, (5) The Flick Case, (6) The I.G. Farben Case, (7) The Hostage Case, (8) The RuSHA Case, (9) The Einsatzgruppen Case, (10) The Krupp Case, (11) The Ministries Case, and (12) The High Command Case.[15] A small number of trials of war criminals by military courts took place in Rome, Italy, where fourteen defendants were tried in nine cases; eleven convictions and seven death sentences were imposed.

The rules that governed the courts at Dachau built upon precedent established in American and 'customary' international military law, not in the London Charter adopted for the International Nuremberg Tribunal. The new indictments of 'crimes against the peace' and 'crimes against humanity' were not found in the charges at the Dachau courts. There was no overt coordination between the jurists at Nuremberg and those at Dachau, although some attorneys worked at both sets of trials. When Benjamin Ferencz, a war crimes investigator for the Dachau trials and the lead prosecutor for the '*Einsatzgruppen* Trial' at Nuremberg (NMT), was asked about the relationship between the trials at Dachau and the trials at Nuremburg he replied, 'Nothing. You can't compare the two. Comparing the trials at Dachau to the trials at Nuremberg is not like comparing even apples to oranges. It's like comparing apples to trucks'.[16] The Dachau tribunals warrant a full scholarly study in their own right because they: (1) represent the largest attempt by the United States to punish Nazi crimes committed at the concentration camps liberated by the Americans and thus add a significant story to the study of postwar Germany and the transitional postwar justice programmes happening there and (2) the Dachau trials have the potential to

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[14] *Conduct of the Ilse Koch War Crimes Trial: Interim Report*, 4.

[15] See Kim C Primel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (New York: Berghahn, 2012).

[16] Interview of Tomaz Jardim, 'Rough American Justice: Interview with Tomaz Jardim on the Mauthausen Trials' on historynewsnetwork.org, October 2012. Accessed 31 July 2015.

make an intervention, a correction, in the prevailing historiographical literature in American war crime policy and adds to the development of the concept of human rights and transitional justice in the postwar era.

Despite the fact that Nuremberg and the Holocaust play an enormous role in human-rights literature even in the most celebrated and authoritative accounts, such as Elizabeth Borgwardt's *A New Deal for the World*, Samuel Moyn's *The Last Utopia*, Mark Mazower's *No Enchanted Place*, and Bradley's *The World Reimagined*, the Dachau trials are ignored.[17] Some historians, such as Elizabeth Borgwardt, see Nuremberg as a moment in the genesis for a global human rights discourse; others such as Moyn and Mazower, argue that the importance of Nuremberg and the Holocaust have been grossly exaggerated; while others still, such as Mark Bradley, try to split the difference. These four major books are all emblematic of a massive amount of additional literature on the early genesis of human rights, all of which affords little to no recognition of the Dachau trials.

The Dachau trials were much larger and more extensive than either set of Nuremberg trials. In the following chapters, the Dachau trials will reveal themselves to be much more politically cautious and legally conservative in that they were more respectful of state sovereignty, less attuned to the emergence of ideologies about genocide and crimes against humanity, run along narrower, traditional lines of military justice, and more conducive to clemency during review. Thus, the Dachau trials were a better fit with the temperament of world politics until the 1970s-80s than the burgeoning human rights movement. Yes, norms were in the midst of changing, but they did not change quickly or comprehensively. Like Moyn and Mazower, the Dachau trials proved a sceptical reading of human rights history. Where the IMT was, arguably, more novel and transformative, the Dachau trials were more conservative and practical with their foundation in legal precedent and the more firmly established conventions of laws governing war.

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[17] Elizabeth Borgwardt, *A New Deal for the World: America's vision for Human Rights* (Cambridge, MA: University of Harvard Press, 2005); Akira Iriye, Petra Goedde, William I. Hitchcock (eds.) *Nuremberg in The Human Rights Revolution: An International History* (Oxford: Oxford University Press, 2012); Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press, 2012); Mark Mazower, *No Enchanted Place: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2013); Mark Bradley, *The World Reimagined: Americans and Human Rights in the Twentieth Century (*Cambridge: Cambridge University Press, 2016).

Indeed, the Dachau trials occupy a unique place in the programmes of justice put together by the Allies because they operated under military law and had the established focus of meting out 'swift, certain and adequate punishment' of 'organized crime against civilization and humanity'. Early documents, like the Geneva Conventions and Kellogg-Briand Treaty allude to human rights, and the American prosecutors at Dachau in particular, may have felt they were extending and expanding the definitions of 'aggressive war' and 'crimes against peace' highlighted in these documents. However, they also felt strongly about maintaining precedence for the trials in the 'customary' international military law and prior American cases. Thus the Dachau Trials focused along the more traditional and conservative lines of military justice. The push of human rights did, however, seemingly move Congress to mount a full review, discussed later in this thesis, of the Dachau trial programme, based on the need assure the legality of the trials and to protect and validate the defendants' rights, after the defendants in the Malmédy trial claimed they had been tortured for their confessions.

Some scholars argue that the international political, economic, social and judicial systems were impacted by the planners of the New Deal and inheritors of the Bill of Rights. Borgwardt, for example, believed that the ideals of the New Deal—its emphasis on improving the social welfare of all people—directly impacted the social engineering of a new world order that transcended national boundaries, found in the ideals outlined in the Atlantic Charter, Bretton Woods Agreements, United Nations Charter (Dumbarton Oaks Agreements) and the Nuremberg Charter. The Nuremberg Charter in many ways laid out a path to transitional justice by which people could move from violence and repression to a more stable society and political order. However, these transitional justice principles, like Truth Commissions, repatriation programmes and institutional reforms did not fully flower until the later part of the century—in places like Chile (1975), Argentina (1983) and South Africa (1995). This is similar to the arguments of most of the contributors to *The Human Rights Revolution* (2012), who, as a group, looked at human rights legislation emerging out of World War II, including the UN Declaration of Human Rights, the International Military Tribunal, the Geneva Conventions, and the later expansion of human rights

activity in the 1970s.[18] Other historians, like Samuel Moyn in *The Last Utopia,* have argued that the Nuremberg Trials were not an accurate starting point for the modern human rights movement and that it arose much later, as a response to the disillusionment with anticolonial independence struggles in the 1950's and 1960's, and the emphasis of President Jimmy Carter on human rights in United States foreign policy. This is more in line with Mazower (*No Enchanted Place* 2013), whose history of the early UN emphasises its connections of the British Empire and 'imperial internationalism' – not the burgeoning human rights movement.

The Dachau concentration camp trials, and indeed all the trials held at Dachau, remain relatively unknown today, as very little has been written and published about them. Even Harold Marcuse's thorough study of Dachau from 1933 to 2001, *Legacies of Dachau*, barely mentioned the United States military trials held there, noting only that 'except for trial transcripts, very little is known about these trials'.[19] While a few published sources are available on the Malmédy Massacre trial and some of the other 'Fliers cases' tried at Dachau,[20] so little has been written on the concentration camp trials at Dachau, that all books dedicated solely to the study of one or more of these trials can be discussed below.

The most thorough academic study of the Dachau trial programme is Frank Buscher's *The United States War Crimes Trial Program, 1946-1955*.[21] In his book Buscher studied the entire American postwar trial programme in Germany and analysed its connections to denazification policy and the emerging West German state in the American zone of occupation in Germany. He argued that while 'for historians and legal scholars, the IMT proceedings were significant because of their precedent setting nature' it was the US army 'which was most active in bringing war criminals

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[18] Akira Iriye, Petra Goedde, William I. Hitchcock (eds.) *Nuremberg in The Human Rights Revolution: An International History* (Oxford University Press, 2012).

[19] Harold Marcuse, *Legacies of Dachau: The Uses and Abuses of a Concentration Camp, 1933-2001* (Cambridge: Cambridge University Press, 2001), 70.

[20] There are two excellent published Malmédy trial sources: James J. Weingartner's *A Particular Crusade: Willis M Everett and the Malmedy Massacre* (New York: New York University Press, 2000) and *Crossroads of Death: The Story of the Malmedy Massacre and Trial* (University of California Press, 1979). The most comprehensive Fliers trial source is Gregory A Freeman, *The Last Mission of the Wham Bam Boys: Courage, Tragedy, and Justice in World War II* (New York: St. Martin's Griffon, 2012).

[21] Frank M Buscher, *The US War Crimes Trial Programme in Germany, 1946-1955* (New York: Greenwood Press, 1989).

to justice…they dealt with almost 90% of all defendants in the American zone'.[22] Buscher's study concentrated primarily on the postwar period and 'the post-trial treatment of war criminals as a judicial and political problem'.[23] When writing about the trials themselves, Buscher focused most of his examination on the politics surrounding the trials, particularly American and German diplomacy, rarely concerning his work with events themselves inside the Dachau courtrooms. He took no particular interest in the concentration camp trials. The majority of his book was focused on what happened in the years after the trials were concluded at the end of 1947, in which he argued that the pressures of the emerging Cold War affected the American commitment to continuing prosecution and imprisonment of Nazi criminals.

Tomaz Jardim has written an excellent study of one of the Dachau concentration camp trials, the first Mauthausen 'parent trial'.[24] He began by arguing that the famous International Military Tribunal, which 'has received the benefit of extensive research', was only one of 'three distinct paths the United States followed in bringing Nazi perpetrators to justice at war's end'.[25] The other two 'paths' were the Nuremberg Military Trials and the trials at Dachau. He used most of his book to look at the testimony given in the Mauthausen 'parent trial' to both 'shed light on the motives, justifications, and worldviews of common concentration camp personnel' and to provide 'a venue in which more than one hundred victims of Nazi persecution could both tell their stories and participate in the prosecution of their former oppressors'.[26] Jardim concluded that American military justice at Dachau was well intentioned but harsh and uneven, and was heavily influenced by the emerging Cold War politics. The disadvantage of Jardim's work is that he looked at only one set of trials, which took place over a very limited period of time: January 1946-March 1946.

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[22] Ibid., 2.

[23] Ibid., 2.

[24] Tomaz Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge MA: Harvard University Press, 2012). 'Parent trial' can be defined as the first trial for a camp (Dachau 'parent trial', Mauthausen 'parent trial', etc.). In general the parent trials took the longest to try as they introduced evidence of the camps conditions for the first time. 'Parent trials' had the most defendants and arraigned the highest ranking or most notorious defendants. Other trials for that camp are called 'subsequent trials.'

[25] Jardim, *The Mauthausen Trial,* 1.

[26] Jardim, *The Mauthausen Trial,* 4; Jardim, 7.

A third book that focused on the Dachau trials, this time particularly on the concentration camp trials, was written for a general audience by a film producer/director, Joshua Greene. Entitled *Justice at Dachau: The Trials of an American Prosecutor*, Greene's book was presented as the story of an American hero, William Denson, chief prosecutor of the 'parent trials' for Dachau, Mauthausen, Flossenburg, and Buchenwald, fighting against both the horrific crimes of the Nazis and a lack of resources and commitment from the American army and government. The book said very little about the trials relating to POWs and downed airmen, and instead told the story of the Dachau trials as a 'David versus Goliath' epic, one man versus the perpetrators of the Holocaust. Greene's primary purpose was to tell a good story, and, while researched using Denson's personal papers (available for the first time for this book)[27], he took liberties with the source material, for example misquoting the Congressional Senate reviews to make them more dramatic.

Chief Prosecutor William Denson published a long brochure, through his law firm, written almost 50 years after these events, entitled *Justice in Germany: Memories of the Chief Prosecutor*.[28] It was a very small original edition and is now out-of-print, thus rarely cited.[29] The brochure was full of excellent photographs, but had little text, and it covered only basic information about the trials. Elisabeth Yavnai, now a staff member at the United States Holocaust Museum and Memorial, wrote an unpublished dissertation on the subject of the American trials at Dachau, and had two chapters published on the subject, both containing short overviews of the war crimes trial programmes and the briefest of introductions to some of the issues surrounding the trials.[30] The major drawback of her work was that it focused on the trials solely

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[27] After Greene finished his book, *Justice at Dachau: The Trials of an American Prosecutor* (Broadway Books, 2003), the papers (and his notes) were deposited in Yale University Archives and are now available to any researcher.

[28] William Denson, *Justice in Germany: Memories of the Chief Prosecutor* (New York: Meltzer, Lippe, Goldstein, Wolf, Schlissel & Sazer, P.C, 1995)

[29] It is available at Yale University Manuscript Archives in the William Denson Papers.

[30] 'Military Justice: The U.S. Army's Investigation and Prosecution of Nazi War Criminals in Germany 1944-1947', Ph.D. Dissertation, Department of International History, The London School of Economics and Political Science University of London, 2007; 'US Army War Crimes trials in Germany, 1945-1947' in Patricia Heberer and Jugen Matthaus (eds.) *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (University of Nebraska, 2008), 49-71; 'Military Justice: War Crimes Trials in the American Zone of Occupation in Germany, 1945-1947' in Herbert R Reginbogin (ed.), *The Nuremberg Trials: International Criminal Law since 1945* (Munich: KG Saur, 2006), 191-195.

through the lens of the Holocaust. Yavanai suggested that legal limitations restricted the scope of the trials and thus the history of the Holocaust presented in the courtroom was distorted. In her published work, she neglected to explain why the American army chose to keep the scope of the trials limited. Her work focused on what the trials failed to do, not what they did or aimed to do.

There are three books about the Dachau trials that can be largely discounted due to their non-academic and biased nature. Fern Hilton, a playwright, took a handful of defendants and studied their personalities as revealed through the documentation of their trials.[31] She was selective about which defendants she choose, often posing them in a positive light – each man is an ill-fated, tragic protagonist. She wrote that each of the defendants 'have something to teach us about World War II-era Germany and the tragedy that grew out of the German culture of that time'[32]; thus repeating the outdated argument that German culture was to blame for the Holocaust. There are two non-academic condemnations of the Dachau trials: Joseph Harlow's vehemently negative book, *Innocent at Dachau* (1993), and Herbert Gebers' personal account, *I Was a Prisoner of War: POW War Crimes Trial in Dachau* (1971). Both were recently reissued by the Holocaust-denial advocacy organization, the Institute for Historical Review. Neither author offered defensible historical arguments.

German historians began to grapple with the history of the criminal prosecution of NS criminals more intensely in the 1980s, though this was concentrated overwhelmingly on the time period after the founding of the Federal Republic of Germany and the German Democratic Republic when the role of NS trials within the German-German system conflict became the main point of interest.[33] In the few works focusing on trials prior to 1949, the Allied military trials appear as one facet of international prosecution politics shortly before and after the end of the Second World War or as a precursor to the International Military Tribunal.[34]

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[31] Fern Overbey Hilton, *The Dachau Defendants: Life Stories from Testimony and Documents of the War Crimes Prosecutions* (London: McFarland and Company, Inc, 2004).

[32] Hilton, *The Dachau Defendants,* 7.

[33] For more on this see John Cramer, *Belsen Trial 1945: Der Lüneburger Prozess gegen Wachpersonal der Konzentrationslager Auschwitz und Bergen-Belsen* (Göttingen: Wallstein Verlag, 2011).

[34] For example, Gerd R. Ueberschär (ed.), *Der Nationalsozialismus vor Gericht. Die allierten Proozesse gegen Kriegsverbrecher und Soldaten 1943-1952 (Frankfurt: Main 1999)*. Despite

Robert Sigel's, *Im Interesse der Gerechtigkeit,*[35] was a pioneering study about the American military trial against Dachau personnel. Sigel argued that the Allies developed the process of trials in order to help shape postwar Germany by prosecuting the Nazi elite down to the lowest foot soldier, although ultimately the American goal failed because of obstacles put up against them by the political situation in the US and Europe. His book draws heavily on the Dachau 'parent trial', incorporating little empirical information or analysis of the subsequent trials. This focus on the Dachau parent trial (to the detriment of the hundreds of subsequent trials) is also a problem that plagues Holger Lessing's *Der erste Dachau Prozess (1945-1946).*

Other German scholars focused on the IMT part of the programme, with some of the authors looking at specific Dachau trials in order to highlight poor judicial practices, the ignoring of evidence, and questionable jurisdiction on the behaviours of honourable soldiers who followed superior orders. German historians, writers and politicians, in general, viewed the trials as *Siegerjustiz* ('victor's justice'). This is congruent with the views of contemporary Germans who pushed back almost immediately on the unlawfulness of the trials. German defense attorneys often claimed that the non-signing of various international pacts, like the 1929 Geneva Convention, by certain Allied governments made the war crime trials moot since they were operating outside lawful agreements. Furthermore, the 'common design' or criminal conspiracy basis for prosecution was seen as *ex post facto law*, created after events had occurred. Charles Wyzanski, in the April 1946 issue of *The Atlantic*, stated that Germans, in general, were neither interested in nor persuaded by these proceedings, which they regarded as partisan. They saw the proceedings 'not as marking a rebirth of law in Central Europe, but as a political judgment on their former leaders'.[36]

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its promising name, the book overwhelmingly addressed the main proceedings of the IMT as well as the subsequent NMT. A brief mention of the Dachau trials comes in a section entitled 'Further Allied Trials' and is no more then a cursory glance at the Dachau 'parent trial.'

[35] Robert Sigel, *Im Interesse der Gerechtigkeit. Die Dachauer Kriegsverbrecherprozesse 1945-1948* (Frankfurt: Main 1992)

[36] Charles Wyzanski, *The Atlantic*, April 1946. He argues that the document dissolving the German government in June 1945 gave 'supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority' did allow the victorious powers ample room to mete out justice.

A few German historians have also written about specific parts of the Dachau trial programme to highlight a variety of characteristics of the trials. Robert Sigel saw the Dachau trials as an *Orienterungsmarke*—an orientation point –for the start of legal pursuits against National Socialists and the beginning of trying to end German militarism and 'aggressive' war.[37] Ludwig Einer, along with Sigel, studied how the jurisdiction for the trials was restricted to crimes against Allied personnel after 1941 and how that particularly impacted the concentration camp guards.[38] Florian Freund focused on the Mauthausen parent trial.[39] He argued that the defendants at the trial pleaded not guilty, down played the severity of their actions ('just following orders') and tried to strengthen the belief that Austria was the first victim of National Socialism—Mauthausen was a 'German Problem', not an Austrian one. Rudolf Schlaffer studied the Flossenberg parent trial and asked if the possibilities and limits of the trial could ever correctly help the Allies create 'justice'.[40] Martin Gruner challenged the legality of the trials, the jurisdiction of the Allies and specifically highlighted the Alex Piorkowski trial, which dramatically showed the chronic disparity of treatment between the prosecution and defense around evidence and judicial procedure.[41] While all of these works are valuable for their individual insight, they only cover small portions of the trials at Dachau – not the entire programme. This limited scope, particularly if chosen to prove a specific point or support a single argument, can thus limit the generalizability of the analysis and arguments presented.

It is worth noting that this thesis focused on the American dimension of the story of the Dachau trial programme. In a broad sense it is an exploration of the American foreign relations and associated legal history that surrounded these trials. Given this premise, occupied Germany represented a backdrop for examining the views and actions of the Americans. It was driven in part by the desire to focus on the American perspective. Furthermore, the surviving transcripts contained little of the

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[37] Ludwig Einer and Robert Sigel (eds.), *Dachau Prozesse. NS-Nerbrechen vor amerikanischen Militärgerichten in Dachau 1945-1948.* (Verfahren Ergebnisse: Nachwirkungen 2007)
[38] Ibid.
[39] Florian Freund, "Der Lachauer Mauthausenprozess' in *Dokumentationsarchiv des österreichischen Widerstandes* (Jahrbuch, 2001) 35-66.
[40] Rudolf Schlaffer, *GeRechte Shüne? Das Konzentrationslager Flossenbürg: Möglichkeiten und Grenzen der nationalen und internationalen Strafverfolgung von NS-Verbrechen* (Verlag Dr. Kovac; Auflage: 1. Aufl, 2001)
[41] Martin Gruner, *Verurteilt in Dachau. Derprozess gegen den KZ-Kommandanten Alex Piorkowski vor einem US-Militärgericht* (Wißner-Verlag; Auflage: 1., Aufl., 2008)

defendants' voices – they rarely testified in statements to defend themselves – and when on the stand being questioned, their replies went through a convoluted series of translators in order to be recorded by the court. Translators were limited so the courts worked with what local citizens, or camp survivors, they could find. Often a question to the defendant (or witness, for that matter) as well as the subsequent reply would need to go through two or three translators, for example German to Polish to English. This was not only tedious for those involved in the trial but also distorted the true German voice on the written record.

The trials at Dachau represented the best attempt by the United States to punish Nazi crimes committed at the concentration camps liberated by the Americans. When compared to the other American trials, the prosecutors at Dachau tried the most defendants, 1,045, who were responsible for conditions in the concentration camps. These men were arraigned using established 'laws of war' as understood through customary international and American military practices. Still, the Dachau trials had flaws, particularly reflecting the strain of using American and 'customary' international military law to prosecute the unprecedented crimes in the Nazi concentration camps. Furthermore, the concentration camp trials were an amalgamation of two opposing ideas, argued passionately between the followers of hard-liner U.S. Treasury Secretary Henry Morgenthau Jr. and the more lenient U.S. War Secretary Henry Stimson, of what should be the appropriate American reaction to Nazi crimes committed during the Second World War. Born of these tensions, the Dachau concentration camp courts, although taken predominantly from traditional military law, included an inventive legal concept: the use of a 'criminal-conspiracy' charge –arraigning defendants for participating in the 'common design' of the concentration camp, which was defined as 'a criminal organisation'. Finally, additional challenges were associated with the post-trial period, as American lawmakers had spent a good deal of time focused on the problem of how to begin the trials (What charges What courts? Which defendants?) and very little time planning for the aftermath of the trials.

Reporters and the public followed the postwar trials in Europe only for a short time. As early as 1946, the general public, and the politicians who represented them, grew weary of the Nuremberg and Dachau trials; for, as one scholar argued, 'having constantly to confront the awful evidence may have helped to bring about the dramatic wane in concern over war crimes prosecutions that began to appear as the

trial of major war criminals at Nuremberg dragged on'.[42] The winding up of the trials in 1947 and 1948, in the face of growing tensions between the United States and the Soviet Union, revealed the major problem with the Dachau trials; namely the lack of long term plans for the appellate process for those convicted. After two scandals (the Ilse Koch sentence reduction and Malmédy accusations) that captured the press and the public's attention, the United States Senate held two reviews of the entire Dachau tribunal programme. Although these reviews, while critical of the Army's review process, were largely positive about the trials themselves, the Dachau trials faded from public memory.

The Dachau trials have been overshadowed by the extensive study of the famous Nuremberg Trial (IMT).[43] The IMT became a precedent-setting example for new ideas of international law and helped lead to the Universal Declaration of Human Rights and The Convention on the Prevention and Punishment of the Crime of Genocide (part of the Geneva Convention) in 1948, and, eventually, the International Criminal Court.[44] By contrast, the military trials at Dachau are the proverbial 'road-

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[42] Robert H. Abzug, I*nside the Vicious Heart: American and the Liberation of Nazi Concentration Camps* (Oxford: Oxford University Press, 1985), 171.

[43] The list of academic studies on the IMT is inexhaustible. The major full-length overviews of the trial that also discuss its precedent setting effect on international law include: G. M. Gilbert, *Nuremberg Diary* (New York: Farrar, Straus, 1947); Telford Taylor, *The Anatomy of the Nuremberg Trials* (Boston: Little, Brown and Co., 1992); Robert Woetzel, *The Nuremberg Trials in International Law* (London: Stevens; New York: Praeger, 1960); Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Viking, 1994); George Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Boston: M. Nijhoff , 1990); Robert Conot, *Justice at Nuremberg* (New York: Harper & Row, 1983); Hilary Gaskin, *Eyewitnesses at Nuremberg* (London: Arms and Armour Press, 1990); Ann Tusa and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984); Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York: A. A. Knopf, 1946); Peter Calvocoressi, *Nuremberg* (New York: MacMillan, 1948); Victor Heine Bernstein, *Final Judgment: the Story of Nuremberg* (New York: Boni & Gaer, 1947); American Bar Association, Section of International and Comparative Law Section, *Nuremberg revisited: The Judgment of Nuremberg in today's world* (S.l.: s.n., 1970); Airey Neave, *Nuremberg: A Personal Record of the Trial of the Major Nazi War Criminals in 1945-1947* (London: Grafton, 1989); John Hartman Morgan, *The Great Assize: An Examination of the Law of the Nuremberg Trials* (London: J. Murray, 1948); Alfons Klafkowski, *The Nuremberg Principles and the Development of International Law* (Warsaw: Zachodnia Agencja Prasowa, 1966); Robert H Jackson, *The case against the Nazi War criminals. Opening statement for the United States of America* (New York: A.A. Knopf, 1946) and *The Nürnberg Case* (New York: Alfred A. Knopf, 1947).

[44] See Judge Philippe Kirsch, President of the International Criminal Court, 'Applying the Principles of Nuremberg in the ICC', Keynote Address at the Conference 'Judgment at Nuremberg' held on the 60th Anniversary of the Nuremberg Judgment, Washington University, St. Louis, USA, 30 September 2006; Tove Rosen (ed.) *The Influence of the*

not-taken'. Furthermore, the clemency during the 1950s of those convicted in the trials make it too easy to conclude the Dachau trials were a failure.

Most meta-arguments about whether or not postwar justice was fair or successful are almost exclusively based on extensive study the IMT.[45] My study affects these arguments by introducing a different set of trials into the debate. A thorough analysis of the Dachau trials makes it possible to discuss a distinctly American postwar justice, putting this thesis more in line with studies of national responses to Nazi criminality, which were by far the majority of trials in the postwar era.[46]

Nuremberg Trial on International Criminal Law (Available at the Robert H. Jackson Center and online at roberthjackson.org); Philippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003)

[45] See above list of sources on the IMT.

[46] The first source for the study of postwar national trials is *The Law Reports of the Trials of War Criminals,* prepared by the United Nations War Crimes Commission published in London in 15 volumes from 1947-1949, which summarizes the more important proceedings taken against war criminals in national or occupation courts. The *Law Reports* chronicles some trials by the Americans (Germany, Italy and the Far East), France (within the country and in their occupied zone), the UK (in Germany, Holland, and Italy), Norway, Canada (in Germany), Poland, and The Netherlands. For an overview of trials from France, Norway, Czechoslovakia, Hungry, Finland, Bulgaria, and Greece see John Laughland, *A History of Political Trials: From Charles I to Saddam Hussein* (Oxford: Peter Lang, 2008). Michael J. Bazyler and Frank M. Tuerkheimer's *Forgotten Trials of the Holocaust* (New York: NYU Press, 2014) covers trials in Russia, Poland, France, and British-occupied Germany among others. For Russia: *People's Verdict: A Full Report of the Proceedings at the Krasnodar and Kharkov German Atrocity Trials* (London: Hutchinson & Co., Ltd., 1944); 'The Sachsenhausen Trials: War Crimes Prosecutions in the Soviet Occupation Zone and in West and East Germany' in Patricia Heberer and Jürgen Matthäus (eds.) *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln, NE: University of Nebraska Press, 2008); George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial* (Boston: M. Nijhoff, 1996). For the UK: Raymond Phillips, *The Belsen [Bergen-Belsen] Trial (Josef Kramer and Forty-Four Others)* (London: William Hodge and Company, Limited, 1949); Ulf Schmidt, '"The Scars of Ravensbrück": Medical Experiments and British War Crimes Policy, 1945-1950' in Patricia Heberer and Jürgen Matthäus (eds.) *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln, NE: University of Nebraska Press, 2008); discussions in Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001). For Austria: Patricia Heberer, 'Justice in Austria Courts?: The Case of Josef W. and Austria's Difficult Relationship with Its Past' in Patricia Heberer and Jürgen Matthäus (eds.) *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln, NE: University of Nebraska Press, 2008).

For France: Richard J. Golsan, 'Crimes-against-Humanity Trials in France and their Historical and Legal Contexts: A Retrospective Look' in Patricia Heberer and Jürgen Matthäus (eds.) *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln, NE: University of Nebraska Press, 2008).

As for the contemporary applications of the Dachau trials, despite historical neglect, the legal legacy of the Dachau trials remains relevant today. The American 'War on Terror' has produced another series of trials run by military commissions, held at Guantanamo Bay. The 'laws of war' serve as 'the basis for the criminal prosecution of al-Qaeda members and associated forces in military commissions'.[47] President George W. Bush created the military commissions in 2001 to try foreign nationals; under his administration thirteen defendants were charged. When President Barack Obama took office, he continued the use of military commissions and announced the detainees would be charged with violations of the laws of war.[48] Although Attorney General Eric Holder attempted to transfer the case of four men charged with organizing the 9/11 attacks to a federal court in New York City, due to massive public backlash, the men remain in the jurisdiction of the military commissions.

As Tomaz Jardim recently wrote,

> Criticism [of the military trials at Guantanamo] is often couched in terms of contrasting the Guantanamo hearings to Nuremberg. These critics sketch out a narrative in which they say that, after the Second World War, the United States rose to the occasion with Nuremberg and illustrated that even perpetrators responsible for the most horrific crimes would have received the benefits of a full and fair trial and that was the legacy of American justice in the wake of the Second World War, and therefore Guantanamo is a gross deviation from an otherwise noble course. If you understand the Mauthausen trial and the Dachau trial system, you realize that's not true at all. In fact, Guantanamo Bay is very much in keeping with how the United States has dealt with the vast majority of war criminals in the past.[49]

Both the Dachau tribunals and the Guantanamo Bay trials locate their legal precedence in the 'laws of war' (and the Supreme Court case *Ex parte Quirin*)[50].

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[47] John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 372.

[48] Human Rights Watch (hrw.org). retrieved 7 August 2016.

[49] Interview of Tomaz Jardim, 1 October 2012, The George Washington University, Columbian College of Arts and Sciences: History News Network.

[50] As will be discussed in following chapters this was a case in which the Supreme Court of the United States was upheld President Roosevelt's order to try eight German saboteurs by military commission in 1942.

Today, the 'laws of war' have, once again, found their way to the forefront of American policy towards war criminals. Although there are absolute differences between the courts for Guantanamo Bay and the Dachau courts, the Dachau trial programme takes on a new relevance in this context.

This dissertation will study the Dachau concentration camp trials, the successes, and the drawbacks, in their full historical context through the examination of secondary and primary sources including archival material primarily from the National Archives and Records Administration (Washington DC and College Park, MD), the National Archives (Kew, UK), the United States Holocaust Memorial Museum archives (Washington DC), and Manuscripts and Archives at Yale University (New Haven, CT). The thesis engages particularly deeply with the Dachau trial records and William Denson's personal papers (housed at Yale University). While certain scholars have engaged with parts of these archival materials to analyse one trial or one aspect of the postwar trials, this narrow analysis has led to conclusions that may not be generalizable or apply to the entirety of the American postwar trial programme. This thesis will combine and analyse large selections from these archives in a more comprehensive way, giving a broader and farther-ranging picture of the American postwar trial programme in Germany. This thesis' methodical analysis of recorded sentencing data is unique and allows the analysis, in part, to account for the greatest void in the archival materials – the lack of written judicial decisions.

The following chapter (1) explores the 'United Nations' (the formal name of the Allies) wartime rhetoric promising retribution for Nazi crimes and the divisions between the U.S., U.S.S.R., and Great Britain over what form punishment for war criminals should take. Additionally, this chapter offers a brief introduction to the history and crimes in the concentration camps at Dachau, Mauthausen, Flossenbürg, Buchenwald and Dora-Mittelbau (sometimes called Nordhausen). Chapter 2 focuses on the development of the American war crimes tribunals from the fall of 1944 through the summer of 1945, and the search for legal precedents for punishing Nazi crimes. The chapter recounts arguments between those in the American government who favoured a tough policy towards defeated Germany (led by Secretary of the Treasury, Henry Morgenthau Jr.) versus those who argued for a more lenient policy (led by Secretary of War, Henry L Stimson). Chapter 3 introduces the whole of the military tribunal programme at Dachau as well as the concentration camp trials themselves.

Chapter 4 explores a number of interesting aspects that presented themselves throughout the 'parent trials', including legal arguments as they played out in the courtroom. The chapter finishes with an exploration of the press and politics in the courtroom in two case studies. Chapter 5 follows the changing American policy towards occupied Germany in light of tensions with the Soviet Union, which led to a policy of clemency for former Nazi criminals. It explores in-depth the review process of the Dachau trials, which took the place of an appellate process. In the wake of two scandals involving the Dachau trial programme, two U.S. congressional reviews were held. The chapter concludes with a discussion of the reports of these two reviews. The dissertation closes with a discussion of the successes of the Dachau trials.

Chapter 1: Rhetoric and Reality: The Nazi Concentration Camps and The United Nations' Wartime Policy

Throughout the war, the allies of the United Nations,[51] particularly the US, USSR, and UK had used rhetoric to define the war in legal tones: the Nazis and their actions were criminal and needed to be brought to justice by the Allies. After making promises throughout the war, the actual practicalities of using international law to punish the worst of the Nazi crimes, including those committed in the concentration camps, was unresolved. Although united by multiple promises to punish Nazi crimes, for most of the war the Allies remained divided over what form justice should take: swift and summery executions? Political trials? Military tribunals? This chapter looks at the wartime rhetoric as well as the realities of crimes committed in the concentration camps (with specific focus on the concentration camps which would become the subject of American prosecution at Dachau).

A. An Overview of the Concentration Camp System

The Nazi concentration camp system began at a makeshift camp in an old munitions plant at Dachau, about ten miles from Munich. Initially the camp held 4800 inmates. The first prisoners of the concentration camps, including Dachau, were political prisoners who had resisted Hitler's rise to power – Communists and Social Democrats, along with other left-wind activists and journalists.[52] The camp system was 'wild' and decentralized as German police, the SS, and the SA arrested alleged subversives *en masse*. By 1934, 'the function of political repression had been taken over by the police, the courts, and the regular state prisons and penitentiaries'[53] and the concentration camp population dropped. The camp system, starting with Dachau, was centralized under the control of *Reichsführer* Heinrich Himmler and the SS; 'it

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[51] The United Nations was the formal title of the Allies. These terms are used interchangeably.

[52] See essays in Michael Berenbaum (ed.), *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (New York: New York University Press, 1990) including 'Non-Jewish Victims in the Concentraion Camps by Konnilyn Feig, and 'Pacifists during the Third Reich' by Gordon C Zahn.

[53] Richard J Evans, 'The Anatomy of Hell', *New York Times Review of Books*, 9 July 2015. See Nikolous Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven, CT: Yale University Press, 2004).

was the approach pioneered here –with both the political police (in charge of arrests) and the SS (in charge of the camp) united in Himmler's hands—which was soon extended to the whole Reich'.[54]

SS Lieutenant General (*Gruppenführer*) Theodor Eicke, commandant of the Dachau camp from the summer of 1933 to the summer of 1934, became the Inspector of Concentration Camps (*Inspekteur der Konzentrationslager*). Eicke used his experience at Dachau to introduce a model system to the entire camp system including, 'the organizational structure with separate administrative departments; the formal division of SS men into those stationed around the camps perimeter and those inside; draconian camp regulations and punishments such as whippings; and the creation of a professional corps of SS jailers'.[55] In 1935, Dachau became the primary training centre for SS concentration camp guards.

The character of Dachau, particularly its inmate population, changed rapidly through the years. Soon after its foundation, Dachau became the central Bavarian camp for police custody. After the Anschluss, Dachau was the holding place for many prominent persons including the deposed mayor of Vienna Richard Schmitz, the sons of Archduke Franz Ferdinand Ernst and Maximilian Hohenberg – whom the other prisoners referred to as 'Your Royal Highnesses'—and the last Chancellor of Austria Kurt Schuschnigg. The camp was expanded from 1937-1938 and the number of Jewish prisoners rose after *Kristallnacht* (10-11 November 1938). Dachau eventually incorporated thirty larger sub-camps that included over 30,000 prisoners. The main camp had a courtyard used for executions, thirty-two barracks and a prison block, along with support buildings. A crematorium and gas chamber were constructed in 1942; the gas chamber was never used as prisoners were sent to a euthanasia centre in Hartheim near Linz, Austria, along with inmates from Mauthausen and Buchenwald,

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[54] Nikolous Wachsmann, 'The Dynamics of Destruction,' *Concentration Camps in Nazi Germany: The New Histories*, eds. Nikolaus Wachsmann and Jane Caplan (London: Routledge, 2010), 21. There are many excellent sources that detail the beginnings of the camp system including discussions in Richard J. Evans, *The Coming of the Third Reich* (New York: Penguin, 2004) and Evans's *The Third Reich in Power* (New York: Penguin, 2005); Christian Goeschel and Nikolaus Wachsmann (eds.) *The Nazi Concentration Camps, 1933-1939: A documentary history* (Lincoln: University of Nebraska Press, 2012).

[55] Wachsmann, *KL*, 21. For in-depth accounts of the practice of administration of the concentration camps as a whole there are many excellent sources; in particular see Eugen Kogon. *The Theory and Practice of Hell: the German concentration camps and the system behind them* (New York: Berkeley, 1960); and Wolfgang Sofsky, *The Order of Terror: the concentration camp* (Princeton: Princeton University Press, 1996).

to be killed if they were too weak to work.[56] Between 1933 and 1945, 188,000 inmates passed through Dachau.[57]

Over the next few years, Dachau remained, and more camps were established including Buchenwald (1937), Flossenbürg (1938) and Mauthausen (1939). By 1939, there were six concentration camps (and their subcamps) in the Greater German Reich – Ravensbrück, Sachsenhausen, Dachau, Flossenbürg, Buchenwald, and Mauthausen.

Opened in July 1937 near Weimar, Buchenwald was one of the largest concentration camps in Germany. Despite the later predominance of communist prisoners, most of the prisoners at Buchenwald were not political prisoners; they were 'asocials,' repeat criminals, homosexuals, Jehovah's Witnesses, Roma, and German military deserters.[58] After 1938, Jews made up a large proportion of the camp's population. Around 250,000 people passed through Buchenwald from July 1937-April 1945.[59] Buchenwald had eighty-eight subcamps, including the notorious Berga-Elster camp where 350 American POWs worked in horrendous conditions along with other inmates to build an underground munitions factory. At its peak population, in February 1945, the Buchenwald camp system held 112,000 prisoners. Among other sites, prisoners worked quarries, the Gustloff armaments works, and rail works, and at

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[56] See and Pierre Serge Choumoff, *Nationalsozialistische Massentötungen durch Giftgas auf österreichischem Gebiet 1940-1945* (Bucher, 2000).

[57] While there are many accounts of the concentration camps as a whole, for more on Dachau concentration camp specifically see Stanislav Zamecnik classic account *Das war Dachau*; Harold Marcuse, *Legacies of Dachau: The Uses and Abuses of a Concentration Camp, 1933-2001* (Cambridge: Cambridge university Press, 2001); Wolfgang Benz and Barbara Distel (eds.), *Dachau and the Nazi terror 1933-1945* (Dachau: Dachauer Hefte, 2002); Paul Martin Neurath, *Die Gesellschaft des Terrors: Innenansichten der Konzentrationslager Dachau und Buchenwald* (Frankfurt am Main: Suhrkamp, 2004); Marcus Smith, *Dachau: The Harrowing of Hell* (Albany NY: State University of New York Press, 1995); Barbara Distel and Ruth Jakusch (eds.); *Concentration camp Dachau, 1933-1945*, trans. Jennifer Vernon (Brussels : Comité International de Dachau, 1978) 14 edition; Paul Berben, *Dachau, 1933-1945: the official history* (London : Norfolk Press, 1975); Sam Dann (ed.), *Dachau 29 April 1945: the Rainbow liberation memoirs* (Lubbock, TX: Texas Tech University Press, 1998); and the non-academic Fern Overbey Hilton, *The Dachau Defendants: Life Stories from Testimony and Documents of the War Crimes Prosecutions* (Jefferson, NC: McFarland & Company, 2004).

[58] Dan Stone, *The Liberation of the Camps: The End of the Holocaust and its Aftermath* (New Haven, CT: Yale University Press, 2015).

[59] Martian Broszat, 'The Concentration Camps 1933-1945', Helmut Krausnick, Martin Broszat, and Hans-Adolf Jacobsen (eds.), *Anatomy of the SS State* (London: Flamingo, 1968). Figures amended in Wachsmann, *Hitler's Prisons*, 395. Also see, Dina Porat, 'The Vilna Proclamation of January 1, 1942, in Historical Perspective', *Yad Vashim Studies*, 25(1996): 99-136.

the DAW (*Deutsche-Ausrüstungs-Werke*, German Equipment Works). Medical experiments were carried out on prisoners including testing vaccines and treatments against contagious diseases such as typhus and cholera. At least 56,000 male prisoners died at Buchenwald; they died from medical experiments, over-work, starvation, executions (shot or hanged), or were sent to be killed at Bernburg and other 'euthanasia' sites to be killed by injection.[60] The 6th Armoured Division liberated the camp on 11 April 1945.[61]

The first prisoners arrived at Flossenbürg, in northeastern Bavaria, in May 1938. The campsite was chosen partly because it was near a large granite quarry and the SS planned to use the inmate as forced labour to harvest the stone for building projects.[62] Later in the war, prisoners were used as forced labour in the Messerschmitt plant as well as in around one hundred sub-camps concentrated in the armaments industries.[63] By the end of 1938 the camp contained 1500 inmates. These inmates

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[60] Michael Burleigh, *Death and Deliverance: 'Euthanasia' in Germany, c.1900 to 1945* (Cambridge: Cambridge University Press, 1995), 220 - 229; Hans-Walter Schmuhl, *Rassenhygiene, Nationalsozialismus, Euthanasie: Von der Verhütung zur Vernichtung 'lebensunwerten Lebens', 1890–1945* (Göttingen: Auflage, Vandenhoeck & Ruprecht, 1992), 217-19; and Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill, NC: The University of North Carolina Press, 1997).

[61] Robert H. Abzug, *Inside the Vicious Heart: Americans and the Liberation of Nazi Concentration Camps* (Oxford: Oxford University Press, 1987); Harry Stein, 'Funktionswandel des Konzentrationslagers Buchenwald im Spiegel der Lagerstatistriken', Herbert et al. (eds.), *Die Nationsozialistische Konzentrationslager* (Wallstein, 1998), 167-92. For more on Buchenwald see, Kim Wünschmann, *Before Auschwitz: Jewish Prisoners in the Prewar Concentration Camps* (Cambridge MA: Harvard University Press, 2015); Lutz Niethammer, *Der gesäuberte Antifaschismus. Die SED und die roten Kapos von Buchenwald* (Berlin, 1994); Bill Niven, *The Buchenwald Child: Truth, Fiction, and Propaganda* (Suffolk, UK: Camden House, 2009); Walter Bartel (ed.), *Buchenwald-Mahnung und Verpflichtung: Dokumente und Berichte* (Deutscher Verlag der Wissenschaften, 1961); The Gedenkstätte Buchenwald (eds.), *Buchenwald concentration camp 1937-1945: a guide to the permanent historical exhibition* (Göttingen: Wallstein, 2004); Volkhard Knigge and Bodo Ritscher, *Totenbuch. Speziallager Buchenwald 1945–1950* (Weimar: Stiftung Gedenkstätten Buchenwald und Mittelbau Dora, 2003); and primary sources including: *Text of official report of Buchenwald atrocities: immediate release*, 29 April 29, 1945 (Washington, D.C.: War Department, 1945); David A. Hackett (ed.), *The Buchenwald Report* (Boulder: Westview Press, 1995); William Densen, et al., *An Information Booklet on the Buchenwald Concentration Camp Case: The United States of America* vs. *Josias Prince zu Waldeck et al., to be heard at Camp Dachau*, *Germany, 11 April 1947* (Dachau, 1947).

[62] See Paul B. Jaskot, *The Architecture of Oppression: The SS, Forced Labour, and the Nazi Monumental Building* (London: Routledge, 2000), 80-113.

[63] Paul G. Pierpaoli, 'Flossenbürg', *Modern Genocide: The Definitive Resource and Document Collection,* 4 col., eds. Paul R. Bartrop and Steven Leonard (Santa Barbara, CA: ABC-CLIO, 2014).

were mostly 'asocials' and repeat criminal offenders; very few Jewish inmates were at Flossenbürg until Hungarian and Polish Jews arrived in large numbers from August 1944 through the winter of 1945. Later from 1940 onwards, political prisoners and resistance fighters from Czechoslovakia, Poland, France, Germany, the Netherlands, and the Soviet Union, made up a large number of the prisoners. In late 1941, Flossenbürg received over 1700 Soviet prisoners of war, who were housed separately and singled out for particularly brutal treatment – nearly 1000 Soviet POWs were executed in 1941.[64] At the high point of the camp population in March 1945, Flossenbürg contained nearly 53,000 inmates in its main camp and subcamps.[65]

Mortality at the camp was high; out of an estimated 97,000 inmates who passed through Flossenbürg, approximately 30,000 died. Inmates died of starvation, disease, overwork, executed at 'euthanasia' centres, and were killed by shooting or hanging. On 15 and 20 April 1945 most of the remaining inmates were evacuated by the camp; almost 7000 of the most then 16,000 died in route.[66] Fewer then 7000 were left in the main camp and subcamps. Members of the 358th and 359th United States Infantry Regiments liberated Flossenbürg, and around 1500 inmates, on 23 April 1945.[67]

The concentration camp at Mauthausen was created in August 1938, in Upper Austria, near Linz, in conjunction with the German Earth and Stone Works Inc. (*Deutsche Erd-und Steinwerke, GmbHDESt*), a company founded by the SS to exploit the granite in the area.[68] The number of inmates increased rapidly from 300 in August 1938 to 2600 in December 1939. A majority of the inmates were convicted criminals, 'asocials,' political opponents, and Jehovah's Witnesses. It is estimated that over 197,000 prisoners 'passed though the Mauthausen camp system between August 1938

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[64] Ibid.

[65] Ibid. There are few books that deal solely with the history of the Flossenbürg camp. One is Wolfgang Benz and Barbara Distel (eds): *Der Ort des Terrors. Geschichte der nationalsozialistischen Konzentrationslager*: *Volume 4: Flossenbürg, Mauthausen, Ravensbrück* (C.H. Beck, 2006); Other descriptions of Flossenbürg are found in larger works on the concentration camps as a whole such as Nikolaus Wachsmann's *KL* and Raul Hilberg, *The Destruction of the European Jews* (New York: Holmes and Meier, 1962). Also see U. Herbert (ed.), *Europa und der "Reichseinsatz." Auslaendische Zivilarbeiter, Kriegsgefangene und KZ-Haeftlinge in Deutschland 1938–1945* (Essen: Klartext, 1991).

[66] Wachsmann, *KL*. See also Richard J. Evans, *The Third Reich at War,* 692-693.

[67] Robert H. Abzug, *Inside the Vicious Heart*, 80.

[68] Paul B Jaskot, *The Architecture of Oppression,* 80-113.

and May 1945' and at least 95,000 died there.[69] Mauthausen camp was the home to a notoriously deadly set of steps: inmates were forced to carry fifty kilogram stones from the quarry up a set of 186 steps and 'if they staggered and fell, the prisoners were shot by the SS guards, who would sometimes throw them down into the quarry from thirty to forty meters up, or force them to empty trucks of stones on to the men working below'.[70] Mauthausen had its own gas chamber and crematorium, which operated until liberation, and its administrators sent thousands to their deaths at the 'euthanasia' centre at Hartheim.

In April 1945, a War Crimes Investigating team was created in Europe by order of the Headquarters European Theatre of Operations and on 17 July 1945 they reported their major findings on the Hartheim site, near Linz, Austria, to the Commanding General of the Third US Army.[71] Around 30,000 people were murdered, including many German T4 (the Nazi designation for their euthanasia programme) victims through August 1941 and as many as 18,000 prisoners from Mauthausen and its subsidiary camps (and some from Buchenwald and Dachau) starting in July 1941.[72] After the German euthanasia programme had been halted in August 1941, following the intervention of the religious establishment in Germany, the T-4 unit began sending its doctors to evaluate and select sick concentration camp inmates to be killed, mainly by gassing, under 'Special Treatment 14f13'.[73]

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[69] Michael Fabreguet, 'Entwicklung und Veranderung der Funktionen des Konzentrationslager Mauthausen 1938-1945', *Die Nationsozialistische Konzentrationslager*, 167-92.

[70] Richard J Evans, *The Third Reich at War*, 517.

[71] Report, 'Report of Investigation of War Crime' to Commanding General Third US Army APO 403 US Army. 17 July 1945. William Dowdell Denson Papers: Series II, Box 7, Yale University Library Manuscript Collection, New Haven, Connecticut, USA.

[72] Ibid.

[73] Richard J Evans, *The Third Reich at War,* 524-25; Burleigh, *Death and Deliverance*, 238-48. For more on euthanasia in Nazi Germany also see Christopher Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939 – March 1942* (Lincoln NE: University of Nebraska Press, 2005); Udo Benzenhöfer, *Euthanasia in Germany Before and During the Third Reich* (Münster/Ulm: Verlag Klemm & Oelschläger, 2010); Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution.* (Chapel Hill NC: University of North Carolina Press, 1995); Ernst Klee, *Euthanasie im NS-Staat. Die Vernichtung lebensunwerten Lebens* (Frankfurt am Main: Fischer Taschenbuch Verlag, 1983) and Klee's *Dokumente zur Euthanasie* (Frankfurt am Main: Fischer Taschenbuch Verlag, 1985).

Conditions at Mauthausen main camp deteriorated rapidly towards the end of the war as thousands of prisoners from smaller subcamps were herded in. Between October 1944 and 5 May 1945, when American troops liberated the camp, 45,000 inmates died.[74]

While political prisoners remained in the Nazi concentration camp system, from 1937-8 the camps' inmate population included 'asocials' and 'social deviants' including alcoholics and vagrants. Himmler's Reich Work-Shy Action (*Aktion Arbeitsscheu Reich*) in April and June 1938 in Austria and Germany sent thousands to the camps. These raids included specific targeting of 'asocial' and 'criminal' Jews. Between 31 May and 25 June three trains arrived at Dachau from Vienna carrying 1521 Jewish men aboard.[75] Newly arrested Jews were also sent to Buchenwald, where in the summer of 1938 the conditions were particularly appalling, as 'the SS forced hundreds of new arrivals among them many Jews from Berlin, into a sheep pen'.[76] Between June and August 1938 almost 100 Jews died at Buchenwald.[77] Despite the lethality of the camps, up until the outbreak of war, prisoners were regularly released. For example, a majority of the Jews arrested during the November pogroms of 1938 (*Reichskristallnacht*) went free, after brutal (and sometimes fatal) treatment by the camp guards. These inmates bought their freedom by 'bribing the camp authorities or selling their properties and businesses to local authorities at knock-down prices'.[78]

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[74] For more on Mauthausen concentration camp see Amy Schmidt and Gudrun Loehrer, *The Mauthausen Concentration Camp Complex: World War II and Postwar record* (Washington DC: National Archives and Records Administration, 2008); Hans Maršálek, *Die Geschichte des Konzentrationslagers Mauthausen* (Wien-Linz: Österreichischen Lagergemeinschaft Mauthausen, 1995); Evelyn Le Chêne, *Mauthausen, The History of a Death Camp* (London: Methuen, 1971); Simon Wiesenthal, *KZ Mauthausen : Bild und Wort* (Linz-Wien: Ibis-Verlag, 1946); *Mauthausen 1938-1998: Papers presented at a symposium held in Amsterdam, Oct. 21, 1998, organized by Stichting Vriendenkring Mauthausen* (Westervoort: Van Gruting, 2000).

[75] Waschmann, *KL,* 177.

[76] Ibid., 178.

[77] Ibid., 178.

[78] Richard J Evans, 'Anatomy of Hell', *New York Times Book Review*, 9 July 2015. For more on *Kristallnacht* see Martin Gilbert, *Kristallnacht: prelude to destruction* (London: Harper Press, 2006); *Damit die Nacht nicht wiederkehre : Gedenken an die faschistische Pogromnacht vom 9. November 1938: eine Dokumentation* (Dresden: herausgegeben vom Verband der Jüdischen Gemeinden in der DDR, 1988); and discussions in Saul Friedlander, *Nazi Germany and the Jews : Volume 1: The Years of Persecution 1933-1939*. (New York: Perennial, 1998); Hans Reichmann, *Deutscher Bürger und verfolgter Jude : Novemberpogrom und KZ Sachsenhausen 1937 bis 1939* (München : R. Oldenbourg, 1998).

The understanding was that they would emigrate immediately. Still *Reichskristallnacht* marked a distinct change in the SS concentration camps;

> Never before had they held more inmates: within days, the prisoner population doubled from twenty-four thousand to around fifty thousand…never before had there been as many Jews in the KL: at the start of 1938, they had made up only around five per cent of the prisoner population; now they were suddenly in the majority. And never before did as many prisoners die in the KL as in the week following the pogrom.[79]

Further change came to the camps at the start of the war in September 1939. As millions of workers marched off with the army, the German war economy needed replacement labourers. Forced labour was always a core element of the concentration camp project – camps were meant to 'teach' 'asocials' and other non-conformists the value of productive work, as it was the way to maintain basic social order.[80] Forced labour became a necessary element in the survival of Germany's war time economy and the camps, 'were transformed into centres of forced labour, buttressed by the industrial sub-camps that spread like a cancer through the body of the German Reich'.[81] Throughout occupied territories, millions of people, including POWs, were transported to the Reich to work. The *Auslandereinsatz* (Foreign Labour) system functioned side-by-side with the forced labour in the concentration camps. The foreign labourers were treated better than the inmates, as historian Stone noted,

> The foreign labourers were more or less well treated; that is to say, at least they were kept alive. Depending on where they happened to end up, they were all required for work and a rational calculation underpinned their positions. By

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[79] Washmann, *KL*, 181.

[80] For more on forced labour in the concentration camps see discussions in Marc Buggelm, *Slave Labor in Nazi Concentration Camps*, translated by Paul Cohen (Oxford: Oxford University Press, 2014); Michel T Allen, *The Business of Genocide: The SS, Slave Labor, and the Concentration Camps*, (Chapel Hill: University of North Carolina Press, 2002); Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (New York: Public Affairs, 2003); Eugen Kogon, *The Theory and Practice of Hell: The German Concentration Camps and the System Behind Them*. (London: Secker and Warburg, 1950).

[81] Richard J Evans, 'Anatomy of Hell', *New York Times Book Review*, 9 July 2015.

> contrast, the inmates of concentration camps were there to be beaten into submission, and if they died it was of no significance.[82]

Furthermore, by 1942, many concentration camps prisoners were being deliberately worked to death as a means of extermination. At Mauthausen, thousands died running up the infamous steps in the quarry while carrying huge boulders. As Richard J. Evans observed, 'By the end of the war there were more then 700,000 forced labourers held in this vast network of camps and sub-camps in rapidly deteriorating conditions; half of them did not survive'.[83]

Established originally as a sub-camp of Buchenwald, Dora-Mittelbau, (sometimes called Dora-Nordhausen or just Nordhausen), located in the Harz Mountains, was founded in August 1943.[84] By October 1944, the SS transformed Dora-Mittelbau into an independent camp with more than thirty subcamps of its own. At the end of the war, the 'desperate desire to press prisoners into the service of the SS, army, state, and private industry—often without any sense of planning or logic—acted as a centrifugal force: a vast number of new satellite camps sprang up…until the whole of Germany was covered'.[85] Dora-Mittelbau consisted mainly of underground factories for the V-2 missile programme (and other 'Weapons of Retaliation' or *Vergeltungswaffen*). The incredibly brutal factory conditions meant that the workers were rarely productive and the environment often lethal.[86] About 12,000 inmates were at Dora-Mittelbau by the fall of 1944. In April 1945, most prisoners were evacuated

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[82] Dan Stone, *The Liberation of the Camps*, 10. See U. Herbert (ed.), *Europa und der "Reichseinsatz." Auslaendische Zivilarbeiter, Kriegsgefangene und KZ-Haeftlinge in Deutschland 1938–1945* (Essen: Klartext, 1991).

[83] Evans, 'Anatomy of Hell'.

[84] For more on Dora-Mittelbau see Jens-Christian Wagner, *Produktion Des Todes: Das Kz Mittelbau-Dora* (Gottingen: Wallstein, 2001); William J. Aalmans, *Booklet with a Brief History of the 'Dora'-Nordhausen Labor-Concentration Camps*, 1947. Aalmans was a member of the US army Prosecution staff for the trial against Nordhausen personnel. Also see Ernest C James, *Liberation of the Nordhausen and Dora/Mittelbau Concentration Camps* (Sacramento: EC James, 1996); Jean Michel and Louis Nucera, *Dora: The Nazi Concentration camp where modern space technology was born and 30,000 prisoners died* (New York: Holt Rinehart and Winston, 1979); Andre Sellier and Michael J Neufeld, *A History of the Dora Camp: The Untold Story of the Nazi Slave Labor Camp That Secretly Manufactured V-2 Rockets* (Ivan R. Dee, 2003). For a history of 'Dora' from 1945-2000s see Gretchen E Schafft and Gerhard Zeidler, *Commemorating Hell: The Public Memory of Mittelbau-Dora* (Springfield IL: University of Illinois Press, 2011).

[85] Nikolaus Wachsmann 'The Dynamics of Destruction', *Concentration Camps in Nazi Germany: The New Histories*, 34.

[86] Stone, *The Liberation of the Camps,* 11, Wachsmann, *KL,* 34-35.

to Bergen-Belsen. When American forces liberated the camp in April 1945, units of the Third Army found over 2700 corpses and 3000 barely surviving inmates.[87]

Over time, the camps grew exponentially in size; there were 24,000 inmates in the camps in June 1938; 53,000 by 1940; by 'September 1942 there were about 110,000 camp inmates; this number shot up to 224,000 a year later, 524,286 a year after that, and over 700,000 by the start of 1945'.[88]

From 1941 until the end of the war, the Nazis' extermination programme of the Jews meant that 'Jewish inmates were removed [from the concentration camp system] and taken to extermination centres, where they were killed along with Jews brought from every part of Europe over which the Nazis had control'.[89] Even if they were not the primary sites of the Holocaust, the concentration camps were places of truly grievous crimes and large number of inmate deaths. At Buchenwald, from 1937-1945, around 56,000 inmates died; at Dachau (1933-1945) 39,000 were killed; at Mauthausen from 1938-1945 more then 90,000 died; at Flossenbürg (1938-1945) around 50,000 inmates died; and at Dora-Mittelbau 15,000-20,000 inmates were killed in a little over a year. At all five camps, POWs, particularly Russian soldiers, were often executed outright. Along with severe neglect and general ill treatment, the inmates of these concentration camps were subjected to two particularly deadly practices: forced labour and human experimentation, both of which were considered war crimes by contemporary international treaties.

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[87] Abzug, *Inside the Vicious Heart*, 31.

[88] Stone, *The Liberation of the Camps,* 11.

[89] Evans, 'Anatomy of Hell'. There is a huge body of literature on the extermination of the Jews in the camps; some of the works that were most helpful to this thesis include: Lucy S. Dawidowicz, *The War against the Jews, 1933-1945* (Toronto and New York: Bantam Books, 1986); Martin Gilbert, *The Holocaust: A History of the Jews of Europe during the Second World War* (New York: Holt, Rinehart, and Winston, 1985); Raul Hilberg, *The Destruction of the European Jews* (Yale University Press, 2003; originally published in 1961) and Hilberg's *Perpetrators, Victims, Bystanders: The Jewish Catastrophe, 1933-1945* (Aaron Asher Books, NY, 1992); and Leni Yahil. *The Holocaust: The Fate of European Jewry, 1932-1945* (New York: Oxford University Press, 1990). Particularly helpful sources for the history of the extermination camps include Saul Friedländer, *The years of extermination: Nazi Germany and the Jews, 1939-1945* (New York: Harper Collins Publishers, 2007); Arad, Yitzhak, *Belzec, Sobibor, Treblinka: The Operation Reinhard Death Camps* (Indiana University Press, 1987); Omer Bartov, *The Holocaust: Origins, Implementation, Aftermath*. (London: Routledge, 2000); Richard J Evans's discussion of the subject in *The Third Reich at War* (New York: Penguin, 2009); Konnilyn G. Feig, *Hitler's Death Camps: The Sanity of Madness* (New York, 1979).

B. The Crimes at the Camps as Defined by Established Law

By the beginning of the outbreak of hostilities in 1939, a number of international laws and treaties existed to codify and govern a nation's conduct during war. Unlike the International Nuremberg Tribunal—predicated on the London Agreement of 1945, which was a new treaty defining new international crimes—the Dachau tribunals found legal precedent in both the traditional laws protecting the small number of POWs in the camps based on international treaties signed in the earlier part of the century[90] and American military law. Defendants at Dachau were charged with 'violations of the laws and customs of war'.

It is important to note, that while there were a small number of POWs at the concentration camps, particularly at the Berga sub-camp of Buchenwald, a majority of the inmates were civilians. While protections of POWs were codified by the outbreak of the Second World War, *international* protections for civilians mostly relied upon *customary* laws of war. Although not codified in *international* law, discussion and acceptance of the honourable treatment of civilians by soldiers was widespread by the time of William Shakespeare.[91] As one legal scholar noted:

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[90] There are countless discussions on international law and military tribunals. For those with an emphasis on the history of the first half of the twentieth century see Geoffrey Best's *Humanity in Warfare, The Modern History o f the International Law of Armed Conflicts* (London, 1983) and the first chapter of *War and Law since 1945* (Clarendon Press, 1994); Wigfall Green, 'The Military Commission', *American Journal of International Law*, 42:4 (1948); Howard Bell, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience* (KS: University of Kansas Press, 1999), Omer Bartov, Atina Grossmann, Mary Nolan (eds.), *Crimes of War: Guilt and Denial in the Twentieth Century* (New York: The New Press, 2002); John Alan Appleman, *Military Tribunals and International Crimes* (Indianapolis, 1954); Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience* (Kansas, 1999); Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary* (Littleton, 1994); Yoram Dinstein, and Mala Tabory (eds.), *War Crimes in International Law* (The Hague, 1996); Leon Friedman (ed.), *The Law of War: A Documentary History, vol. 1* (New York, 1972); Sheldon S. Glueck, *War Criminals: Their Prosecution and Punishment* (New York, 1944); Peter H. Maguire, *Law and War: An American Story* (New York, 2000); Theodore Meron, *War Crimes Law Comes of Age* (Oxford: Oxford University Press, 1998); Michael W. Reisman and Chris T. Antoniou (eds.), *The Laws of War, A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict* (New York, 1994); Donald A. Wells, *The Laws of Land Warfare: A Guide to the U.S. Military Manuals* (Westport, 1992) and *War Crimes and Laws of War* (Lanham, 1984); Georg Schwarzenberger, *The Law of Armed Conflict: International Law as Applied by International Courts and Tribunals, vol. 2* (London, 1968).

[91] Henry V instructing his army on the march to Agincourt: 'We give express charge, that in our marches through the country, there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language; for when lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner'. William Shakespeare, *Henry V*, Act III, Sc. VI (1599).

> Most of the early rules of war were in the form of orders issued by sovereign authorities for the regulation of their own armed forces… In 1625, Hugo Grotius published his masterwork, *The Law of War and Peace*, in which he analysed the practice of states over the centuries in order to outline systematically how that practice had hardened into the law of nations.[92]

As early as the Brussels Conferences in 1874, there was an attempt by international parties to codify customary laws of war into a binding treaty. By the Hague Convention of 1899, 'the so-called "Martens clause",'[93] provided that:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[94]

This is far from clear and customary protection for civilians was predicated upon 'honourable', restrained behaviour by the army. It wasn't until the Geneva Convention of 1949 when protections for civilians and non-combatants were codified.

While international law was, perhaps, lacking, many nations had laws outlawing the ill-treatment of civilians. By the end of the First World War, France, Belgium, the United Kingdom, Germany, and the United States, all had national laws in place that allowed for the court-martial of enemy soldiers. Thus the 'prosecution of war crimes by national criminal courts was possible, although the absence of extradition agreements was a major drawback'.[95] The absence of extradition agreements proved a massive problem at the end of the First World War, as neither neutral countries (The Netherlands where the Kaiser was in exile) nor Germany itself would give up accused war criminals. But, at the end of Second World War, German

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[92] Waldemar A. Solf, "Protection of Civilians Against the E ects of Hostilities Under Customary International Law and Under Protocol I." *American University International Law Review 1, no. 1* (1986): 117-135.

[93] ICRC, Customary IHL Database, www.ihl-databases.icrc.org/customary-ihl Accessed 29 August 2016.

[94] See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2003).

[95] John Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial* (New Haven: Yale University Press, 2001), 330.

territory was conquered completely and no extradition laws were necessary. The Dachau trials thus included the application of national (American) 'laws of war'. Even the IMT, with proceedings based on a new international treaty defining war crimes, fell back on national law to dismiss defence arguments:

> When the Nazi defendants in the Nuremberg trials raised the non-applicability of the Hague and Geneva Conventions as a matter of defence, the International Military Tribunal held that the general principles of these Conventions had passed into general international law and were thus binding on Germany.[96]

In general, most of the personnel charged at the concentration camp trials were found guilty of violating the established forced labour law and/or the laws regarding the treatment of prisoners of war. A third group of defendants were found guilty of experimenting on humans. It is important to note, as we shall see in upcoming chapters, that although the Hague and Geneva conventions were written to protect POWs (and some civilian populations), during the American trials at Dachau, these protections were interpreted to apply broadly to most of the *Allied* victims in the concentration camps.

1. Forced Labour

The two major international treaties in existence before the Second World War were The Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929. Both contained regulations about the correct treatment of prisoners of war in captivity and about using captured enemy soldiers *or civilians* as forced labours. The Hague Regulations (1899) stated in Article 6: 'The State may utilize the labour of prisoners of war according to their rank and aptitude. [But] Their tasks shall not be excessive, and shall have nothing to do with the military operations'. This was amended in the 1907 Convention to excluded officers. The work was to be paid in accordance with the national army's wages. Based on several documents supplying evidence of outrages committed during the First World War, 'the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be

[96] Waldemar A. Solf, "Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I." *American University International Law Review 1, no. 1* (1986): 117-135; 123. Also see *Trial of the Major War Criminals Before the International Military Tribunal* (1945), 253.

subject to criminal prosecution, including forced labour of civilians in connection with the military operations of the enemy and the employment of prisoners of war on unauthorized works'.[97] The relevant section of The Hague convention of 1907 was entitled the 'Laws and Customs of War on Land (Hague IV)' and contained nine articles promising the signatory countries would abide by the laws of war on land and that any belligerent county would be liable for the actions of its soldiers. The 'Annex' to the convention contains more specific laws – particularly banning the use of 'inappropriate' forced labour.

The Geneva Prisoners of War Convention (1929) reinforced the rules set by the Hague Convention in Articles 29-32; work had to be appropriate, not excessive in time or danger, and POWs could not be forced to work on any works that had direct connection with the operations of war. In the 1930s, the Forced Labour Convention[98] defined forced labour as 'all work of service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. It further stated: 'Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period'.[99] Germany was a signatory of both Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929. As thus, German military members and employees, including concentration camp personnel, were expected, by law, to follow the rules and conduct of war.

POWs were a tiny percentage of the overall inmate population of the concentration camps. They were so small in number that their presence was sometimes forgotten. From the beginning of the postwar investigations, there were conflicting stories about American POWs in the concentration camp system. The Congressional committee that investigated Buchenwald, Nordhausen, and Dachau at the request of General Eisenhower concluded in its official report that:

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[97] International Red Cross. 'Customary IHL – Practice Related to Rule 95. Forced Labour', Online Customary International Humanitarian Law Database, accessed online 21 August 2015.

[98] Germany was not a signatory of the Forced Labour Convention and did not ratify at the time.

[99] 'Convention concerning Forced or Compulsory Labour (Entry into force: 01 May 1932)', International Red Cross Online Customary International Humanitarian Law Database, accessed online 16 November 2015.

> In the first place the concentration camps for political prisoners must not be confused with prisoner of war camps. No prisoners of war are confined in any of the political-prisoner camps, and there is no relationship whatever between a concentration camp for political prisoners and a camp for prisoners of war.[100]

This was not correct, as some POWs were sent to concentration camps. At least one American POW (a major) was found when Dachau was liberated.[101] Several dozen, British and American airmen were machine-gunned at Sachsenhausen from December 1942-April 1943.[102] The war crimes investigators' report on Flossenbürg concentration camp concluded that, 'according the several reports, 13 American or British parachutists were hanged there after being captured trying to blow up bridges in March or April 1945'.[103] During the Flossenbürg 'parent trial', the prosecutor related that:

> "English and American POWs were placed in dark isolated cells. Some of these inmates remained in these cells from their arrival until April 1945, a few as long as 11 months…An American second lieutenant who was confined in this prisoner was hanged the day before Good Friday in April 1945."[104]

However, there was only one camp, a subcamp of Buchenwald called Berga, where a large number of American POWs were confined as slave labourers. Close to 94,000 Army and Air Corps personnel 'were POWs in more than 50 permanent camps in the European and Mediterranean theatres. Also 99 per cent survived. Of the 1121 who

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[100] Report found in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November-1 October 1946* (Nuremberg, 1947), Vol. 37, 610.

[101] See the *New York Times*, 'Dachau Captured by Americans Who Kill Guards, Liberate 32,000', 1 May 1945. Interestingly, the article describes Dachau as 'Germany's most dreaded extermination camp'.

[102] Szymon Datner, *Crimes Against POWs* (Poland: Zachodnia Agencja Prasowa, 1964), 317-318. Quoted extensively in [102] Mitchell G Bard, *Forgotten Victims: The Abandonment of Americans in Hitler's Camps* (San Francisco: Westview Press, 1994).

[103] 'Investigations of Killing and mistreatment of Allied POWs in Flossenbürg Concentration Camp, Headquarters, Third US Army Judge Advocate General Sections, War Crimes Branch, 21 June 1945,' in *Nazi Conspiracy and Aggression: Vol. IV* (DC: Government Printing Offices, 1946), 1001-2.

[104] See Bard, *Forgotten Victims,* 42; original source is *US vs. Friedrich Becker, et al*, 21 May 1947, Vol. 1 Trial Record, Part 2, Folder 2, Box 293, The War Department and the Army Records, Records of the Office of the Judge Advocate General (RG 153), The National Archives and Records Administration, College Park, Maryland, USA.

died, approximately 6 per cent were in one virtually unknown camp [Berga] where the fatality rate was 20 per cent'.[105]

On 13 February 1945, 350 American POWs arrived at Berga from Stalag IX-B the POW camp at Bad Orb. These 350 men were singled out for transfer because they identified themselves Jewish, (or because the their Nazi captors thought they looked Jewish). At Berga, the Americans worked alongside Buchenwald inmates to dig an underground munitions factory. Of the 350 men sent to Berga, 'at least 73, or 21 percent, died in the space of 10 weeks, the highest rate of attrition among American prisoners of war in Europe'.[106] The surviving men were liberated, along with other inmates, after a 'death march' of over 150 miles, on 23 April 1945.[107]

[105] Bard, *Forgotten Victims,* 35; Stan Sommers, *The European Story* (WI: American Ex-Prisoners, Inc., 1980), 4.

[106] Roger Cohen for *The New York Times Magazine*, 'The Lost Soldiers of Stalag IX-B', 27 February 2005. This article is based on his book, *Soldiers and Slaves: American POWs Trapped by the Nazis' Final Gamble* (New York: Knopf, 2005). Also see Flint Whitlock, *Given Up For Dead: Americans in the Nazi concentration camp at Berga* (New York: Basic Books, 2005).

[107] The trial that followed is discussed in Chapter 4.

Photo 2. American medics treat 63 American POWs who survived a death march from the Berga concentration camp and were liberated by soldiers of the 357th Infantry Regiment. Courtesy of the USHMM Photo Archives.

Other inmates at Buchenwald were forced to work at the main camp and sub-camps at the SS-owned German Equipment Works (*Deutsche-Ausrüstungs-Werke*), the stone quarry, construction, and munitions factories including the nearby Gustloff munitions factory. At the other camps, Dachau, Mauthausen, Flossenburg, and Dora-Mittelbau, the civilian inmates, and the odd-POW inmate, were forced to perform slave labour. At Dachau the inmates were forced to construct the camps as well as to drain marshes, build roads, work in gravel pits, and later in armaments production. Mauthausen was founded near the site of a stone quarry for the purpose of using inmates as slave labour to extract the stone for the SS company, German Earth and Stone Works Inc. (*Deutsche Erd-und Steinwerke, GmbH-DESt.*) The quarry at Mauthausen was a notoriously lethal place to work and at least 95,000 inmates died at Mauthausen. At Flossenbürg, the inmates were used as slave labour for the stone quarry (for the SS owned *Deutsche-Ausrüstungs-Werke*) until 1943 when inmates were transferred to

work in a newly built Messerschmidt plant. Dora-Mittelbau, originally a subcamp of Buchenwald, was a large underground industrial complex in the Harz Mountains, and most of inmates were used as slave labour to build *Vergeltungswaffen* (Weapons of Retaliation – V-2 missiles and other experimental weapons). The underground working conditions were particularly brutal and deadly. As Dora-Norhausen rapidly expanded in 1944-1945, inmates were used as slave labour in sub-camps specializing in quarrying, construction, and other weapons projects.

These inmates were technically 'police detainees' in 'protective custody' (*Schutzhaft*) and civilians, not POWs or another internationally protected group.[108] Police detainees could, under Nazi law, be executed without trial.[109] When the Americans, and other Allies, occupied Germany they rebuilt the judicial system modelled on the Weimer period – the last period of German law they considered legitimate. As the Allies sought to prove that the Nazi regime was criminal, its laws were considered illegal – thus it mattered not to American prosecutors at Dachau that the concentration camp inmates were brought to the camp legally under Nazi law – Nazi law was invalid. The judges at the Nuremberg 'Justice Case' (1947) described the Allied view of Nazi law as, 'the prostitution of a judicial system for the accomplishment of criminal ends'.[110]

2. Mistreatment and Killing of POWs

Murder and torture were long illegal under German domestic law, and in their horrendous treatment of inmates at the concentration camps the Germans violated almost every article concerning the protection of POWs of the Geneva Convention of 1929. For example, Article 2 stated that POWs 'shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity. Measures of reprisal against them are forbidden'. Or Article 3: 'Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with

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[108] See Nikolaus Wachsmann, *Hitler's Prisons: Legal Terror in Nazi Germany* (New Haven, Connecticut: Yale University Press, 2004), 166-167; Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany 1600-1987* (Oxford: Oxford University Press, 1996), 679; Martin Broszat, 'The Concentration Camps 1933-1945,' in Helmut Krausnick (ed.), *Anatomy of the SS State* (London, 1968), 397-450; Hans Engelhard (ed*.), Im Namen des deutchen Volkes: Justiz und Nationalsozialismus* (Cologne, 1989), 251.

[109] Michael Stolleis, *The Law Under the Swastika*, translated by Thomas Dunlap (Chicago: The University of Chicago Press, 1998), 3.

[110] Quoted in Wachsmann, *Hitler's Prisons*, 344.

all consideration due their sex'. Or Article 4: 'The detaining Power is required to provide for the maintenance of prisoners of war in its charge. Difference of treatment between prisoners is permissible only if such difference is based on the military rank, the state of physical or mental health, the professional abilities, or the sex of those who benefit from them'. Article 6 allowed prisoners to keep their personal belongings, Article 7 permits correspondences between family and prisoners of war, and articles 10-12 promised POWs lodging in heated, lighted, well-outfitted dormitories, sufficient drinking water, use of tobacco, food of the same quality and quantity of the depot troops, adequate clothing, underwear and footwear, and access to a canteen which prisoners might use to buy things they wished. All of these conditions were grossly violated in the camps. Of course, who qualified as a Prisoner of War was hotly debated in the trials (as discussed in detail in Chapter 5) While the Dachau trials did not only deal with the mistreatment of POWs, the POWs' presence in the camps was small yet significant, as will be discussed in Chapter 4.

Russian prisoners of war were singled out for particular mistreatment both in and out of the camps. Although the USSR had never signed the Geneva Convention of 1929, nor the Hague Convention of 1907, Germany had. Fifty-seven per cent (3.3 million) of Russian prisoners were killed by the Germans over the course of the war: the second largest victim group besides the Jews.[111] Russian POWs were deliberately singled out for brutal treatment and death through starvation, shooting, and gassing. The Nazi policy of 'living space' for Germans in the East included the clearing out of the native population. On 8 September 1941, the German High Command

> Decreed that Soviet prisoners-of-war had forfeited all rights. Why and how was not explained, but any and all measures were now permissible…On receipt of the 8 September order, some army units simply machine-gunned their captives. The majority were left in barbed-wire compounds, deprived of food and war clothing and allowed to starve or freeze to death in conditions of indescribable squalor.[112]

By 1942, Hitler had decreed that Russian POWs should be used for slave labour. Thousands transported to camps in Germany were used in construction, coal mining,

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[111] United States Holocaust Memorial Museum, Encyclopedia online.

[112] Charles Winchester and Ian Drury, *Hitler's War on Russia* (Oxford: Osprey Publishing, 2007), 56.

agriculture and other heavy labour. The POWs were gassed, shot, or otherwise killed when they were unable to work any longer.[113]

Thousands of Russian POWs were killed outright as soon as they arrived at the camps. For example, between 1941-1943 at Buchenwald, at least 4400 (with estimates of up to 8000)[114] Soviet prisoners were shot in the back of the neck in a former horse stable built specifically for this purpose. The facility was disguised as a medical exam room and prisoners were shot from behind as they were lined up to have their height measured. Thousands more were executed by firing squad at Dachau, Mauthausen, and Flossenbürg.

3. Human experimentation.

By the end of the Second World War, no 'international' law, itself a novel concept, existed to regulate human experimentation or to codify correct and incorrect treatment of medical patients. The Hippocratic oath was used by a small number of medical schools in the United States by the 1920s, but was not legally binding. Experiments on human subjects were not uncommon in western countries in the nineteenth and twentieth century. In fact, 'their publication evoked little concern for the welfare of the human subjects, among either physicians or the unaware public. When ethical concerns were raised at all, it usually was to demonstrate the supposed integrity of the researcher, not to deplore the plight of the subject'.[115]

In 1946, the defendants at the medical trial (as part of the Subsequent Nuremberg Trials), 'tried to convince the judges that those experiments had not crucially exceeded conventional standards for medical experimentation on human subjects, and their exceptional callousness was not as much a sign of individual human failure as it was a testimony to the brutalizing effect of the war'.[116] In the past,

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[113] For more on German the treatment of Russian POWs see Timothy Snyder, *Bloodlands: Europe Between Hitler and Stalin* (New York: Basic Books, 2010); Christian Streit, *Keine Kameraden: Die Wehrmacht und die Sowjetischen Kriegsgefangenen, 1941–1945* (Auflage: Neuausg, 1997); and Gerhard Hirschfeld and Wolfgang J. Mommsen (eds.), *The Policies of Genocide: Jews and Soviet Prisoners of War in Nazi Germany* (Allen & Unwin, 1986).

[114] See the Buchenwald Memorial site. Accessed 18 June 2016.

[115] Horst H. Freyhofer, *The Nuremberg Medical Trial: The Holocaust and the Origin of the Nuremberg Medical Code* (New York: Peter Lang 2004), 9-10. See also Wolfgang U Eckart (ed.), *Man, Medicine, and the State The Human Body as an Object of Government-Sponsored Medical Research in the 20th Century* (Stuttgart, Germany: Franz Steiner, 2006).

[116] Freyhofer, *The Nuremberg Medical Trial,* 10.

physicians largely defined ethical standards themselves—there was no law stating the basic tenet, *Primum non nocere.* However, as established above, there were international treaties governing the treatment of soldiers (and enemy civilians) in captivity. As we will see, it was under these laws that the American military commissions came to try Nazi doctors.

German medical experiments conducted during the Second World War on camp inmates at the camps of this study can be grouped as follows: experiments to help rescue fliers and sailors, the improved treatment of war injuries, and controlling epidemics. [117] Dachau served as a major centre of experimentation for the Luftwaffe. In 1942, Luftwaffe physicians received an assignment from their high command to study the effects of high-altitude ejection and subsequent descent with and without oxygen equipment. At Dachau nearly 200 inmates were used as subjects between March and August 1942 in an experimental low-pressure chamber (that simulated high-altitudes) built inside the Dachau main camp. In exchange for their participation, 'these purportedly condemned prisoners were promised a pardon'.[118] At least seventy inmates died as a result of these experiments. The apparent cause of death was brain embolism, 'incurred as a result of low atmospheric pressure shortly after simulated ejection at record height of up to 68,000 feet'.[119] In May 1942 the scope of the aviation experiments was expanded to find the most effective rescue methods for warming fliers stranded in water at low temperatures. The Luftwaffe physicians performed a series of hypothermia experiments on approximately 300

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[117] Experiments in reconstructive surgery, biological warfare, and eugenics were practised at other camps which are not the subject of this dissertation. For more on Nazi human experimentation see Paul Julian Weindling, *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent* (New York: Palgrave Macmillian, 2004); Ulf Schmidt, *Justice at Nuremberg: Leo Alexander and the Nazi Doctors' Trial* (New York: Palgrave Macmillan, 2004) and discussions in Schmidt's *Karl Brandt: The Nazi Doctor: Medicine and Power in the Third Reich* (London: Hambledon Continuum, 2007); Johnethen D. Moreno, *Undue Risk: Secret State Experiments on Humans* (New York: WH Freeman and Company, 1999); Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the psychology of Genocide* (New York: Basic Books, 1986); John Cornwell, *Hitler's Scientists: Science, War, and the Devil's Pact* (New York: Penguin, 2004); Ute Deichmann, *Biologists Under Hitler*, translated Thomas Dunlap (Cambridge MA: Harvard University Press, 1996); Wolfgang U. Eckart (ed.), *Man, Medicine, and the State: The Human Body as an Object of Government-Sponsored Medical Research in the 20th Century* (Stuttgart, Germany: Franz Steiner, 2006).

[118] Freyhofer, *The Nuremberg Medical Trial*, 27.

[119] Ibid., 27.

concentration camp inmates. Hypothermia was rapidly induced through submersion in ice-water and once achieved, various warming techniques were administered.
At least eighty inmates died in the water as a result of cardiac failure or during attempted rewarming. Experiments discovered that rapid rewarming was most effective in hot water (not lukewarm water as previously thought).[120]

By 1943, the air war had shifted to the Mediterranean and the Luftwaffe ordered research to find a portable kit that could desalinate seawater. By the end of 1943, two such kits had been developed that sweetened sea water. The kits were tested on forty-four Gypsies at Dachau in the summer of 1944. One group drank sweetened seawater, and one drank no water at all. Limited information was obtained from the experiment; it was, essentially, a failure.

At both Dachau and Buchenwald, as well as other camps, German doctors experimented on inmates to find treatment and cures for various war injuries. At Buchenwald in November 1943, doctors looked to find cures for burns caused by phosphorous bombs, no helpful medication was found, and many subjects were grievously injured. At Dachau, abscesses were induced in forty Catholic priest inmates to study different cures in August 1942. Ten died as a result and the subjects left untreated were harmed less than the subjects who received experimental treatment. Like the sweetened seawater experiments, the war injury experiments were useless.

At Dachau and Buchenwald, along with Natzweiler and Sachsenhausen, experimental stations were set up to study how to halt the spread of typhus and 'most other epidemic diseases as well, including influenza, typhoid, jaundice, yellow fever, malaria, tuberculosis, and hepatitis…Hundred of subjects were injected with the cultivated viruses or viral blood of infected inmates and later inoculated with different vaccines to study their comparative effectiveness'.[121]

At Dachau most of the epidemic experiments centred on finding a vaccination and cure for malaria, under the direction of Dr Klaus Schilling. Dr Schilling had worked on tropical diseases for forty-five years, particularly in Africa, and was well known in the field as a member of the prestigious Rockefeller Foundation in Berlin.

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[120] For all intents and purposes, this was the only useful medical experiment the Nazi doctors conducted on concentration camp inmates. After reading the results in captured papers, the US Navy implemented rapid warming for the remainder of the war in the Pacific.

[121] Freyhofer, 32.

In 1941, after a meeting with Himmler, who ordered him to continue his research, Dr Schilling chose Dachau concentration camp to continue his work because it was close to his hometown.[122] He inoculated inmates 900-1000 prisoners, by his own count, and 'as well as I can remember, in three years there were forty-nine patients who died outside the malaria station'.[123] At Buchenwald, physicians experimented on inmates to test vaccines and treatments for typhus, typhoid, cholera, and diphtheria. Some of the vaccines developed at Buchwald 'were administered to infected and threatened populations and soldiers. Vaccines were apparently not offered to the inmates of concentration camps, whereby the end of the war the spectre of death by epidemic disease was overshadowed only by the horrors of mass killings in the gas chambers'.[124]

Activities sponsored by the Nazis in the camps, including human experimentation, the mistreatment and killing of POWs, and the use of POWs as forced labour, were blatant violations of the existing international laws as established in the Hague and Geneva conventions.

C. The United Nations' Wartime Rhetoric, 1941-1945

Throughout the war, the governments of the United Nations were well informed about German transgressions of the laws of war.[125] Although President Roosevelt, along with the United Kingdom and the Soviet Union, made several wartime statements pledging to punish the perpetrators of war crimes, the United States government did not develop a concrete plan to punish offenders until summer 1944, after the Allied invasion and breakout from Normandy. Winning the war was considered the top priority for the United States. However, the legal emphasis set by the leaders of the major United Nations during the war in their speeches about the objectives of war drew attention to the criminality of the Germans and the need to

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[122] Transcript of the Nuremberg Medical Trial: 13 December 1946, 397, United States National Archives and Records Administration, College Park, Maryland, USA.

[123] Ibid., 397.

[124] Freyhofer, *The Nuremberg Medical Trial*, 33. Also see Paul Julian Weindling, *Epidemics and Genocide in Eastern Europe, 1800-1945* (Oxford, Oxford University Press, 2000).

[125] By no means a simple term, the 'laws of war' are a code of generally accepted rules that all belligerents were required to follow developed by internationally signed treaties at The Hague (1899 and 1907) and Geneva (of 1864, 1906, and most importantly, 1929). Violations of the 'laws of war' are considered to be war crimes. See Chapter 1 for more.

bring them to justice. While this fuelled morale for the war effort, the rhetoric set the Allies up to bring the perpetrators to justice.

The legal emphasis was set early in the war as both the United States and Great Britain made statements defining the fight against Nazism as a fight for justice. Like Winston Churchill before him, President Roosevelt sounded the alarm early on about the 'reign of terror and international lawlessness' practiced by the fascist states of Europe. On 5 October 1937, in his 'Quarantine' Speech, he warned, 'Innocent peoples, innocent nations,' he declared, 'Are being cruelly sacrificed to a greed for power and supremacy which is devoid of all sense of justice and human considerations'. [126] He believed the United States should lead an international quarantine of these states and could not be isolated from these events. The nation, still reeling from the Great Depression, was not yet willing to follow with action.

When President Roosevelt began speaking about the war in 1940 and America's role in it, he used a marked emphasis on religious vocabulary in his speeches. By 1942, Roosevelt added legal language to his religious imagery as he began planning for what possible concrete legal action he might take in the postwar period. The convergence of religious thought and legal action was particularly prominent in the eventual foundation of the United Nations and the Universal Declaration of Rights.[127] In late May 1940, President Roosevelt explained, in one of his famous 'Fireside' radio chats to the American people his choice to ask Congress

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[126] Franklin D. Roosevelt, 'Quarantine Speech' (given in Chicago on 5 October 1937). Franklin D. Roosevelt Speeches, The Miller Center at the University of Virginia, Charlottesville, Virginia, USA. There are countless sources on Roosevelt and the lead up to American entry into the Second World War, including Arnold Offner, *American Appeasement: United States Foreign Policy and Germany, 1933-1938* (Cambridge, MA: The Belknap Press of Harvard University Press, 1969); Robert A. Divine, *The Reluctant Belligerent: American Entry Into World War II (*New York: John Wiley & Sons, 1965) and Divine's *Second Chance: The Triumph of Internationalism in America during World War II* (New York: Athenaeum, 1967); Justus D. Doenecke, *Storm on the Horizon: the challenge to American Intervention 1939-1941* (New York: Rowman and Littlefield, 2000); S. Everett Gleason, *The Undeclared War 1940-1941: The World Crisis and American Foreign Policy* (Harper & Brothers, 1953); Robert Dallek, *Franklin D Roosevelt and American Foreign Policy, 1932-1945* (New York: Oxford University Press, 1979); Steve Casey, *Cautious Crusade: Franklin D. Roosevelt, American Public Opinion and the War Against Germany* (Oxford: Oxford University Press, 2001).

[127] Several scholars have touched on Protestant and Catholic thought and its role in providing part of the foundation of the United Nations of the Universal Declaration of Rights; see John S. Nurser, *For All Peoples and All Nations* (Washington DC: Georgetown University Press, 2005); Andrew Preston, *Sword of the Spirit, Shield of Faith* (New York: Anchor, 2012); Samual Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania, 2015), and David Hollinger's various articles and chapters.

for more funding for defensive measures: 'We defend and we build a way of life, not for America alone, but for all mankind. Ours is a high duty, a noble task'.[128] By 29 December 1940, President Roosevelt declared America would be the 'great arsenal of democracy'.[129] The US must help in the fight against the 'new order' imposed by Germany.[130]

In January 1941 President Roosevelt gave his famous 'Four Freedoms' speech. He defended continued support for Great Britain by making the war about protecting freedoms he believed all people were owed (the freedom of speech, the freedom of worship, the freedom from want, and the freedom from fear) that the Germans had taken away illegally. These ideas became the foundational principles that evolved into the Atlantic Charter, a policy statement about UK and US goals for the postwar world, declared by Prime Minister Churchill and President Roosevelt on 14 August 1941.[131]

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[128] Franklin D. Roosevelt, 'Fireside Chat 15: On National Defence' (26 May 1940). Franklin D. Roosevelt Speeches, The Miller Center at the University of Virginia, Charlottesville, Virginia, USA.

[129] Franklin D. Roosevelt, 'Fireside Chat 16' Franklin D. Roosevelt Speeches, The Miller Center at the University of Virginia, Charlottesville, Virginia, USA. This policy was formalized in the American Lend-Lease program ('An Act to Promote the Defence of the United States') enacted March 11, 1941, which supplied huge amounts of materials to Great Britain, Free France, and China. (later to the USSR and other Allies). For more on Lend-Lease see Edward R. Stettinius, *Lend-Lease, Weapon for Victory*. (New York: The Macmillan Company, 1944); Warren F. Kimball, *The Most Unsordid Act: Lend-Lease, 1939–1941* (Baltimore, Maryland: Johns Hopkins University Press, 1969); as well as discussions in Alan P. Dobson, *US Wartime Aid to British 1940-1946* (London: Croom Helm, 1986); Sir Richard Clarke, *Anglo-American Economic Collaboration in War and Peace, 1942–1949* (Oxford: Oxford University Press, 1982); David Reynolds, *The Creation of the Anglo-American Alliance 1937–1941: A Study on Competitive Cooperation* (London: Europa, 1981).

[130] Franklin D. Roosevelt, 'Fireside Chat 16: On the "Arsenal of Democracy"' (29 December 1940). Franklin D. Roosevelt Speeches, The Miller Center at the University of Virginia, Charlottesville, Virginia, USA.

[131] For more on the Atlantic Charter see Douglas G. Brinkley and David Facey-Crowther (eds.), *The Atlantic Charter*. (Basingstoke, UK: Palgrave Macmillan, 1994); John Charmley, 'Churchill and the American Alliance', *Transactions of the Royal Historical Society*, Sixth Series 11 (2011): 353-371; Nicholas Cull, 'Selling peace: the origins, promotion and fate of the Anglo-American new order during the Second World War', *Diplomacy and Statecraft*, 7:1(March 1996): 1-28; Warren Kimball, *Forged in war: Churchill, Roosevelt and the Second World War* (New York: HarperCollins, 1997); Borgwardt's *New Deal for the World* (Cambridge MA: Harvard University Press, 2007); David Reynolds, *The Creation of the Anglo-American Alliance 1937-1941: A Study in Competitive Cooperation* (University of North Carolina Press, 1981) and *From Munich to Pearl Harbor: Roosevelt's America and the Origins of the Second World War* (Ivan R. Dee, 2001)

President Roosevelt continued throughout the war to condemn Nazi atrocities and his rhetoric included the use legal terminology. On 21 August 1942, Roosevelt declared 'that this Government was constantly receiving information concerning the barbaric crimes being committed by the enemy against civilian populations in occupied countries' and said that 'when victory is won the perpetrators of these crimes shall answer for them before courts of law'.[132] On 7 October 1942, he spoke of 'barbaric crimes being committed' and that 'the American Government was prepared to cooperate with other Allied Governments in establishing a UNWCC for the Investigation of war crimes'.[133] Roosevelt declared there would be postwar justice for the perpetrators: 'It is our intention that just and pure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent people and the commission of atrocities which have violated every tenant of the Christian faith'.[134]

The 'most decisive and far-reaching statement of the three major Allies,'[135] and the one with the most impact on the postwar trials, was the Moscow Declaration of November 1943. It was part of an agreement drawn up by VW Molotov, Anthony Eden, and Cordell Hull, the foreign ministers of the Soviet Union, Great Britain, and the United States, at a conference during the latter half of October 1943. President Roosevelt, Prime Minister Churchill, and Premier Stalin signed the 'Declaration of Atrocities' and announced that the 'Hitlerites' would be punished for their war crimes. It said that the three powers:

> …Solemnly declare and give full warning of their declaration as follows:
>
> At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and

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[132] Robert Jackson, *Report of Robert H Jackson, United State Representative to the International Conference on Military Trials* (Washington DC: Department of State and CreateSpace Independent Publishing Platform, 2013), 9.

[133] Ibid., 22.

[134] Ibid., 9.

[135] John W. Wheeler-Bennett and Anthony Nicholls, *The Semblance of Peace – The political Settlement After the Second World War* (New York: W. W. Norton & Company, 1974), 27.

> punished according to the laws of these liberated countries and of free governments which will be erected therein…

Including the 'wholesale shooting of Polish officers[136] or in the execution of French, Dutch, Belgian or Norwegian hostages of Cretan peasants, or who have shared in slaughters inflicted on the people of Poland.'[137] The document continued its warning:

> Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.
>
> The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.[138]

The Soviet Union immediately put the statement into practice a month later with its first trial at Kharkov in December 1943.[139]

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[136] This may be a mistaken attribution to the Germans of the 'Katyn massacre' of Polish military officers. The massacre of about 4500 Polish officers was carried out by the Soviet NKVD in May and April 1940. The German army uncovered the massacre site in 1943 and announced it to the world press. The Soviet government denied this, blaming the massacre on the Nazis. Stalin's American and British Allies, publicly, believed the Soviets. See Anna M Cienciala, Natalia S. Lebedeva, and Woiciech Materski (eds.) *Katyn: A Crime Without Punishment* (New Haven CT: Yale University Press, 2008); Paul Allen - *Katyń: Stalin's Massacre and the Triumph of Truth* (DeKalb, IL: Northern Illinois University Press, 2010); George Sanford, *Katyn and the Soviet Massacre of 1940: Truth, Justice and Memory* (Routledge Chapman and Hall, 2005).

[137] Here Roosevelt may have been referring to reports, recently received in 1943, about the extermination camps in Poland. In March 1943 the OSS reported a further escalation of Nazi violence against Jews taking place in Poland (Map Room Papers; MR 203(12); Sec. 1; OSS Numbered Bulletins, March-May 1943, Box 72. The Franklin Delano Roosevelt Library and Museum, Hyde Park NY). In the same year, Jan Karski, a Polish resistance fighter, reported personally to Roosevelt on the mass exterminations taking place in Poland. (See E. Thomas Wood and Stanislaw M. Jankowski, *Believing the Unbelievable, Karski: How One Man Tried to Stop the Holocaust* (1994) and Jan Karski, *Story of a Secret State: My Report to the World* (Washington DC: Georgetown University Press, 2013, First Published in 1944)

[138] *A Decade of American Foreign Policy: Basic Documents, 1941-49: Prepared at the request of the Senate Committee on Foreign Relations by the Staff of the Committee and the Department of State* (Washington, DC: Government Printing Office, 1950) Accessed online 22 June 2016. For more on the Allies and what they knew of Nazi crimes see the classic account in Martin Gilbert's *Auschwitz and the Allies* (New York: Holt, Rinehart, and Winston, 1981) and Richard Breitman, *Official Secrets: What the Nazis Planned, What the British and Americans Knew* (New York: Hill & Wang, 1999).

[139] Sources for the Kharkov trial include Ignatik Fedorovich Kladov, *The People's Verdict; a full report of the proceedings at the Krasnodar and Kharkov German atrocity trials* (London: Hutchinson & Co., 1944); Arieh J. Kochavi, 'The Moscow Declaration, the Kharkov Trial,

The Russians were the first of the Allies to try Nazis for atrocities before a military tribunal. As one contemporary observer put it, 'The Kharkov trial balloon was to test the reaction to this sort of procedure both at home and abroad, and to draw the attention of world public opinion to the truly monstrous nature of the German crimes'.[140] The Kharkov trial took place between 15th and 18th of December 1943,[141] in a large auditorium in front of an estimated 6,000 audience members, by far the largest number of spectators for any Allied trial during or after the war. As one American journalist observed, 'the atmosphere of that Kharkov trial room was distinctly reminiscent of the famous Treason Trials of 1936-1938. In fact, two of the defence lawyers, Kommodov and Kaznacheyev, had defended some of the figures in the treason trials. Their presence provided an element of direct continuity'.[142] A correspondent for The Spectator wrote: 'The forms of Soviet law were strictly followed, and the accused were defended by eminent lawyers… The staging of the proceedings recalls certain other trials famous in Soviet history'.[143]

Four men, three Germans (Reinhard Redslav, Wilhelm Langfeld, Hans Ritz) and one Soviet collaborator (Mikhail Bulanov) were tried and hanged for crimes committed during the German occupation of Kharkov and the surrounding area including mass killings by shooting and using gas wagons.[144] One newspaper reported, under the headline 'German's Evidence at Kharkov Trial: Details Of

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and the Question of a Policy on Major War Criminals in the Second World War', *History* 76 (1991): 401–417; Alexander Victor Prusin, 'Fascist Criminals to the Gallows! The Holocaust and Soviet War Crimes Trials, December 1945–February 1946', *Holocaust and Genocide Studies,* 17:1 (2003): 1–30; Michael J. Bazyler and Kellyanne Rose Gold, 'The Judicialization of International Atrocity Crimes: The Kharkov Trial of 1943', *San Diego International Law Journal,* 14:1 (November 2012): 77- 138; for a personal, non-academic (and poorly written) account see Greg Dowson, *Judgment Before Nuremberg: The Holocaust in the Ukraine and the First Nazi War Crimes trial* (New York: Pegasus, 2012).

[140] Edmund Stevens, *Russia is No Riddle* (New York: The World Publishing Company, 1945), 116-117. Note about this source: This author, a veteran American correspondent covering Russia, has a strong pro-Soviet bias, for example he described the Treason Trials as having observed 'all legal niceties…to a fault,' despite their many legal indiscretions.

[141] It is worth noting the Russians also held a trial of collaborators at Krasnodar in December 1943 of 11 Russian and Ukrainian auxiliaries to a *Sonderkommando*. The Krasnodar trial received little international press coverage, dealt with Russian defendants only, and thus is not included in this account for the sake of brevity. See Kevin Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2013), 251.

[142] Stevens, *Russia is No Riddle*, 111.

[143] *The Spectator*, 23 December 1943, 1.

Massacre Of 300 Civilians' that Gestapo member Heinz Ritz admitted that he put to death 300 Russian men, women and children, including in 'exhaust gas' killing vans.[145]

In Kharkov, 'in contrast [to Nuremberg], much of the focus of the trial was on the murder of the Jewish population of Kharkov, although not identified as such. Instead, the victims were referred to in the generic as "Soviet citizens"'.[146] Like in the later Allied trials, the defendants claimed the defence of 'superior orders'. In court, defendant Hans Ritz, 'cited Hitler's direct orders for the inculcation of systematic cruelty and the doctrine of German race superiority, whence followed the advisability for exterminating inferior races, including the Russians'.[147]

International journalists were invited to attend the trial, although difficulty with travel arrangements to this newly liberated area meant they only arrived on the last day for closing arguments and sentencing. Still, the trial and its outcome was widely covered in the press in the Soviet Union and internationally. The Soviet papers insisted, "the Kharkov trial is of great international significance. It proclaims the triumph of justice. It shows that arrogantly violated international standard of law will not go unpunished."'[148] The Western Allied press was inclined to agree. For example one wrote,

> The crimes which they were required to confess were black, but not so black as those committed by the arch-criminals who still control the destinies of Germany. The trial has taken place in accordance with the decision that war criminals shall be tried according to the law of the country in which their crimes were committed. In this first case to be heard the justice of the verdict and sentence is beyond all possible challenge.[149]

Throughout the Soviet press, 'the Kharkov executions were hailed as the "first realization" of the Stalin-Roosevelt-Churchill declaration on war criminals [The Moscow Declaration]'.[150]

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[145] *The Advertiser*, Adelaide, SA, 18 December 1943.

[146] Michael J Bazyler and Frank M Tuerkheimer, *Forgotten Trials of the Holocaust* (New York: New York University Press, 2014), 17.

[147] Stevens, *Russia is No Riddle,* 113.

[148] *Pravda*, quoted in the *New York Times*, 19 December 1943, 3 .

[149] *The Spectator*, 23 December 1943, 1.

[150] Stevens, *Russia is No Riddle,* 116.

Although summary executions by the Soviet forces certainly continued unabated during the fighting, after the end of the war the 'policy and techniques first tested at Kharkov were resumed on a large scale by the Soviet Government'. A series of public trials was conducted in Kiev, Minsk, Riga, Leningrad, Smolensk, Briansk, Velikie Luki, and Nikolaev.[151] Ten Germans were tried in Smolensk for wholesale atrocities against Soviet civilians and war prisoners: seven were hanged, one man was sentenced to twenty years at hard labour, one man to fifteen years and one man to twelve.[152] Eleven Germans, including a Major-General, were tried at Leningrad. The General and seven others were sentenced to hang, two men received twenty years hard labour, one man to fifteen years.[153] At Briansk, three, including a Lieutenant-General, were sentenced to hang, one received 20 years of imprisonment.[154] Seven Germans were convicted of war crimes and executed at Riga.[155] From the sources available, it is clear that the Russians tried and executed more war criminals than any other member of the United Nations: 'In May 1950, Soviet sources indicted that 9,717 German prisoners of war were serving sentences for war crimes and 3,815 waited in custody while investigation continued'.[156]

D. Disagreements

Despite their joint declaration at Moscow, Churchill, Stalin, and Roosevelt had differences of opinion over how to deal with Nazi war criminals, suggesting everything from show trials to summery executions carried out in the field. During the

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[151] See George Ginsburgs and Vladimir Nikolaevich (eds.), *Law in Eastern Europe: The Nuremberg Trial and International Law* (Dordrecht, the Netherlands: Martinus Nijhoff Publishers, 1990).

[152] *Pravda,* 16-21 December 1945.

[153] *New York Times* 30 December 1945, 6; *New York Times,* 6 January 1946, 4.

[154] *New York Times* 31 December 1945, 4. *Pravda* 27 December 1945, 3; *Pravda*, 19 December 1945, 3.

[155] *New York Times,* 4 February 1946, 2

[156] See George Ginsburgs and Vladimir Nikolaevich (eds.), *Law in Eastern Europe: The Nuremberg Trial and International Law* (Dordrecht, the Netherlands: Martinus Nijhoff Piblishers, 1990). For more on Russia's postwar treatment of German war criminals see George Ginsburgs's excellent *Moscow's Road to Nuremberg: The Soviet Background to the Trial* (The Hague, 1996); also see Aron Naumovich Trainin, *Criminal Responsibility of the Hitlerites* (Legal Publishing House NKU, 1944); Francine Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order', *American Historical Review* (June 2008): 701- 730.

Moscow conference, different views were expressed on the treatment of the major Nazi leaders:

> V.M. Molotov of the Soviet Union favoured "stern and swift justice". Anthony Eden of Great Britain argued that all the legal forms should be observed. Cordell Hull of the United States took a position which would later be rejected as the American position. Hull said: "If I had my way I would take Hitler and Mussolini and Tojo and their accomplices and bring them before a drumhead court-martial and at sunrise on the following day there would be an historic incident".[157]

Disagreements persisted until the end of the war.[158] When the United Nations War Crimes Commission (UNWCC), a United Nations agency created in 1943 with 'the goal of identifying, classifying, and assisting national governments with the trials of war criminals,'[159] the Soviet Union refused to join. Even after creating it, the American and British governments undercut the efforts of the UNWCC. The Americans and British worried that the UNWCC would step beyond its purview of making lists of war criminals and debating what should be done with them. These government leaders' fears were justified when in late summer 1944 the UNWCC recommended creating a treaty court to try major Nazi war criminals. The British 'adamantly opposed the idea, contending that it was impractical, unnecessary, and too innovative'[160] and asked the Americans to join them in rejecting the proposal.[161] For

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[157] Wheeler-Bennett and Anthony Nicholls, *The Semblance of Peace*, 27.

[158] There are countless source about Soviet-US relations during the war; some of the most helpful include: Susan Butler (ed.), *My Dear Mr. Stalin: The complete Correspondence of Franklin D Roosevelt and Joseph V Stalin* (New Haven Ct: Yale University Press, 2006); Mary E Glantz, *FDR and the Soviet Union* (Kanas City: University Press of Kansas, 2005); George C Herring Jr., *Aid to Russia, 1941-1946: Strategy, Diplomacy, and the origins of the Cold War* (New York: Columbia University Press, 1973); Sidney S. Alderman, 'Negotiating on War Crimes Prosecutions, 1945', *Negotiating with the Russians*, eds. Raymond Dennett and Joseph E. Johnson (Boston, 1951); Alexander Dallin, *The Soviet Union at the United Nations: An Inquiry into Soviet Methods and Objectives* (New York, 1962).

[159] *History of the United Nation War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office in London, 1948). For an excellent discussion of UNWCC see Dan Plesch, *America, Hitler, and the UN: How the Allies Won World War II and Forged a Peace*, (London: IB Tauris, 2011).

[160] Bradley Smith, *Road to Nuremberg* (New York: Basic Books, 1981), 6.

[161] 'British Aide-Memoire: The British Ambassador to the Secretary of State, August 19, 1944', *Foreign Relations of the United States, Conference at Quebec, 1944* (Washington, DC: United States Government Printing Office, 1972), documents 72-94.

the Second Quebec Conference between the British and Americans in September 1944 the Lord Chancellor Sir John Simon wrote a memorandum making the case for summary executions for top Nazi leaders to show to the Americans. In it he wrote, 'I am strongly of the opinion that the method by trial, conviction, and judicial sentence is quite inappropriate for notorious ringleaders such as Hitler, Himmler, Goering, Goebbels and Ribbentrop. Apart from the formidable difficulties of constituting the Court, formulating the charge, and assembling the evidence, the question of their fate is a political, not a judicial, question'.[162] These major criminals should be executed immediately in the field. The Quebec conference ended with Churchill and FDR approving of both summary executions (sending Simon's memo to Stalin for approval and to initiate a joint effort to draw up a list of war criminals who should be executed when captured) and the Secretary of the Treasury's draconian economic plan for postwar Germany (Discussed in detail in Chapter 3).

The idea of summary executions was particularly attractive to some in the Allied governments in light of fears of a repeat of the failures of the Leipzig (and the lesser-known Constantinople) trials. The shadow of World War I hung over any potential plans for punishing war crimes offenses. During the Great War, the Allied governments, particularly Great Britain under Prime Minister David Lloyd George, made the punishment of war crimes part of its war aims.[163] The Allied public was whipped into a frenzy of anti-German sentiment with stories of German atrocities.[164] While there was some kernel of truth, most of these stories were highly exaggerated. During the Second World War many in the US government, and members of the public, believed that reports of the unfolding genocide were exaggerated, just as the 'Belgian atrocities' had been in World War I. Furthermore, the legacy of the failed

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[162] 'Memorandum: Major War Criminals, by the British Lord Chancellor Sir John Simon, 4 September 1944', *Foreign Relations of the United States: Conferences at Washington and Quebec, 1943* (Washington DC: United States Government Printing Office, 1943).

[163] Gary Jonathan Bass, *Stay the Hand of Vengeance: The politics of war crimes tribunals* (Princeton NJ: Princeton University Press, 2002), 60

[164] For more on German atrocities during the First World War see J.B. Bryce, *Report of the Committee on Alleged German Outrages appointed by His Britannic Majesty's Government and Presided over by the Right Hon. Viscount Bryce*. (London: HMSO, 1915); also see Jeff Lipkes, *Rehearsals: The German Army in Belgium, August 1914* (Leuven, Belgium: Leuven University Press, 2007); John N. Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial* (New Haven CT: Yale University Press, 2001);

trials at Leipzig at the end of World War I haunted the Allies.[165] Anthony Eden winced at 'that ill-starred enterprise at the end of the last war' while Henry Morgenthau Jr. called it a 'fiasco'.[166]

The Leipzig trials (1921) were intended to try German war criminals for crimes committed during the Great War. The trials were part of the provisions in articles 227- 230 of the Treaty of Versailles, which demanded that the Germans give over their suspected war criminals, including William II of Hohenzollern, formerly German Emperor, to the Allies to be tried before military tribunal. The Allies initially provided the Germans with a list of some 900 suspects, but by May 1920 had whittled it down to forty-five war criminals and allowed them to be tried by the German Supreme Court (*Reichsgericht*) in Leipzig. The trials were held from 23 May to 16 July 1921. The *Reichsgericht* either acquitted or gave inappropriately light sentences to all the men tried: for example, Sergeant Karl Heynen, accused of assaulting six British POWs, received a ten month imprisonment while Lieutenant-Captain Karl Neumann, accused of sinking the hospital ship, the *Dover Castle*, was acquitted because the court accepted his defence that he was following superior orders. In June 1921, Max Ramdohr, a German secret police officer accused of torturing Belgian children, was acquitted and Belgium, disgusted, withdrew its delegation.[167] Britain and France followed, removed their delegations, and the trials at Leipzig ended. The Kaiser was never tried. The trials were seen then, and now, as a failure. Germany was defeated, but not occupied, and thus could resist turning over its suspected war criminals while the neutral Netherlands refused to extradite Kaiser Wilhelm II who was living in Doorn in exile. The Allied demands for the trials of German citizens was one issue that helped 'to undermine the fledging Weimar Republic by galvanizing the nationalist right'.[168]

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[165] For more on the Leipzig trials see Gerd Hankel, *The Leipzig Trials: German War Crimes and Their Legal Consequences after World War I* (Dordrecht, Netherlands: Republic of Letters Publishing, 2014); Claud Mullins, *The Leipzig trials: an account of the war criminals' trials and a study of German mentality* (London: H.F. & G. Witherby, 1921); Alan Kramer, 'The First Wave of International War Crimes Trials: Istanbul and Leipzig', *European Review*, 14: 4 (October 2006): 441-455; and Patricia Heberer and Jürgen Matthäus (eds.), *Atrocities on Trial: Historical perspectives on the politics of prosecuting war crimes* (Lincoln, NE: University of Nebraska Press, 2008).

[166] Quoted in Bass, *Stay the Hand of Vengeance*, 58.

[167] Bass, *Stay the Hand of Vengeance,* 81; Lipkes, *Rehearsals,* 592-593.

[168] Bass, *Stay the Hand of Vengeance,* 60.

The Constantinople trials (1919-1921) were largely a British-led enterprise, in cooperation with the other Allies, to punish those responsible for war crimes and the 1915 deportation and genocide of the Armenians. While the British focused largely on postwar justice in Germany (the Leipzig Trials), in a 'striking display of British idealism and universalism,' there was significant pressure from the British public to try the actors in the Armenian genocide. As early as May 1915, France, Great Britain and Russia formally accused the Ottoman Empire of 'crimes against humanity,' the first time the phrase was formally used. The statement promised:

> In view of these new crimes of Turkey against humanity and civilization the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.[169]

After the war in April 1919 under massive pressure from the UK an Ottoman court charged 'some of the most important leaders from the wartime Ottoman government: men who had once held the mighty titles of minister of foreign affairs, minister of justice (two of them), part secretary-general, and even grand vizier'.[170] Thousand more trials were anticipated for those involved with war crimes. However, the tribunal project was slow, gathering evidence was difficult if not impossible and by 1920, the British demanded prioritization of the trials of those men accused of crimes against British soldiers. As at Leipzig, the Constantinople trials aroused nationalist sympathies in Turkey. In 1921, as Turkey descended into civil war, Ataturk's Nationalist forces took a handful of British soldiers as hostages and 'demanded a prisoner swap: all Britons in exchange for all the wars suspects in British custody'.[171] Britain agreed and the trials ended.

The negative experience of the botched Constantinople trials and the Leipzig trials remained in the consciousness of the Allies and remained a stern warning of how poorly large postwar trials could go. The British, in particular, remained deeply sceptical of the idea of trials for the Nazis at the end of the Second World War.

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[169] Telegram from the Department of States, Washington 29 May 1915,T.M.C. Asser Instituut, Den Haag, Netherlands, accessed online 10 July 2016. This is interesting in view of Philippe Sand's book, which heavily credits Hersch Lauterpacht for the concept of the crime against humanity in the 1930s and 1940s. Philippe Sands, *East West Street: On the origins of 'Genocide' and 'Crimes against humanity'* (New York: Alfred A. Knopf, 2016).

[170] Bass, *Stay the Hand of Vengeance,*106.

[171] Ibid., 107

Nevertheless the idea of judicial proceedings won out. By the final wartime conference meeting of the three major Allies at Yalta, from 4 – 11 February 1945, major judicial trials became American policy (See Chapter 3 for detailed discussion). Although Winston Churchill arrived at Yalta with a proposal to execute top Nazis, President Roosevelt overruled him in favour of trials. Guy Liddell, head of counter-espionage at MI5, recorded in his diaries that the 'DPP [UK Director of Public Prosecutions, Sir Theobald Mathew] had recommended that a fact-finding committee should come to the conclusion that certain people should be bumped off and that others should receive varying terms of imprisonment' and that 'any military body finding these individuals in their area to arrest them and inflict whatever punishment had been decided on.' This was a much clearer proposition and 'would not bring the law into disrepute.'[172]

Despite reservations on the British side, in the end, the protocol of the Yalta Conference contained a provision on 'Major War Criminals'. It stated that 'the Conference agreed that the question of the major war criminals should be the subject of enquiry by the three Foreign Secretaries for report in due course after the close of the Conference'.[173] Thus the Allied powers agreed that something concrete must be done to prosecute and punish Nazis, but each government was left to its own devices to decide how to arraign captured Nazi criminals. The crimes committed within the Nazi concentration camp system would require particular attention, as they were the sites of grievous offences - 2.3 million men, women, and children passed through the German camp system between 1933 and 1945; 1.7 million lost their lives.[174]

It is important to note the distinction between the concentration and extermination camps from the outset. Extermination camps were largely separate institutions from the concentration camps – 'no one was concentrated at Chelmno, Belzec, Sobibor or Treblinka, which together account for a little less than a third of the Holocaust victims'. These camps were purely killing facilities, 'not administered

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[172] Diary entry, 21 June 1945, Liddell Diaries: Volume 12 of the diary kept by Guy Liddell, the head of the Security Service's B Division, during the Second World War, KV 4/185 – KV 4/196, The UK National Archives, Kew, UK. Also see, Christopher Andrew, *The Defence of the Realm: The Authorized History of MI5* (New York: Penguin, 2010).

[173] *Germany, 1947-1949, The Story in Documents* (Washington DC: Department of State Publications, 1950), 44.

[174] Nikolaus Wachsmann, *KL: A History of the Nazi Concentration Camps* (New York: Farrar, Strause and Giroux, 2015).

as part of the regular concentration camp system. The [former] are regularly referred to as concentration camps when in fact they were no such thing'.[175] Majdanek and Auschwitz were exceptions in that they combined a killing facility with a concentration camp of slave labourers. Furthermore, despite the concentration camps' overwhelming association with the crimes of the Holocaust (the concentration camp gas chamber become the primary symbol of the Nazis' mass industrialized killing machine), a majority of Jews killed by the Germans were shot, deliberately starved to death, or left to die of preventable disease. During and after the war, there was a lack of understanding about the differences between these camps. As historian Stone argued

> This lack of clarity, combined with the chaos of war's denouement, which brought the different camps crashing together, contributed to the confusion over the geography and operation of the Holocaust for years after the end of the war…it was only late in the war that the systematic murder of Europe's Jews became entangled with the wider history of the concentration camps.[176]

Even with the combination of camp populations at the end of the war, Waschmann estimated that at their peak only a third of the concentration camps' population consisted of Jews.[177]

E. Conclusion

When fully revealed, the crimes at the camps were shocking and horrific. The media blitz surrounding the liberation of Buchenwald on 12 April and Belsen on 15 April on the western front caused immense public outcry and put pressure on the US government to come with a concrete plan to punish war crimes. Dachau was liberated by the United States 42nd and 45th Divisions on 30 April 1945. Along with other horrors, the Americans found a train of coal wagons with hundreds of bodies.[178] The camp and its victims were in bad shape; typhus was prevalent. On 5 May, American newspaper editors were allowed into Dachau. Unlike Buchenwald, which was opened to the press 10 days after liberation and somewhat cleaned up, Dachau was left

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[175] Stone, *Liberation of the Camps,* 12.

[176] Ibid., 12.

[177] Quoted in Evans, 'Anatomy of Hell'.

[178] *The Post*, '39 Carloads of Bodies on track in Dachau,' 1 May 1945.

deliberately piled with dead bodies. This 'overwhelming evidence had been left for editors and congressmen to make sure there were no dissenting reports on those centres in which Nazi terror and extermination reached its peak of cruel perfections'.[179]

While violations of existing international laws were widespread, in order to more easily prosecute the men (and a few women) responsible for the crimes committed at the camp, some legal innovation would be necessary. The prevailing international laws of war did not envision the total war waged by the Germans, particularly on civilians and POWs in the camps. As discussed in the next chapter, a passionate debate about how to bring German criminals to justice was waged at the highest level of American government.

[179] *The Washington Daily News*, 'Tangled Piles of Rotting Corpses Tell Story of Dachau Horrors,' 5 May 1945.

Chapter 2: Developing the Blueprint for the American War Crimes Tribunals, September 1944 - July 1945

> 'Nobody knew what a war criminal was – officially. Nobody knew what men were on the list of was criminals – officially. Nobody knew when they would be tried – officially'. *Newsweek*, May 1945.

> 'Because of the unprecedented developments in this war, this task was without parallel both from the standpoint of its magnitude and the novel questions of international law involved'. Lt. Col. Straight, *Report of the Deputy Judge Advocate for War Crimes*, July 1948.

As early as 1940, the Polish government-in-exile requested that the French and British governments publicly commit to punishing German war criminals. Before the United States entered the war, President Roosevelt, referring to reports of a retributive shooting of fifty hostages by German soldiers, ended a statement to the nation with a vague threat: 'Frightfulness can never bring peace to Europe. It sows the seeds of hatred which will one day bring fearful retribution'.[180] By the autumn of 1944, the government in Washington was under considerable pressure from members of the press and private interest groups within the United States, notably the American Jewish Congress, to punish war criminals.[181] After United States forces landed in Western Europe (June 1944), troops increasingly reported uncovering German atrocities—for example, in mid-January 1945, American troops recaptured the site where SS troops had massacred captured American soldiers. The freezing temperatures had preserved the bodies.[182] In November 1944, in the Vosges

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[180] Quoted in Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: The University of North Carolina Press, 1998), 15. The statement was issued October 1941.

[181] See American Jewish Conference to Secretary of State, 25 August 1944, Statement on War Criminals, War Department preparation papers, McCloy to the Secretary of War, 27 October 1944. Asst. Sect., Box 15, January 1943-December 1944 File, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

[182] James J Weingartener, *Crossroads of Death: The Story of the Malmédy Massacre and Trial* (Berkeley: University of California Press, 1979), 66.

Mountains, the French 1st and American 7th army uncovered the abandoned labour camp of Natzwiller-Struthof, where captured Resistance fighters from Holland, Belgium and France (as well as Jews and Gypsies) were killed through over-work, disease, medical experimentation, and in a small gas chamber.[183] This was the first concentration and labour camp, albeit abandoned and with no prisoners or corpses, the western Allies uncovered, the first of many.

The other United Nations[184] had long discussed the German SS and Wehrmacht crimes and debated what was a proper response. In December 1942, in the midst of the largest mass killings of Jews during the war, members of the United Nations issued a 'Joint Declaration by Members of the United Nations Against Extermination of the Jews'. The declaration, after condemning the 'bestial policy of cold-blooded extermination', finished with the promise 'to overthrow the barbarous Hitlerite tyranny. They re-affirm their solemn resolution to ensure that those responsible for these crimes shall not escape retribution, and to press on with the necessary practical measures to this end.'[185]

The Declaration was widely publicized – British Foreign Secretary Anthony Eden read the short text in full in the House of Commons on 17 December 1942 and the *New York Times* published a report on 18 December 1942. But there remained debate among the United Nations as to how 'to ensure that those responsible for these crimes shall not escape retribution'. At the major wartime conferences in Casablanca, Quebec, Tehran, and Yalta, Churchill, Roosevelt, and (at Tehran and Yalta) Stalin deliberated what form the United Nations' justice would take. As well as an international effort, each United Nations country would need a plan for the treatment of alleged collaborators and German war criminals found in their own country and/or zone of occupation. As we will see in Chapter 6, their vastly different experiences

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[183] Robert H. Abzug, *Inside the Vicious Heart: Americans and the Liberation of Nazi Concentration* camps (Oxford: Oxford University Press, 1985), 3-4.

[184] 'United Nations' was the formal name for the alliance between the Soviet Union, China and other countries fighting the Axis powers during the Second World War. It was proposed by President Roosevelt to Prime Minister Churchill and adopted on 1 January 1942 in the announcement, Declaration of the United Nations. For more on the creation of the term 'United Nations', see Dan Plesch, *America, Hitler and the UN: How the Allies Won World War II and Forged A Peace* (London: I.B. Tauris, 2011).

[185] Joint Declaration by Members of the United Nations Against Extermination of the Jews, 17 December 1942. See appendix in Paul R. Bartrop and Steven Leonard Jacobs (eds.), *Modern Genocide: The Definitive Resource and Document Collection* (Santa Barbara, CA: ABC-CLIO, 2014).

during the war and divergent postwar political situations informed each nation's response to Nazi criminality.

This chapter focuses on the development of a blueprint for the American response to German war crimes and how it was complicated by debate and disagreement between proponents (mostly in the War Department, White House, and some in the State Department) of indicting Germans on the charges of criminal-conspiracy and proponents (in the Army, Navy, and Judge Advocate General (henceforth JAG)) of prosecuting offenders using traditional military commissions and internationally recognized laws of war. The form of the concentration camp trials at Dachau would develop into a mixture of both ideas; defendants were tried before a military commission and charged with 'violations of the laws and usages of war' *as well as* a criminal-conspiracy charge (participating in the 'common design' of the criminal organization of the camp).

A. Choosing Trials

While publicly condemning war crimes throughout the Second World War, United States policy towards German war criminals was vague. The American military primarily considered three options: summary executions, an international treaty tribunal, and national military tribunals. As discussed in Chapter 2, executions, suggested originally by Winston Churchill at the 'Big Three' conference at Yalta in February 1945, were quickly discarded in favour of some form of trial.[186]

President Roosevelt asked the Secretary of the Treasury Henry Morgenthau Jr., Secretary of War Henry L. Stimson, Secretary of State Cordell Hull, and Harry Hopkins, former Secretary of Commerce and confidential adviser to the President (later, after he fell ill, replaced by Judge Samuel I Rosenman), to form a committee for the development of policy regarding postwar Germany.[187] By the fall of 1944 into

[186] For further insight into the British decision making for postwar Germany in 1945 see the diaries of Guy Liddell, head of counter-espionage at MI5 during the 1940s and 50s, at the British National Archives at Kew, UK. 'Liddell Diaries. Volume 1-12 of the diary kept by Guy Liddell, the head of the Security Service's B Division, during the Second World War', KV 4/185 – KV 4/196, The UK National Archives, Kew, UK.

[187] It is important to note that many of the major players formulating American foreign policy in the 1940s had been trained as lawyers and therefore thought in legal terms while planning foreign policy. Morgenthau taught and practiced law in Frankfurt, Germany before emigrating to the United States in 1937. Cordell Hull trained as a lawyer at Cumberland School of Law. Stimson trained as a lawyer at Harvard and practiced as a Wall Street lawyer before beginning his long government career, starting with becoming Attorney General under Theodore

the spring of 1945, the heads of Treasury, State, and War and their departments developed robust views about United States' foreign policy in postwar Germany and how the United States army's occupying force should deal with German war criminals. The committee members searched for a response to German war crimes that would both punish war criminals to make Germany safe for American occupying forces, while also facilitating (or, at least, not hindering) a transition Germany from the criminal Nazi regime to a new democratic government. However, in the face of the extensive and brutal crimes committed under the Nazi regime, the committee debated fiercely about whether American policy towards war criminals should or could remain within (or at least bordering) the constraints present in existing international treaties, conventional international laws of war, and American military law.

Photo 3. Portrait of Henry Morgenthau Jr. at his desk in the U.S. Department of the Treasury. Courtesy of the USHMM Photo Archives.

Roosevelt. Dean Acheson also trained as a lawyer at Harvard Law School. McCloy was trained at Harvard Law School and, after a stint in the Army, began his career on Wall Street, before entering government service. Harry Hopkins was trained as a social worker; his replacement Samuel I Rosenman was trained as a lawyer at Columbia School of Law.

Secretary of Treasury Morgenthau advanced an uncompromising response to German war criminals. On 5 September 1944, in a memorandum sent to President Roosevelt, known as the 'Morgenthau Plan,' he stated his proposal for both (1) the economic deindustrialization of postwar Germany and (2) the immediate execution of war criminals.[188] 'Arch-criminals,' he wrote:

> …Whose obvious guilt has generally been recognized by the United Nations…shall be apprehended as soon as possible and identified as soon as possible after apprehension, the identification to be approved by an officer of the General rank. When such identification has been made the person identified shall be put to death forthwith by firing squads made up of soldiers of the United Nations.[189]

Morgenthau proposed that lesser war criminals be tried by military commissions in the field for one or more of the following crimes: (1) killing in violation of the rules of war, (2) killing a hostage in reprisal for the deeds of other persons, (3) killing a victim because of his nationality, race, colour, creed, or political conviction. Morgenthau's plan did not consider whether the crimes had been committed against an Allied national or before America entered the war. All violators would be punished.

Morgenthau initially had support for his proposal from Secretary of State Hull, who supported some punishment for Germany; specifically, the arrest and interning of 'large groups of particularly objectionable elements, especially the SS and the Gestapo…[they] should be tried and executed'.[190] Hull would later show his ambivalence and outright hostility, when the uncompromising harshness of the Morgenthau Plan was revealed fully. Morgenthau put enormous pressure on Secretary of War Stimson to formulate a tough war crimes policy to be carried out by the United States Army. Stimson was not, at first, against summary executions; he

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[188] Henry Morgenthau Jr. to President Roosevelt, 5 September 1944, The Morgenthau Diary 2:105-8, Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, NY, USA.

[189] Ibid.

[190] United States Department of State, 'State Department memorandum for the Cabinet Committee of Germany, 1944', *Foreign Relations of the United States: Conferences at Washington and Quebec, 1943* (U.S. Government Printing Office, 1943), 96.

simply wanted 'definite instructions' for officers in the field.[191] He noted that 'if shooting is required it must be immediate; not postwar'.[192]

President Roosevelt was largely silent about his opinion concerning war crimes policy throughout this planning period. He made few indications of any concrete plans for punishing war criminals beyond favouring their punishment in a general way. The President seemed to indicate his support for Morgenthau when he sent Stimson a sharply worded memorandum on 26 August 1944 criticizing the army's current occupation handbook. He wrote, 'this so-called 'Handbook' is pretty bad…The German people as a whole must have it driven home to them that the whole nation has been engaged in a lawless conspiracy against the decencies of modern civilization'.[193] Morgenthau's plan enjoyed a short-lived victory at the Quebec conference (12-16 September 1944) when Prime Minister Winston Churchill and President Roosevelt discussed and verbally agreed to deindustrialize Germany and conduct summary executions in the field.

When the Secretary of War Stimson and Secretary of State Cordell Hull, heard of the verbal agreement, the men were furious. Furthermore, at the end of September and early October, 'a fairly accurate summery of the Morgenthau Plan, [was] published by the *Wall Street Journal*, and another published by the *New York Times*'.[194] The *New York Times* article reported the bitter disagreements between Morgenthau, Hull, and Stimson.[195] Other newspapers followed the reports with there own articles and, 'attempts to defend Morgenthau were lost in a chorus of American press criticism of what were seen as [Morgenthau's] inhumane and unrealistic measures'.[196] With an election coming up, President Roosevelt did not want a display

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[191] Notes of Henry L Stimson, 25 August 1944, Conference with the President, Diaries of Henry L Stimson, vol. 48, p. 22, roll 9, The Papers of Henry L Stimson, Yale University Library Manuscript Collection, New Haven, Connecticut, USA.

[192] Ibid.

[193] Presidential Memorandum for the Secretary of War, 26 August 1944, The Morgenthau Diary 2:443-44, Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, NY, USA.

[194] *Wall Street Journal*, 23 September 1944; *New York Times,* 24 September 1944.

[195] David B Woolner (ed.), *The Second Quebec Conference Revisited: Waging War, Formulating Peace: Canada, Great Britain, and the United States in 1944-1945* (New York: St. Martin's Press, 1998), 88.

[196] Bradley F. Smith (ed.), *The American Road to Nuremberg: Documentary Record 1944-1945* (Stanford University: Hoover Institute Press, 1982), 10.

of a divided cabinet, 'particularly when the dispute involved key members of his administration, such as Hull, who commanded great respect among the American electorate'.[197] By the beginning of October, Roosevelt distanced himself from his previous support of Morgenthau's Plan and minimized the importance of the decision in Quebec. The president turned to the advice of Secretary of War Stimson.

Stimson believed that a comprehensive legal programme to punish war criminals was necessary to make the country safe for the occupying forces and re-educate the German people. In early September, before the Quebec conference, Stimson had responded to Morgenthau's plan in a memorandum to the Secretary of Treasury, other committee members, and the President, stating his basic objections to Morgenthau's proposal: The plan 'would add the dangerous weapon of complete economic oppression. Such methods, in my opinion, do not prevent war. They tend to breed war'.[198] Stimson advocated trials of German criminals and that 'such procedure must embody in my judgment, at least rudimentary aspects of the Bill of Rights, namely the notification to the accused, the right to be heard and, within reasonable limits, to call witnesses to his defence'. He continued, 'I do not mean to favour 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 on posterity'.[199] He suggested that the chief German offenders be tried by an international tribunal and they should be charged with 'offences against the laws of the Rules of War in that they have committed wanton and unnecessary cruelties in connection with the prosecution of the war'.[200] Stimson admitted that his proposal lacked a procedure for prewar crimes and war crimes committed in Germany and/or against Germans:

> I have great difficulty in finding any means whereby military commissions may try and convict those responsible…I would be prepared to construe

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[197] Woolner, *The Second Quebec Conference Revisited*, 89.

[198] Henry L. Stimson to Henry Morgenthau Jr., 5 September 1944, The Papers of Henry L Stimson, roll 110, The Papers of Henry L Stimson, Yale University Library Manuscript Collection, New Haven, Connecticut, USA.

[199] Secretary of War to the President, 9 September 1944, *Foreign Relations of the United States: Conferences at Washington and Quebec, 1943* (U.S. Government Printing Office, 1943), 91-93,

[200] Ibid.

> broadly what constituted a violation of the Rules of War but there is a certain field in which I fear that external courts cannot move. 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…[201]

In order to create a concrete alternative plan to Morgenthau's, Stimson and the Assistant Secretary of War John J. McCloy discussed the matter on the phone on 28 August and agreed on four 'propositions'[202] outlining the major goals of the American war crimes programme. First, 'swift punishment should be visited on the Nazi leaders in respect to war crimes'. Second, American investigators 'should then go down by steps into the subordinates responsible for such crimes, beginning with the leaders of the Gestapo and investigating their individual responsibility and punish it accordingly'. Third, upon occupation, American forces should arrest and intern the entire Gestapo and begin investigating each individual. Fourth, investigators should 'institute at once an investigation as to the responsibility of the Storm Troopers and their leaders for similar war crimes'. The trials and punishments 'should be as prompt as possible' to avoid making martyrs. The goal was not retribution, but 'this punishment is for the purpose of prevention and not for vengeance'.[203]

At the time he prepared this plan (September 1944), Stimson believed that military commissions should try war criminals, operating under flexible rules of evidence. Stimson received from support for his policy of trials from the Judge Advocate General Major General C. Cramer. On 5 September 1944, the two men discussed the trials and the flexibility of military tribunal rules. Stimson advised that any military tribunal should be able to make its own rules for 'it must be free from all the delays that would go with the technicalities of a courts-martial or the United States jurisprudence procedure…' and that 'the tribunal must be absolutely free of the

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[201] Ibid.

[202] Report by the Assistant Secretary of War of a Telephone Conversation with Secretary of War Stimson, unknown day, 12:30pm, *Foreign Relations of the United States: Conferences at Washington and Quebec, 1943* (U.S. Government Printing Office, 1943), 76-77. Reprinted in Smith (ed), *American Road to Nuremberg,* 23. For more on John McCloy see Kai Bird, *The Chairman: John K. McCloy and The Making of the American Establishment* (New York: Simon and Schuster, 1992).

[203] Ibid.

restrictions of courts-martial. I understand that's so from experience with the Saboteur Case'.[204]

Here Stimson was referring to the Supreme Court decision in the so-called Saboteur Case (*Ex parte Quirin*). The trial by military commission in August 1942 of eight German saboteurs[205] raised questions about the use of military tribunals to try foreign nationals and/or unlawful combatants while the civil courts were operating, as well as the ability of courts to review decisions made by the president while acting as Commander-in-Chief. In mid-June 1942, eight trained saboteurs landed by German submarine off the east coast (half in Long Island, New York, half in Ponte Vedra Beach, Florida) of the United States. The men were spotted almost immediately in Long Island and two of the defendants turned themselves into the FBI. The rest were rounded up by 27 June 1942. None of the men ever carried out an act of sabotage.

Francis Biddle, Attorney General of the United States and the man who prosecuted the case, received a memorandum from Judge Advocate General (JAG) lawyer Oscar Cox on 29 June 1942, concluding that the men could be tried either by a general courts-martial or a military tribunal. Cox argued that the Supreme Court precedent set out in *Ex parte Milligan* (1866), a case which restricted the use of military commissions for trying civilians and enemy aliens when civil courts were operating,[206] did not apply in the case of the German saboteurs because they were unlawful combatants who came through enemy line out of uniform for the purpose of committing sabotage. Cox compared the merits of the two types of military courts and suggested using a military commission because it would give the prosecution more flexibility in procedural form and rules of evidence. If Biddle tried the Germans using a general courts-martial, he would be required to 'must follow statutory procedures presented in the Article of War, whereas the procedures of a military

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[204] Telephone Conversations Between the Secretary of War and the Judge Advocate General, Box 1603, The War Department and the Army Records, Records of the Office of the Judge Advocate General (RG 153), The National Archives and Records Administration, College Park, Maryland, USA. Also see Smith (ed), *American Road to Nuremberg,* 24-27

[205] The defendants were Ernest Peter Burger, George John Dasch, Herbert Hans Haupt, Heinrich Heinck, Edward Kerling, Herman Neubauer, Richard Quirin and Werner Thiel. Burger and Haupt were United States citizens.

[206] In *Ex parte Milligan* (1866), the Supreme Court ruled that a prisoner's ability to challenge his detention could only be suspended for a brief and finite period of time, and only if the situation compelled it. The Court also ruled that military tribunals generally lack jurisdiction over civilians who are not connected with or engaged in armed conflict.

commission are not necessarily governed by statutes'.[207] For these reasons, Biddle recommended to President Roosevelt that the Germans be tried using a military commission.

President Roosevelt agreed to use a military commission to try the Germans and issued Proclamation 2561, titled 'Denying Certain Enemies Access to the Courts of the United States'. The initial paragraph began by stating that 'the safety of the United States demanded that all enemies who have entered the territory of the United States as part of an invasion…should be promptly tried in accordance with the laws of war'. Roosevelt's reference to the 'laws of war' was crucial. Had Roosevelt cited the 'Articles of War,' he would have triggered the statutory procedures, established by Congress, for courts-martial. The 'laws of war,' were 'undefined by statute, [and] represent a more diffuse collection of principles and customs developed in the field of international law. A military tribunal could thus pick and choose among the principles and procedures that it found compatible…'[208] In short, military commissions were more flexible– giving the court a *carte blanche* to accept any evidence it deemed relevant to the case.

The government charged the eight men with four crimes: one against the 'law of war,' two against the Articles of War (81st and 82nd), and one involving conspiracy. The prosecutors thus combined a mix of offences that were non-statutory ('law of war') and statutory (Articles of War). The distinction is significant because in American federal law the creation of criminal offences is reserved to the legislative branch (Congress), not to the executive branch (the President). The Constitution of the United States,

> …Vests in Congress the power to 'define and punish Piracies and Felonies committed on the high Seas, and Offences on Land and Water'. By enacting the Articles of War, Congress defined not only the procedures but also the punishments for the field of military law. Charging individuals with violations of the 'law of war' shifts the balance of power from Congress to the Executive.[209]

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[207] Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Lawrence, Kansas: University Press of Kansas, 2003), 48.

[208] Ibid., 50-51.

[209] The United States Consitution.

The defence attorneys, assigned to the German defendants from the Judge Advocate General, disputed the military commission's jurisdiction and the case was referred to the Supreme Court. On 29 July 1942 the Supreme Court heard the case, in a rare summer appearance, and handed down a decision dismissing the defence's challenge on 31 June. The court opinion (not filed until 29 October) catalogued the war powers bestowed upon the president including 'the power…to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war'.[210] The Articles of War enacted by Congress included Article 15 which recognized the president's right to use military tribunals to punish offences 'against the law of war not ordinarily tried by courts-martial'.[211] In the light of this, 'the Court decided that President Roosevelt had exercised authority "conferred upon him by Congress," as well as whatever authority the Constitution granted the President [as Commander-in-Chief]'.[212] The jurisdiction of the military commission over the German saboteurs was upheld. The military commission found all eight men guilty and sentenced them to death. Six of the men were executed.[213] *Ex parte Quirin* laid the legal groundwork for the jurisdiction of military commission over enemy combatants –which were used by the United States military at the Dachau tribunals.

B. The Bernays' Plan

Although Secretary of Stimson had articulated an outline of general ideas for an American war crimes trial programme, he needed to devise concrete procedures based on legal precedent for his proposal. The man who would help him, Lt. Colonel Murray C. Bernays, was an army investigator from a Lithuanian Jewish family. Even

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[210] *Ex parte Quirin* (1942).

[211] *Ex parte Quirin* (1942).

[212] Fisher, *Nazi Saboteurs on Trial*, 123.

[213] Ernest Peter Burger, an American citizen since 1933, whose sentence was commuted to life imprisonment by President Roosevelt for his cooperation with the FBI, was deported to Germany in 1948. Georg John Dasch, German saboteur who gave up his fellow spies to the FBI, had his sentence commuted to thirty years in prison and was deported to Germany in 1948 with Burger.

before Stimson officially requested his assistance, Lt. Colonel Bernays,[214] with the encouragement of his friend Col. Mickey Marcus, an adjunct colleague in the Army's Civilian Affairs Division, began formulating a counter-plan in the wake of the press leak and subsequent fall of Morgenthau's plan.

After the ground invasion at Normandy in June 1944, German forces began to take American soldiers prisoner. In the European theatre, almost 94,000 Americans were held as prisoners of war (known as 'Kriegies', short for *Kriegsgefangener*—German for POW.)[215] Mostly they were held in *Stalags* throughout the Greater Reich and were treated relatively well. However, American soldiers who were identified as Jewish were often sent into the concentration camp system where they were afforded no protections reserved for other American POWs (for example at the Berga camp as discussed in Chapter 2). Similar to the concentration camps, conditions in the POW camps worsened in the final months of the war as overcrowding and disease became rampant. At the end of the war, American POWs were subjected to death marches; for example between January and April 1945, to keep them ahead of the Soviet Army, the Germans marched almost 80,000 US and Commonwealth POWs westward, in what is now referred to as the 'Black March'. As many as 3,500 US and Commonwealth POWs died as a result.[216]

General Eisenhower was infuriated by the treatment of American POWs and ordered a full investigation of war crimes against Allied POWs. The Civilian Affairs Division of the Army, which was in charge of helping to formulate postwar policy in Germany, stepped up its investigation of war crimes. Lt. Col. Bernays worked with the Civilian Affairs administration collecting evidence of crimes against American soldiers.

Bernays was born in Lithuania and immigrated to the United States in 1900 with his family when he was six. He attended Harvard for his undergraduate degree and then Columbia and Fordham for law school. He served in the army during World War I and then practised law in New York City. Furthermore, Bernays was well

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[214] Bernays' officially worked for the Office of the Chief of Staff of Personnel Branch of the United States War Department (G-1). G-1 was the branch of the government in charge of investigating war crimes against American servicemen.

[215] 'American POWS in Europe', Exhibition (11 November 2012 - 7 July 2013), The National World War II Museum, New Orleans.

[216] Ibid.

connected; he was a close friend of Judge Samuel I Rosenman (who would take over Harry Hopkin's position as a close advisor to President Roosevelt) and, as thus, was informed of the challenges the government was grappling with in responding to Nazi crimes.

Bernays' investigations of Nazi crimes against American servicemen led him to believe that National Socialism was both a system and conspiracy. He wrote,

> The crimes and atrocities were not single or unconnected, but were the inevitable outcome of the basic criminal conspiracy of the Nazi Party…This conspiracy, based on the Nazi doctrine of racism and totalitarianism, involved murder, terrorism, and the destruction of peaceful populations in violation of the laws of war.[217]

He concluded, furthermore, 'that from the beginning Hitler intended to eliminate the entire German opposition to the Nazis and that this involved the persecution of all opposing elements, including the Jews, both before and during the war'.[218] Bernays believed that large scale trials were the only way to approach Nazi criminality. He wrote, 'Not to try these beasts would be to miss the educational and therapeutic opportunity of our generation. They must be tried not alone for their specific aims, but for the bestiality from which these crimes sprang'.[219]

Bernays was aware of the main problems facing any plan attempting to prosecute German war criminals. The number of cases and offences was overwhelming. Furthermore it might be difficult to establish the individual's identity or to connect him with the particular act charged, witnesses could be dead and scattered, the gathering of proof would be tough and costly, applicable basic law, law as to justification (e.g. orders of duly constituted superiors), procedures, and rules of evidence will vary from jurisdiction to jurisdiction, and there would be massive amount of paperwork. Finally:

> Undoubtedly, the Nazis have been counting on the magnitude and ingenuity of their offences. The numbers of the offenders, the law's complexities, and delay and war weariness as major defences against effective prosecution…

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[217] Robert E. Conot, *Justice at Nuremberg* (New York: Carroll and Graf Publishers, 1983), 11.

[218] Drexel A. Sprecher, *Inside the Nuremberg Trial: A prosecutor's comprehensive account* (Maryland: University Press of America), vol. 1, 29.

[219] Conot, *Justice at Nuremberg*, 11.

> Trial on an individual basis, and by old mode and procedures, will go far to realize the Nazi hopes in this respect….[220]

Finally, 'many of the Axis atrocities were committed before there was a state of war [between Germany and the United States]. These cannot be categorized as war crimes under existing law…[and] some of the worst outrages were committed by Axis powers against their own nationals on racial, religious, and political grounds'.[221]

Bernays chronicled the deficiencies of solutions suggested to deal with German war criminals. He dismissed the plan for summary executions, which its proponents supported for the ability to circumvent all the challenges of prosecuting German war criminals by skipping the law altogether. Summary executions might work for certain well-known German leaders but would do nothing to punish lesser criminals and '…it would do violence to the very principles for which the United Nations have taken up arms, and furnish apparent justification for what the Nazis themselves have taught and done'.[222] Summary executions were likely to elevate leading Nazis to martyrs. In his memorandum, Bernays discussed the possibility of pressuring successor governments in Germany and Italy to use their courts to punish their own nationals. However, he dismissed the idea concluding '…it is hardly likely that all of them can be counted on to be as vigorous and effective as they should be. Furthermore, such a course would not meet the demand that the United Nationals make good their apparent assurance that these acts would be stamped as criminal by international judgment…'[223]

Furthermore, Bernays dismissed the idea of 'streamlined trials' as little better than summary executions, as they would cause similar problems. He concluded that the old procedures and concepts of law would not work to catch and punish a great number of criminals. For, in the face of new levels of criminality practised by the Germans, 'the ultimate offence, for example, in the case of Lidice, is not alone the

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[220] Subject: Trial of European War Criminals (By Colonel Murray C Bernays, G-1), 15 September 1944. Appendix to Stimson to Hull letter of 27 October 1944, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

[221] Ibid.

[222] Ibid.

[223] Ibid.

obliteration of the village, but even more, the assertion of the right to do it'.[224] As Bernays argued, using the law was important to satisfy Allied concerns and to move Europe towards a lasting peace. Barnays wrote, 'To let these brutalities go unpunished will leave millions of persons frustrated and disillusioned…Strong pressure is being brought on the United States and British governments by organized groups [Jewish groups], representing their co-religionists and undoubtedly also expressing the views of many who are not of their faith, to have their act categorized and treated as war crimes'.[225]

The 'Bernays' Plan' proposed trials for German war criminals by charging the accused with criminal conspiracy, a legal concept used in the United States but virtually unknown in international law. A criminal conspiracy occurs when two or more people plan to commit an unlawful act and take steps towards planning that act. The offence of criminal conspiracy appealed to Bernays as a more efficient way to prosecute a large number of Germans, particularly the Nazi and *Wehrmacht* leadership, for committing a variety of crimes, while only needing to demonstrate that these men were part of planning an unlawful act. Bernays' plan foreshadowed both the Nuremberg trials' 'aggressive war' approach and the Dachau trials 'common design'. As Bernays argued, 'This approach throws light on the nature of the individual's guilt, which is not dependent on the commission of specific criminal acts, but follows inevitably from the mere fact of voluntary membership in organizations devised solely to commit such acts'.[226]

The Bernays' blueprint laid out the three basic objectives for the punishment of Axis war criminals:

> First, the establishment of a solemnly considered international judgment that alleged high interests of state are not acceptable justification for national crimes of violence, terrorism and the destruction of peaceful populations.
>
> Second, Bringing home to the world the realities and menace of racism and totalitarianism;

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[224] Ibid.

[225] Ibid.

[226] Ibid.

> And third, arousing the German people to a sense of their guilt, and to a realization of their responsibility for the crimes committed by their government.[227]

Bernays concluded that 'if these objectives…are not achieved, Germany will simply have lost another war. The German people will not know the barbarians they have supported, nor will they have any understanding of the criminal character of their conduct and the world's judgment upon it'.[228] Reeducating the Germans by exposing war crimes and punishing criminals was the cornerstone to the American agenda of transitional justice.

In order for the Bernays plan for the War Department to satisfy proponents of wide-reaching punishment for all German crimes, Bernays proposed that members of the Nazi government and other state organizations, including the SS, SA, and Gestapo,

> …Should be charged before an appropriately constituted international court with conspiracy to commit murder terrorism, and the destruction of peaceful populations in violation of 'laws of war' and that representatives should be chosen from each group for the court. Finally the proceedings should be published and 'the evidence should be full enough to prove the guilty intent (Nazi doctrine and policy) as well as the criminal conduct (atrocious acts in violation of the laws of war).[229]

Additionally, using the criminal conspiracy charge would allow prosecutors to include 'everything done in furtherance of the conspiracy from the time of its inception…including domestic atrocities against minority groups within Germany…'[230]

Bernays explained,

> A conspiracy is criminal either because it aims at the accomplishment of lawful ends by unlawful means, or because it aims at the accomplishment of unlawful ends by lawful means. Therefore, such technicalities as the question

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[227] Subject: Trial of European War Criminals (By Colonel Murray C Bernays, G-1), 15 September 1944. Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

[228] Ibid.

[229] Ibid.

[230] Ibid.

> whether the extermination of fellow Germans by Nazi Germans was unlawful, or whether this could be a 'war crime' if it was perpetrated before there was a state of war, would be unimportant, if you recognize the basic crime the Nazi conspiracy which required for its success the killing of dissident liberal Germans and the extermination of German (and non-German) Jews before and after the war began. Therefore the thing to do [is] to try the organizations along with the Nazi leaders on the conspiracy charge; and having convicted the organizations, the conviction should serve as *prima facie* proof of the guilt of any of their members.[231]

Suggesting charging German nationals for crimes against other Germans was to tread in tricky waters. National sovereignty had long been the cornerstone of international relations – international forces could not intervene in a country's domestic affairs. If Germans were prosecuting and killing other Germans, diplomatic tradition held that, for all intents and purposes, German actions were legal. If Germans were killing Polish nationals, for example, the international community had the legal right to intervene. To advocate for the Allies to try Germans for domestic crimes was Bernays' most radical notion. The courts of the military commissions at Dachau (and in most other national trials) rejected this idea – prosecutors charged the accused with crimes against Allied nationals only.

Many of Bernays' other ideas were adopted by the Dachau courts. Bernays recommended that the judgment for the first major trial of war criminals should mention specifically 'that the Nazi Government and its mentioned agencies are guilty as charged,' and that every 'member of the government and organizations on trial is guilty of the same offence'.[232] After the judgment in the first trial was passed, all following trials would 'require no proof that the individuals affected participated[233] in any overt act other than membership in the conspiracy…Proof of membership, without more, would establish guilt of participation in the mentioned conspiracy, and

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[231] Conot, *Justice at Nuremberg*, 12.

[232] Subject: Trial of European War Criminals (By Colonel Murray C Bernays, G-1), 15 September 1944, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

[233] Should be '…affected participation…' Garbled in original document.

the individual would be punished in the discretion of the court'.[234] The form of the concentration camp trials at Dachau directly mirrored the form presented in Bernays' memorandum. At Dachau, the 'parent trial' was used to establish the criminality of the camp enterprise using representatives of the membership of the camp establishment. In subsequent trials, proof of membership in the camp's organization was enough to convict any defendant.

While the structure mirrored Barnays' plan, it is important to note that the Dachau courts would use the charge of 'common design' against the accused – not 'conspiracy'. Conspiracy is an agreement between two or more persons to engage jointly in an unlawful or criminal act. It is the intent to engage in a criminal act. Conspiracy is a crime separate from the criminal act for which it is developed. For example, one who conspires with another to commit Burglary and in fact commits the burglary can be charged with both conspiracy to commit burglary and burglary. United States Federal conspiracy statutes were first passed in 1909. It is of fundamental importance that the prosecutor's prove that each of the accused agreed to engage in a criminal act. This is where conspiracy and 'common design' primarily diverge. 'Common design' is a more flexible legal concept, developed to prosecute individuals who were part of an illegal activity even if they did not agree to participate in it. 'Common design' allowed prosecutors at Dachau to focus on proving that an illegal act occurred (in this case, setting up and maintaining concentration camps and the torture, deprivation, and death that occurred therein) and then subsequently prove which individuals were involved in participating in the illegal act and were thus guilty of the entire criminal enterprise.

His plan completed, Bernays presented his memorandum at a meeting on 24 October to Secretary of War Henry Stimson.

C. Criticism and Support

Secretary Stimson was enthusiastic about Bernays' document. He wrote to Secretary of State Hull advising that Bernays' memorandum 'deserve [d] careful study' and that Stimson planned to send it to the Secretary of the Navy in order to get

[234] Subject: Trial of European War Criminals (By Colonel Murray C Bernays, G-1), 15 September 1944, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

his opinion as well.[235] Stimson wrote, 'Punishment is essential, not as retribution, but as an expression of civilization's condemnation of the Nazi philosophy and aggression which have relentlessly plunged the world into war. That condemnation must be achieved in a fair manner which will meet the judgment of history'.[236] There continued to be some disagreements over Bernays' plan within the War Department. Colonel Ammi Cutter, Assistant Executive Officer to Assistant Secretary of War John J. McCloy, wrote:

> The discussion in file (a) [Bernays' memorandum] is ingenious. The proposal however, includes fairly radical departures from existing theories, i) of individual criminality and criminal responsibility and ii) of prosecution procedures. It also contemplates one (or a series) of grandiose state trials, which have obvious disadvantages in providing opportunities for the manufacture of national martyrs, giving the defence an effective public platform for use in propaganda etc.[237]

Despite these reservations, Cutter recommended that Bernays' plan be sent to the State Department and Navy Department for their suggestions.

After a meeting on 9 November 1944 on the subject, the Departments of War, State, and Navy issued a joint statement on the 'Trial and Punishment of European War Criminals'. The statement agreed to Bernays' proposal of prosecuting offenders on criminal conspiracy grounds because 'the criminality with which the Nazi leaders and groups are charged does not consist of scattered individual outrages such as may occur in any war, but represents the results of a purposeful and systematic pattern created by them to the end of achieving world domination'. A trial based on conspiracy charges would 'condemn the criminal purpose behind each individual outrage' and allow the major war criminals to 'be disposed of in a single trial'. The signatories believed 'the proceeding will be judicial rather than political. It will rest securely upon traditionally established legal concepts'. They recommended to

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[235] The Secretary of War to the Secretary of State, 27 October 1944, Subject files, 1940-45, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

[236] Ibid.

[237] Memorandum for Mr. McCloy from Colonel Ammi Cutter, Assistant Executive Officer, Office of the Assistant Secretary of War. Subject: War Crimes 1 October 1944. Assistant Secretary, Box 15, January '43-December '44 File, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

President Roosevelt that he 'approve this method of dealing with the basic war crimes problem' and begin preparation and negotiation to create 'a court constituted by international treaty'. The treaty should be of limited scope in order to 'avoid long-term and unforeseeable commitments' and the court 'may consist of military or civilian personnel, or both, and should be representative of the interested United Nations'. War, State, and Navy officials held that the creation of such a court would 'not foreclose other available procedures for dealing with particular offences'. War crimes committed against American nationals 'will remain subject to trial by United States military and naval commissions…These procedures present no new problems of law or policy, and are mentioned only for the sake of completeness'.[238] The Dachau tribunals would fall into this final category of trials, as opposed to Nuremberg, which was a treaty-based international tribunal.

Although the basic blueprint for an American response to German war crimes was agreed upon in theory, Barneys' plan, now under the control of Assistant Secretary of War John J. McCloy, continued to face criticism. Assistant Attorney General Herbert Wechsler sent a memorandum detailing his objections to parts of Bernays' proposal.[239] For example, he objected to using the accusation of common-law conspiracy as it is known primarily only in American law. He was joined in his criticism by Brigadier General Kenneth C. Royall, the army's Deputy Fiscal Director and later Secretary of the Army. Royall proposed trying the leaders of the German government by a military commission, consisting of members of ranking European commanders from the United States, France, Britain, and the Soviet Union and other military legal personal, for, 'the commission of war crimes and for the conspiracy to commit war crimes…the members of the organizations [SS, Gestapo etc.] would have to be specifically named in the charges but they would be permitted to have only class representation in the trial'.[240] Royall recommended that Allied military courts or

[238] All quotes in Draft Memorandum for the President from the Secretaries of State, War and Navy. Subject: Trial and Punishment of European War Criminals. 11 November 1944. Rosenman Papers War Crimes, Harry S. Truman Library and Museum, Independence MO, USA.

[239] Memorandum for the Attorney General from the Assistant Attorney General, 29 December 1944, Assistant Secretary of War, Box 16, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

[240] Memorandum for the Assistant Secretary of War from General Kenneth C. Royall, 14 December 1944, Records of the Office of the Secretary of War, Correspondence (RG

national civilian courts try Germans for war crimes committed during occupation. German crimes committed before the war, the act of starting the war, and crimes committed in Germany against German citizens should not be tried at all – except in the civil courts of Germany. Royall believed that his recommendations were 'consistent with history, represent the best policy for the future, and adequately effectuate the declarations heretofore made by the United Nations and by the President of the United States'.[241]

Francis Biddle, the Attorney General, was another critic of the criminal-conspiracy plan proposed by Bernays and his supporters. Biddle wrote, 'I doubt whether such a conspiracy is criminal under international law'.[242] He rejected the idea of prosecuting crimes committed before the war or by Germans against other German nationals. He recommended that the United States 'should eliminate, at this point at least, any attempt to punish crimes committed *before the war*. We will have our hands full with crimes after the war [began]'.[243] He doubted the practicality of trying a large number of criminals by an international court. He suggested instead that 'devices should be worked out for the punishment of other criminals [besides a few leaders] by very many courts. Is there any way of establishing a group of mixed military tribunals to punish the large mass of criminals'?[244] Biddle was one of the first government or army officials to raise the problem of what occupying American forces would do with the convicted German war criminals. He wrote, 'I think the court should have no discretion on punishment and consider only cases punishable by death. Where would you find enough jails to imprison'?[245] This problem was never adequately solved throughout the life of the American trial programme.

107.2.1), The National Archives and Records Administration, College Park, Maryland, USA. Reprinted in Smith's collection of documents, *The American Road to Nuremberg*, 75.

[241] Ibid.

[242] Memorandum, Re: Punishment of Criminals from the Office of the Attorney General, 5 January 1945, The War Department and the Army Records, Records of the Office of the Judge Advocate General (RG 153), The National Archives and Records Administration, College Park, Maryland, USA. Reprinted in Smith (ed.), *Road to Nuremberg*, 91.

[243] Ibid.

[244] Ibid.

[245] Ibid.

The Judge Advocate General, the head of the legal arm of the army,[246] Cramer gave approval to the plan for an 'a full-dress international trial of the ringleaders [He called this a 'Stage A' proceeding]…there is likewise agreement as to what I may call the Stage C trials, the individual proceedings against identifiable criminals before the military or civilian courts of the injured nations'.[247] However, General Cramer found the proposal to prosecute individual offenders for serving as members of Nazi organizations ('Stage B') problematic. This was what can be called the 'common design' charge; if the accused participated in an organization deemed criminal, he was guilty of participating in the maintenance of a criminal enterprise. General Cramer argued that the United States military commissions, despite having more relaxed rules of evidence and procedures, 'can proceed to judgment of conviction only upon complete proof of the personal guilt of the individuals before them'.[248] Bernays' proposal seemed to push the concept of *res judicata* 'beyond anything now known to our criminal law'.[249] General Cramer suggested the plan be expanded to include stronger language about an international treaty and language indicating that the 'courts in the Stage B proceedings will, in addition to identifying the individuals of the groups and organizations whose criminality will have been adjudicated in Stage A, determine these individuals' respective degrees of guilt, and award appropriate punishments accordingly'.[250] The War Department redrafted the memorandum in late November following General Cramer's suggestions. This new draft was sent for approval to the State and Justice departments as well as the President's Office.

D. Developments Abroad

Developments in London at the United Nations War Crimes Commission threatened to complicate the United States' blueprint by introducing the concept of

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[246] The Judge Advocate General Corps, or JAG as it is known, provided legal services for all levels of the American military. Each branch (navy, air force, army) has its own JAG corps. Those who serve in JAG are soldiers and trained lawyers. Confusingly, the Judge Advocate General refers to both the leader of this branch and the branch itself.

[247] Judge Advocate Generals' Memorandum for the Assistant Secretary of War. Subject: Trial of European War Criminals (Comments on the Bernays' plan). 22 November 1944. Box 4 Trial and Punishment File no. 1, Murray C Bernays Collection, University of Wyoming, Laramie, Wyoming, USA.

[248] Ibid.

[249] Ibid.

[250] Ibid.

prosecuting aggressive war as a crime. Although political manoeuvring by the United States was able to stall this idea abroad, it gained an important supporter stateside. Colonel William C. Chanler, Deputy Chief of the Army's Civilian Affairs Division and an associate of Secretary Stimson, sent a memorandum to Stimson suggesting that the offending German leaders be prosecuted under the 1928 Kellogg-Briand Pact, which had been signed by representatives of the Weimar Republic in 1928. He suggested that 'these defendants could be charged and convicted for the offence of attempting to overrun and annihilate Germany's peaceful neighbours in violation of treaty obligations and attempting to destroy the peace of the world in an effort to conquer Europe'.[251] The Kellogg-Briand Pact attempted to make war an illegal instrument of national policy and thus the 'armed forces of a signatory State which enter the territory of a neighbouring signatory State and commit depredations therein stand on no better footing than a band of guerrillas who under established International Law are not entitled to be treated as lawful belligerents'.[252] Thus 'all hostile actions of the Axis armies are war crimes and could be punished as such by any Allied military tribunal…a count in the proposed conspiracy indictment charging all acts of the Axis Armies as constituting war crimes would seem logically to be tenable'.[253] After making a long argument based on contemporary legal scholarship, Chanler finished with a pragmatic conclusion; 'So far as legal objections are concerned, the answer is that once it is done, it will *be* International Law, regardless of possible present doubts. If it presents a possibility of contributing to the future peace of the world, legalistic objections should not be permitted to stand in the way'.[254] Secretary Stimson was intrigued by Chanler's arguments. He commented, 'While his thesis is, I think, a little advance of the progress of international thoughts, it is nevertheless along lines of approach which thoughtful members of the international bar have been putting forward during the past twenty years'.[255]

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[251] Memorandum on Aggressive War by Colonel William Chanler, with a cover letter from Henry L Stimson to John J. McCloy, 30 November 1944, Assistant Secretary of War, Box 16, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA.

[252] Ibid.

[253] Ibid.

[254] Ibid. Emphasis in the original.

[255] Ibid.

Notwithstanding the Secretary's support, Chanler's paper, circulated throughout various government departments, drew significant criticism as being too radical. Despite objections, President Roosevelt, with support from Bernays' friend and new Roosevelt confidant Judge Samuel I Rosenman, moved forward with the proposal to prosecute German leaders for 'aggressive war' as a criminal act. The President requested a written report in January 1945 on 'the offenses to be brought against Hitler and the chief Nazi war criminals. The charges should include an indictment for waging aggressive warfare, in violation of the Kellogg Pact. Perhaps these and other charges might be joined in a conspiracy indictment'.[256]

Another factor in moving forward war crimes trials in late 1944 was the 'Malmédy Massacre' on 17 December 1944, which caused a shift in attitude in Washington. Members of the Sixth Panzer Army, First SS Panzer Regiment, led by SS Colonel Joachim Peiper, shot 84 disarmed American soldiers who had surrendered on the second day of the Battle of the Bulge.[257] The American press picked up the story and made it a headline. 'Nazi Slaying of 100 Yanks Confirmed,' read the *Washington Post* front-page story on 21 December 1944.[258] The article noted that 'The story has spread up and down the entire First Army area, giving cold determination to the Yanks' desire to finish off the attacking Germans'.[259] On 29 December, the Post printed an editorial entitled 'Massacre as a Policy' about the 'wanton German brutality reported in the course of the war'.[260] The next day the American State Department issued 'the strongest possible protest to the German government…in regard to the killing by German forces near Malmédy, Belgium, of all but 15 American soldiers and officers, who had been taken prisoners by a German

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[256] Presidential Memorandum for Edward Stettinius, Secretary of State, 3 January 1945, *Foreign relations of the United States. Conferences at Malta and Yalta, 1945* (Washington, DC: U.S. Government Printing Office, 1945), 401.

[257] The Malmédy Massacre was just one incident of atrocity committed by the First SS Panzer Regiment between 16 December 1944 and 13 January 1945. Atrocities were committed at 12 places throughout Belgium and included, according to accounts of witnesses, the killing of approximately 350 unarmed American prisoners of war and 100 Belgian civilians. United States Senate, Eighty-First Congress, *Report of the subcommittee of the Committee on Armed Services, 'Malmédy Massacre Investigation'* (Washington, DC: United States Government Printing Office, 1949), 2.

[258] *The Washington Post*, 'Nazi Slaying Of 100 Yanks Is Confirmed: First Army Makes Official Report on How Prisoners Were Robbed and Shot', 21 Dec 1944, 1.

[259] Ibid.

[260] *The Washington Post*, 'Massacre As A Policy', 29 Dec 1944, 6.

tank corps and stripped of their equipment'.[261] As one historian opined, 'This shift in attitude in favour of the basic principles of the Bernays' plan came at a most opportune moment for its proponents, because only two months remained before Roosevelt was scheduled to meet with Prime Minister Churchill and Marshal Stalin at Yalta, and war crimes might well be a topic of discussion by the Big Three'.[262]

Despite the butchery at Malmédy, opposition remained in the Judge Advocate General to the criminal-conspiracy plan, particularly to the indictment of 'aggressive war' as a crime. Because of the proposed central role of the Judge Advocate General in carrying out the war crimes investigations and tribunals, Bernays and the War Department took the criticism of the aggressive war charge into consideration and produced a new plan on 4 January 1945 and another redraft on 13 January. In the new draft Bernays noted, 'it is further commonly agreed that the launch of the war by itself by the Axis leaders does not constitute a '*war* crime' in the strict legal sense in which this phrase is used in the literature on the subject'.[263] However Bernays concluded that according The Hague convention of 1907, 'the launching of the present war was criminal by reason of the fact that as against certain of the United Nations, it was launched in violation of treaties of friendship and non-aggression, and without any declaration of hostilities'.[264] The 13 January draft strongly recommended the use of an international treaty to try German war crimes. 'Such a treaty or convention,' wrote Bernays, 'would affirm the criminality of aggressive war…it would thus establish the legal basis of the proposed proceedings upon the most unimpeachable foundation'.[265]

Bernays' plan had gained enough momentum to be signed off by the War Department, State Department, and Attorney General Francis Biddle, although focusing on the criminal-conspiracy plan and not the aggressive war charges.[266] The

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[261] *The Washington Post*, 'U.S. Protests Nazi Massacre of Yank Prisoners', 30 Dec 1944, 1.

[262] Smith (ed.), *Road to Nuremberg*, 53.

[263] Memorandum from War Department, War Department General Staff, Personnel Division G-1, 4 January 1945, Assistant Secretary of War Box 16, January-April 1945 File, Records of the Office of the Secretary of War, Correspondence (RG 107.2.1), The National Archives and Records Administration, College Park, Maryland, USA. Emphasis in original.

[264] Ibid.

[265] Memorandum for the President: Subject: Trial and Punishment of War Criminals. 13 January 1945. Rosenman Papers, War Crimes, Harry S Truman Library and Museum, Independence, Missouri, USA

[266] By mid-January 1945, the authorship of Bernays' plan was more or less attributed to Secretary Stimson.

Navy Department, with its strong preference for using a traditional military commission, abstained from supporting Bernays' plan. In January 1945, plans for what would become the International Military Tribunal at Nuremberg and the military tribunals at Dachau begin to diverge. As planning went forward for an international trial of leading Nazis, the Army began developing its own processes for dealing with traditional war crimes (as defined by the Hague Convention of 1899 and 1907 and Geneva Convention of 1929).

E. Establishing the American Military Commissions at Dachau

When it came to developing a blueprint for the American military war crimes commissions, the American military, led by the Judge Advocate General's (JAG) staff, had two concerns: first, determining the legal status of German prisoners of war and second, developing the infrastructure to arrest, detain, and prosecute identified war criminals. The legal status of POWs was decided relatively quickly. Were POWs suspected of committing war crimes protected by the Geneva Conventions in respect of trial, punishment, and imprisonment? Did the Articles of War as applied in the 'Manual for Courts-Martial, US Army' (1928) apply to the proceedings before the war crimes tribunals? JAG lawyers concluded that neither set of principles was applicable for war criminals. The Supreme Court of the United States (*In re Yamashita,* 1945) and the United Nations War Crimes Commission reached the same conclusion.

In November 1944, the Secretary of War ordered the Judge Advocate General to establish a war crimes office.[267] The Supreme Headquarters, Allied Expeditionary Force (SHAEF) established a Court of Inquiry and army group leaders were instructed to report incidents of war crimes committed against Allied military personnel to the Court for investigation. In December 1944, the directive was expanded to include reporting 'all war crimes, irrespective of the status or nationality of the victims'.[268] In

[267] War Department Office of The Chief of Staff to The Judge Advocate General, 30 November 1944, Memorandum 'Punishment of War Criminals', The War Department and the Army Records, Records of the Office of the Judge Advocate General (RG 153), The National Archives and Records Administration, College Park, Maryland, USA.

[268] Letter 'Procedure for Investigation of Alleged Violations of the Geneva Conventions', Supreme Headquarters, Allied Expeditionary Force, to HQ, Twenty-first Army Group, et al., 14 December 1944, Box 1, Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA.

late 1944 and early 1945, SHAEF planned to forward reports of war crimes to individual countries. The intention was for each country to investigate and prosecute crimes committed against its own nationals. The expectation was that a majority of war crimes had been committed 'for the most part outside Germany'.[269] However, 'the volume of such reports increased to numbers many times more than was anticipated. Consequently, only the more flagrant and heinous cases involving American or British military personnel were submitted to the Court of Inquiry for investigation'.[270]

The American military worked with the other Allies (excluding the USSR) through the United Nations War Crimes Commission (UNWCC), as discussed in detail in Chapter 2. The UNWCC (later centralized under the Central Registry of War Criminals and Security Suspects, known as CROWCASS, after its establishment in April 1945) drew up 'Wanted Lists,' which were made available to all Allied troops, and American army commanders were instructed by SHAEF to focus on apprehending these criminals.[271] The reporting system worked the other way as well; army commanders were instructed to fill out wanted reports and send them to CROWCASS with a copy to the United States' military War Crimes Group. Suspected war criminals were not to be prosecuted until the end of hostilities in Europe. Extradition was similarly halted until the end of the war.[272] Although these broad directives existed, on the ground in combat zones the war crimes process was unformulated and decentralized. As an army report stated in that 'In combat zones

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[269] See Letter 'Eclipse Memorandum No. 18', Supreme HQ, Allied Expeditionary Force, to Allied Naval Commander, Expeditionary Force, et al., 16 January 1945 and Letter 'Eclipse Memorandum No. 18 – War Criminals and Security Suspects', Supreme HQ, Allied Expeditionary Force, to Twenty First Army Group, et al., 7 February 1945, Box 1, Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA.

[270] Lt. Col. Straight, *Report of the Deputy Judge Advocate for War Crimes, European Command*: *June 1944 to July 1948*, 15.

[271] Letter, 'War Criminals – Enemy and Liberated Territory – Al Operations in NW Europe', Supreme Headquarters, Allied Expeditionary Force to HQ, Twenty-first Army Group, et al., 7 September 1944. Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA.

[272] War Department to United States Military Mission in Moscow, 19 September 1944, Cable Reference No. WARX-33021, Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA.

most commands assigned supervisory responsibilities [to report and investigate war crimes] to their Judge Advocate sections'[273] as well as various other sections including Inspector Generals,[274] the Assistant Chiefs of Staff, G-2,[275] or simply to undefined individual soldiers'.[276] Apprehension and detention was similarly decentralized and 'no provision was made for the congregation of war criminal suspects'.[277] Even after the War Department and army commanders had committed to investigating war crimes as a mission directive, the army showed hesitation and sent out mixed messages to commanders. The Combined Chiefs of Staff[278] and the War Department prohibited 'the segregation of war criminal suspects and directed that they be handled in such a manner as to avoid disclosure that they were being held for future trials,'[279] although suspects (officer and other rank) and 'unfriendly' witnesses were assigned to specific prisoner of war enclosures –temporary holding camps established by the army for German POWs.[280]

By the end of 1944 and beginning of 1945, the American military began preparing its official investigation of war crimes committed in the European Theatre. In November 1944, in anticipation of eventual trials, the War Department amended

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[273] Each section of the front had a number of Judge Advocates assigned to the area to deal with military law issues that may arise.

[274] Inspector Generals of the army are in charge of internal investigations, assessments, and inspections.

[275] G-2 is a designation from the Army's Military Intelligence Corps.

[276] Straight, *Report of the Deputy Judge Advocate*,17.

[277] Ibid.,18.

[278] Combined Chiefs of Staff were the supreme military staff of the Allies on the western front. It consisted of members from the British Chief of Staff's Committee and American Joint Chiefs. The American members were: General George C. Marshall, the United States Army chief of staff, Admiral Ernest J. King, the Chief of Naval Operations, Commanding General of the Army Air Forces, Lt. Gen. Henry H. Arnold and the President's personal Chief of Staff, Admiral William D. Leahy.

[279] War Department to Southwest Pacific Area, et. al., 25 December 1944, 'Establishment of War Crimes Offices'. Similar letter sent to European HQ, 24 February 1945, Box 1. Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA..

[280] German Officers were sent to Continental Central Prisoners of War Enclosure No. 25, Normandy Base Section. Other ranks and witnesses were sent to the so-called Enclosure No. 13. Source: Letter, 'War Crimes Suspects and Witnesses' HQ, European Theatre of Operations, United States Army, to United States Strategic Air Forces in Europe, et al., 4 May 1945, Box 1, Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA.

the 'Rules of Land Warfare' to eliminate 'a provision in paragraph 347 providing that members of armed forces will not be punished for war crimes committed under the orders or sanction of their government or commanders'.[281] This reduced the effectiveness of the 'Superior Orders' line of defence to a consideration in mitigating punishment, not a defence against guilt in war crimes. In February 1945, following a directive issued by the War Department in December 1944, the United States Army established war crimes branches in each army group that reported directly to the central Judge Advocate General War Crimes Group in Europe (hereafter 'War Crimes Group'), located in Paris, France, but was under the operational control of the army group commanders. These war crimes groups' primary function was 'the investigation of alleged war crimes, and the collection of evidence relating thereto, including, for transmission to the governments concerned, evidence relating to war crimes committed against nations of other United Nations'.[282] A similar directive went out to Pacific Army commanders.[283] These directives helped to establish direct communication between JAG's war crimes branches as well as to attempt to centralize the investigation of war crimes. This process of centralization would continue until July 1946 when the war crimes sections became consolidated under the responsibility of the Judge Advocate General and the European Theatre Command and all tribunals were moved to Dachau.[284] To assist with the gathering of evidence of war crimes, the War Crimes Group, established an office and the records centre in Wiesbaden, Germany to centralize documentation.

To begin gathering evidence of war crimes, the army commanders were instructed to screen and interview all military or civilian personnel 'arriving at any

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[281] Straight, *Report of the Deputy Judge Advocate*,16.

[282] Letter, 'Establishment of War Crimes Offices,' HQ European Theatre of Operations, United States Army to United States Strategic Air Forces in Europe. Et al. 24 February 1945, Box 1, Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA.

[283] Letter, 'Establishment of War Crimes Offices, War Department to Southwest Pacific Area, et at., 25 December 1944, Box 1.. Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA.

[284] Letter, 'Trial of War Crimes Cases,' Headquarters, United States Forces, European Theatre to Third United States Army, et al., file AG 000.5 WCB-AGO, 11 July 1946, Records of United States Army, Europe (RG 549). The United States National Archives and Records Administration, College Park, Maryland, USA.

assembly or staging area in order to identify those in possession of information regarding war crimes'.[285] This process was implemented to gather intelligence and sworn statements in chaotic end-of-war Europe before personnel or civilians left the area. Although the original plans called for the organization of nineteen war crimes investigation teams to be in the field with the Twelfth and Sixth Army Group (the largest army groups in Europe), only seven were formed by the end of hostilities in May 1945. Twelve additional teams were created in May and June 1945; two of these teams were assigned to Austria.

On 8 July 1945, the Joint Chiefs of Staff issued the first comprehensive directive, based on recommendations from the Judge Advocate General staff, outlining the functions of the War Crimes Group for the upcoming international and military tribunals. Along with focusing on 'the trial of the leaders of the European Axis powers by the International Military Tribunal,' the directive 'provided for the War Crimes Group to supervise the development and trial of cases involving American nationals as victims and mass atrocities committed in the US Zones of Occupation in Germany and Austria and areas overrun by the United States Armed Forces, irrespective of the nationality of the victims'.[286] The directive further called for the investigation of offences on 'racial, religious or political grounds, committed since 30 January 1933'.[287] Although greatly broadening the scope of investigations, American tribunals would not prosecute offences occurring before 1941. The tribunals would only try crimes that occurred after 1 January 1942, the date of the creation of the United Nations.[288] The intention was to hand evidence over to German courts that had been invested with special power 'to try individuals for the crimes in question and prescribing a procedure therefore'[289] in the Law for the Liberation from

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[285] Letter, 'War Crimes Interrogation of US Military and Civilian Personnel' HQ, European Theatre of Operations, United States Army, to United States Strategic Air Forces in Europe. Et. al., 28 April 1945; Letter, 'Investigations in Connection with Alleged War Crimes' HQ, European Theatre of Operations, United States Army, to United States Strategic Air Forces in Europe. Et. al, 15 April 1945. Both in Box 1, 000.5 – 000.5/2, Records of Allied Operational and Occupation Headquarters, World War II (RG 331), The United States National Archives and Records Administration, College Park, Maryland, USA.

[286] Straight, *Report of the Deputy Judge Advocate*, 23.

[287] Quoted in Straight, *Report of the Deputy Judge Advocate*, 24.

[288] Tomaz Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge: Harvard University Press, 2012), 31.

[289] Quoted in Straight, *Report of the Deputy Judge Advocate*, 24.

National Socialism and Militarism. Less than two weeks later, a Joint Chiefs' command removed the prohibition of the segregation of war criminal suspects and the prosecution of war crimes trials.[290]

F. The British Belsen Trial as a Prologue to the Dachau Concentration Trials

After publicly condemning war crimes throughout the Second World War, the United States needed a concrete policy towards German war criminals. Members of the government decided any response to German war crimes needed to accomplish two primary objectives: (1) punish war criminals to make Germany safe for American forces, and (2) transition Germany from the criminal Nazi regime to a new democratic government. After the use of summary executions had been ruled out in favour of a judicial response, the unprecedented scale of German war crimes ignited debate and disagreement between proponents of indicting Germans on the charges of criminal-conspiracy and proponents of prosecuting offenders using traditional military commissions and the laws of war. Using a plan written by Lt. Coronel Murray C Bernays, Secretary Stimson won the support of the President for large-scale trials in Germany. The International Military Tribunal at Nuremberg, the Subsequent Nuremberg Trials, and the Dachau concentration camp trials were the result of these plans. The procedure and form of the Dachau trials would be a mixture of both the criminal-conspiracy charge and the laws of war before a military commission. Although originally intended to be a completely separate legal process from the IMT and Nuremberg trials, based wholly on traditional military law, the lead prosecutor at Dachau, Lt. Col. William Densen, incorporated the criminal-conspiracy idea into the charges.

What really put pressure on the Americans to begin the Dachau tribunals was the British trial at Belsen, which began on 17 September 1945 in Lüneberg at a British military court.[291] The British were the first of the Western Allies to try the staff of a

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[290] Combined Chiefs of Staff to Supreme Headquarters, Allied Expeditionary Force, 19 June 1945, Cable Reference No. WX-18961, Records of United States Army, Europe (RG 549). The United States National Archives and Records Administration, College Park, Maryland, USA.

[291] Donald Bloxham, 'British war crimes trial policy in Germany 1945-57: Implementation and Collapse', *Journal of British Studies*, 42 (2003). Also see Ben Shephard, *After Daybreak: The liberation of Bergen-Belsen, 1945* (New York: Schocken, 2005); Eberhard Kolb's *Bergen-Belsen: vom 'Aufenthaltslager' zum Konzentrationslager, 1943 – 1945* (Göttingen: Vanderhoeck and Ruprecht, 1996); John Cramer, *Belsen Trial 1945: Der*

concentration camp.[292] Despite being planned separately, the First Belsen Trial (*The Trial of Josef Kramer and forty-four others*) and the Dachau concentration camp trials would have many things in common. The Dachau and Belsen courts were both military tribunals; the Belsen court consisted of five members of the British military; there were two members on the prosecution team while the defence consisted of thirteen members of the armed forces (Twelve British; one Polish Lieutenant for the six Polish defendants – all prisoner-functionaries), each representing two to four defendants. A member of the Judge Advocate, a barrister, was also an official court member. All the accused were charged with committing war crimes against *Allied* nationals at Bergen-Belsen. The charge was long, and took great care to name specific *Allied* victims along with unknown *Allied* victims, including British, Hunagairn, Polish, French, Italian, and Dutch nationals.[293] Note that no German nationals were listed as victims. Thirteen of the defendants were also charged with 'violations of the laws and usages of war' committed at Auschwitz Concentration Camp, Poland, again naming both particular Allied victims and unknown Allied nationals.

Lüneburger Prozess gegen Wachpersonal der Konzentrationslager Auschwitz und Bergen-Belsen (Göttingen: Wallstein Verlag, 2011), and Ben Flanagan, Jo Reilly, and Donald Bloxham (eds.), *Remembering Belsen: Eyewitnesses Record the Liberation* (London: Vallentine Mitchell, 2005)

[292] It is worth noting that the Soviets were the first overall to try camp staff: From 27 November -2 December 1944, a group of six officials of the Majdanek extermination camp were tried before a Soviet/Polish tribunal in Lublin. All were sentenced to death and hanged (one committed suicide). See Jürgen Matthäus and Patricia Heberer (eds.), *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln NE: University of Nebraska Press, 2008), 223

[293] The United Nations War Crimes Commission, *Case No. 10, Trial of Josef Kramer and 44 Others*, *Law Reports of Trials of War Criminals: Volume II: The Belsen Trial* (London: His Majesty's Stationery Office, 1947). The full charge reads: 'At Bergen-Belsen, Germany between 1 October and 30 April 1945, when members of the Bergen-Belsen Concentration Camp staff responsible for the well-being of the persons interned there, in violation of the laws and usages of war were together concerned as parties to the ill-treatment of certain persons, causing the death of Keith Meyer (a British national), Anna Kis, Sara Kohn (both Hungarian nationals), Hejmech Glinovjechy and Maria Konatkevicz (both Polish nationals) and Marcel Freson de Montigny (a French national), Maurice Van Eijnsbergen (a Dutch national), Jan Markowski and Georgej Ferenz (both Polish nationals), Maurice Van Mevlenaar (a Belgian national), Salvatore Verdura (an Italian national), and Therese Klee (a British national of Honduras), Allied nationals and other Allied nationals whose names are unknown; and physical suffering to interned there, these persons being Allied nationals and particularly Harold Osmund le Druillenec (a British national), Benec Zuchermann, a female internees name Korperva, a female internee named Hoffman, Luba Rormann, Ida Frydman (all Polish nationals) and Alexandra Siwidowa, a Russian national and other Allied nationals whose names are unknown.'

Of the forty-five defendants arraigned in the First Belsen trial, eleven were sentenced to death by hanging; nineteen to prison; and fourteen were acquitted. Like the Dachau courts, no opinions were written or released from the judges regarding how or why they came to their decision. Those defendants acquitted must have been found not guilty of either individual brutality or responsibility of the conditions of the camp. Those given lighter sentences must have been found innocent of personal killing but guilty to some extent of the state of the camp.

The numerous similarities between the First Belsen trial and the Dachau 'parent trial' are striking. First, only crimes against Allied national victims were tried. The defence counsel Colonel Herbert Smith used the nationality of the victims as a defence, alleging that the crimes had been committed against Hungarians and Italians and they were not Allied nationals. He also argued that Poles and Czechs had in fact become Germans as a result of German annexation of their territory and, if so, Germans could not commit war crimes against other Germans.[294] The prosecution counsel responded by quoting Article 46 of the Hague Convention, 'which guaranteed respect for the lives of the inhabitants of occupied countries'.[295] This was another similarity between the Dachau and Belsen trials: using The Hague and Geneva conventions to charge the accused with crimes against the laws and usages of war.[296]

The defence argued that 'war crimes, being violations of the recognized rules of warfare, could only be committed by members of the armed forces'.[297] The prosecution responded by stating that 'members of the SS considered themselves to be members of the armed forces and the problem created by the use of the words "armed forces" was that when the Hague Convention was written, no-one had anticipated a force such as the SS'.[298] The prosecution also referred to the Treaty of Versailles in

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[294] NC Bereford, *The Belsen Trials, 1945-1948* (CreateSpace Independent Publishing Platform, 2012), 24.

[295] Ibid., 41.

[296] Ibid. in the Foreward by Lord Wright of Druley. 'The Court was a British Military Court, convened under the Royal Warrant…Jurisdiction was asserted under the military law, which entitles the Court to punish war crimes, limited under the Royal Warrant to crimes against Allied Nationals…[despite coming from many Allied nations] they [the victims] were however all the same under the protection of the Hague Convention, also, if prisoners of war, of the Geneva Conventions. The Royal Warrant did not cover crimes against peace or crimes against humanity.'

[297] NC Beresford, *The Belsen Trials 1945-1948*, 38.

[298] Ibid., pg. 41

which, 'the German government had recognized the right of Allied nations to try individuals for war crimes rather than simply hold the belligerent state responsible'.[299]

Just as the defence counsel at the Dachau trial would two months later, the defence team at the First Belsen trial protested the lack of specificities of charges for each of the accused as well as the format of a mass trial. The defence protested that the Belsen and Auschwitz charges should be separated into different trials because they had no relation to one another, besides both being concentration camps administered by the Germans. The prosecution responded that it would try the defendants for:

> …A joint and collective offence by a group of people. Individual atrocities committed by individual persons were put forward to show that they were taking part in and acquiescing in the system which a group were carrying on. They were a unit acting in common, under a commanding officer, Kramer, who was the Commandant of that camp.[300]

Although the British prosecutors did not spend any significant time during the trial developing the argument of 'a joint and collective offence' or the defendants acting as 'a unit acting in common', this comment by the British prosecutor revealed striking similarity to the American prosecutor's central charge of 'common design'. The idea of a criminal Nazi conspiracy, for example to start an aggressive war, was used at Nuremberg and developed during discussions in London in the summer of 1945. At the Belsen trial, the conditions of the camp were discussed, but the focus of the prosecutors case was on individual murder and mistreatment of Allied civilians, not a common conspiracy at the camps.

Although the trial only lasted 54 days, like the Dachau trial, speed was a major concern. By the time the prosecution case came to a close in 6 October 1945, concerns about the slow pace of the trial were reported in the press. On 1 October, *The Times* of London observed:

> International observers, and certainly the Germans themselves, are no doubt impressed by the pains taken by the Court to extend all the privileges of

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[299] Ibid., Pg. 41

[300] The United Nations War Crimes Commission, *Case No. 10, Trial of Josef Kramer and 44 Others*, *Law Reports of Trials of War Criminals: Volume II: The Belsen Trial* (London: His Majesty's Stationery Office, 1947).

> British justice to the accused, who in other circumstances might have been dealt with more summarily; but with a whole series of war criminal trials now pending…the Belsen case is probably also being watched for the possibility of reducing procedure to a less redundant form.[301]

The constant pressure to speed up the trial programme would trouble the British and American trial programme.

Just as their American colleagues would, the defence counsel entered the plea of superior orders. The defence further claimed that the accused were following municipal law, which was superior to international law. Because the concentration camps were legal in Germany, the accused had not broken the law. The accused 'had to obey German law before International Law'.[302] The prosecution responded that 'many accused had said it was forbidden to ill-treat prisoners and they had acted against orders'.[303] Like the Americans, the court would reject superior orders as a legitimate defence, although considered it a mitigating circumstance when handing out sentences.

As we shall see in the next chapter, the Dachau trials would have many similarities to the British Belsen trial. The question of procedure and form, as well as issues that arose for the British at the First Belsen trial would plague the American's Dachau concentration camp trials as well. The major difference between the two trials would be American concentration camp trials' incorporation of the criminal-conspiracy idea into the charges.

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[301] Quoted in NC Beresford, *The Belsen Trials 1945-1948,* 28-29.

[302] NC Beresford, *The Belsen Trials 1945-1948*, 38.

[303] Ibid., 41.

Chapter 3: The Military Tribunal Programme at Dachau and the Concentration Camp Trials: American Precedents and Overview

In September 1945, the staff of the Judge Advocate General at the Headquarters of the Third Army received an inquiry from USFE (United States Forces, Europe) enquiring as to why no war crimes trials for concentration camp personnel had been held in the Third Army area.[304] In the former Dachau concentration camp, now the United States Army's primary prison for those suspected of war crimes, at least 32,000 camp administrators and workers were awaiting their fate.[305] The British Army had already begun to prosecute personnel from the Bergen-Belsen camp in their military court at Luneburg on 17 August 1945.[306] Lt. Col. William Denson, a member of the staff of JAG Third Army, reported that 'immediately wheels started turning and we were ordered to get a concentration camp case prepared and presented by the beginning of December'[307] at the latest.

[304] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

[305] Horace R. Hansen, *Witness to Barbarism* (St Paul, MN: Thousand Pinetree Press), 5

[306] The trial lasted until 17 November 1945.

[307] Hansen, *Witness to Barbarism*, 5.

Figure 1. U.S. Army occupation zones, 1945. Source: United States Third Army, *Mission Accomplished; Third United States Army occupation of Germany, 9 May 1945-15 Feb. 1947* (Engr. Repro. Plant, 1947), 22.

On 2 November 1945, the prosecution team, headed by Lt. Col. William Denson, chose forty defendants to represent the Dachau concentration camp system for the first American concentration camp trial before a military tribunal. The accused, who were being held prisoner along with 30,000 other internees[308] in the former prison barracks at the Dachau camp, included the following: nine camp commandants or deputy commandants, twenty-three non-commissioned officers, four labour officers or their deputies, five medical officers, two medical orderlies, three

[308] Joshua Greene, *Justice at Dachau: The trials of an American prosecutor* (New York: Broadway Books, 2003), 35.

administrative staff, four *Blockfuhrers*,[309] one head of a political department and one adjutant, one officer of the guards, one officer in charge of supplies, three guards from prisoner transports, and three prisoner functionaries (*Funktionshäftling,* or more commonly known as, kapos).[310] The men were chosen by the prosecution team to represent both the administrative aspects of the camp as well as its functional aspects.[311] The men were told that they would stand trial and were informed of their rights as accused.

Two days later, on 4 November 1945, the formal charges were delivered and read to the defendants in English and German by Lt. Col. Denson. The gathered men, 'were ignorant of the purpose for which they had been summoned and apprehension was visible in every expression until the Army translator gave them the context of Colonel Denson's statement'.[312] The first charge was that the accused had:

> Acted in pursuance of a 'common design' to commit acts hereinafter alleged and as members of the staff of the Dachau Concentration Camp, and camps subsidiary thereto, did at or in the vicinity of Dachau and Landsberg, Germany, between about 1 January, 1942, and 29 April, 1945, wilfully, deliberately and wrongfully aid, abet and participate in the subjection of civilian nationals of nations then at war with the German Reich, to cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities, the exact names and numbers of such victims being unknown but aggregating many thousands.

The second charge was the same except directed towards victims who were 'captured members of the armed forces of nations then at war with the German Reich'.[313]

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[309] Men in charge of the blocks that housed the prisoner barracks. See Nikolaus Wachsmann, *KL: A History of the Nazi Concentration Camps* (New York: Farrar, Straus and Giroux, 2015).

[310] Greene, *Justice at Dachau*, 36

[311] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

[312] *New York Times,* '42 Men Indicted in Dachau Crimes,' 4 November 1945.

[313] Col. David Chavez, JAGD Army of the United States, wrote the charges: 'The above charges are referred for trial to The General Military Court, appointed by Par 3, Special Order Number 304, Headquarters Third United States Army and Eastern Military District, dated 2 November 1945, to be held at Dachau, Germany, on, or about, 15 November 1945' (and then translated into German) 'By Command of Lt. Gen. Truscott: AJ Fischer Capt., Inf., Actg. Asst. Adj. Gen'.[313]

General Truscott, who had succeeded General Patton as the Commanding General of the Third Army, called the prosecution team together for a lecture before the Dachau 'parent trial' began. As Denson remembered, 'The lecture was about the importance of being fair…I had just finished preparing a case with the most mind-boggling evidence of the most brutal mistreatment by some human beings against others. Of course I would be fair, I thought. But I would also do whatever I had to do to lawfully get convictions'.[314] Thus began the American concentration camp trials.

The American military held trials at the former concentration camp at Dachau from the autumn of 1945 through the winter of 1947. The camp had undergone a change since its liberation on 29 April 1945. The camp was left relatively untouched for a week so that visitors (Allied military brass, newsmen and women, members of US congress, and local German residents forced to tour the camp) could see the atrocities of the site for themselves. On 7 May, clean up of the camp began with local townspeople and captured SS guards forced to bury the 2400 corpses found at the camp at liberation, as well as clean the camp of garbage. The surviving inmates, over 31,000 of them, were given medical treatment, and the process of relieving the overcrowding of the camp through repatriation, if possible, began for those well enough to travel.[315] An International Information Office was set up in early June 'upon orders of the US Military Government by the city of Dachau' in order to care for the needs of the liberated inmates.[316] By the end of June, the former 'protective

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o[314] William Dowdell Denson, *Justice in Germany: Memories of the Chief Prosecutor* (New York: Meltzer, Lippe, Goldstein, Wolf, Schlissel and Sazer, P.C, 1995) This is a brochure.

[315] By the end of May 1945, about 2000 Poles, 1000 Hungarians and Romanians, a few hundred Russians and Jews were left. Marcuse, *Legacies of Dachau*, 65. For more on the unique problems faced by DPs in occupied Germany see Mark Wyman, *DPs: Europe's Displaced Persons, 1945-1951* (Ithaca, NY: Cornell University Press, 2014); Ben Shephard, *The Long Road Home: The Aftermath of the Second World War* (New York: Alfred A Knopf, 2010); Gerard Daniel Cohen, *In War's Wake: Europe's Displaced Persons in the Postwar Order* (Oxford: Oxford University Press, 2012); Michael Brenner, *Nach dem Holocaust: Juden in Deutschland 1945-1950* (Munich: CH Beck'sche Verlagsbuchhandlung, 1995); and discussion in Dan Stone, *The Liberation of the Camps: The End of the Holocaust and Its Aftermath* (New Haven: Yale University Press, 2015)., and Atina Grossman, *Jews, Germans, and Allies: Close Encounters in Occupied Germany* (Princeton University Press, 2007). For more of Dachau's DPs in particular see Joel Sack, *Dawn After Dachau* (Schreiber Publishing, 1990) and Paul Berben, *Dachau, 1933-1945: The Official History* (Norfolk Press, 1975).

[316] Marcuse, *Legacies of Dachau*, 66.

custody compound' housed 'about 1000 German POWs who were being used "on an extensive programme of cleaning up the premises"'.[317]

By the beginning of July 1945, the Dachau complex was 'officially transformed into a "War Crimes Enclosure" with a capacity of 30,000 prisoners.' As Marcuse reported, 'Thus…it was converted from a makeshift camp for survivors who could not be repatriated (so-called "displaced persons") into an internment camp for Germans active at higher levels of the SS, Nazi Party, and army'.[318] Different parts of the camp were used for different categories of prisoners. The largest, the former 'protective custody' camp, became the so-called 'SS Compound' and housed mainly former concentration camp guards and members of the Waffen-SS.

Photo 4. American troops guard a prison for former SS troops on the site of the Dachau concentration camp. Courtesy of the USHMM Photo Archives.

The 'SS Compound' was divided into subsections – the *Freilager* and the *Sonderlager*—the latter 'was reserved for persons suspected of committing

[317] US Army Report quoted by Marcuse, *Legacies of Dachau,* 66.

[318] Marcuse, *Legacies of Dachau,* 66.

particularly heinous crimes'.[319] JAG requisitioned a large former prisoner service building within the former 'protective custody' camp to be used as the courtrooms for the Dachau tribunal programme.

The entire Dachau tribunal programme can be separated into four categories, based on differences in defendants and approach to traditional military law: (1) trials against German civilians and soldiers who had shot downed American pilots, (2) SS soldiers who participated in the Malmédy Massacre, (3) personnel from the Hadamar euthanasia centre, and (4) trials of former concentration camp personnel. While providing a brief exploration of the other sets of trials, the focus of this chapter is this last category – the trials of the men (and a few women) from the ranks of the camp personnel at Dachau, Mauthausen, Flossenbürg, Buchenwald, and Dora-Mittelbau. This category consisted of 240 trials and involved 1,045 defendants.[320]

For the concentration camps trials at Dachau, the American military lawyers chose to frame their prosecution of Nazi criminals primarily in the tradition of international warfare law, not based on the new ideas in criminal law - such as the notion of 'crimes against humanity' developed for the International Military Tribunal (known popularly as The Nuremberg Trial) and Nuremberg Military Tribunals (known as the Subsequent Trials). The goals of the American war crimes trial programme at Dachau, as well as at Nuremberg, were conflicted and added complications to the prosecution of the accused. The United States government wished to fulfil its wartime promises to punish the perpetrators of war crimes. Trials were to serve as an appropriate reaction to the discovery of particularly gross war crimes, including the treatment of inmates at the concentration camps. Thorough and fair trials were thought to educate the German population about the criminality of the Nazi regime, while functioning as an example of the fairness of democracy. Trials would serve to discourage future war criminals by setting a legal precedent of American reaction. Furthermore, any trial programme should reinforce the stability of the American occupation of Germany (and not interfere with the decisions of the US army commanders). Eventually, in their closing years, the trials were to assist, or

[319] Marcuse, *Legacies of Dachau*, 69.

[320] A note on the location of the camps: After the division of Germany into occupation zones, Buchenwald, Mauthausen, and Dora-Mittelbau were all located in the Soviet zones of Germany and Austria. However, because the Americans had liberated these camps (and had many of their staff in custody), they conducted trials for the personnel of these camps.

at least not deter, the economic and political unification of Germany by quickly processing the criminals of the old regime so Germany could be 'cleansed' and retake its place among the (American-allied) nations in Europe. The Dachau Trials, and specifically the concentration camp trials, were to be swift and efficient punishment of war crimes and, more broadly, demonstrate the effective use of transitional justice to end the Nazi culture of impunity and re-establishing the rule of law by holding perpetrators accountable to traditional internationally recognized 'usages of war'. The Nazi concentration camp system required particular attention, as they were the sites of grievous crimes.

Although held at a major concentration camp site, the trials mostly skirted discussing victims of Nazi racial policies and concentrated instead on crimes against victims who could be categorized as POWs under established international criminal law (i.e. Hague and Geneva Conventions). It was not just law that stood in the way of recognizing the particular mistreatment of Jews. Even years later, Denson believed the Jews in the camps had been treated 'not worse than the others'.[321] He continued to emphasize the international character of the prisoners. He believed the mistreatment of Jews was due to individual kapos' hatred that could easily have been directed against another nationality or racial group.

> If you had one kapo that didn't like Jews if there were any Jews in that detail then they got Hell, If you had a kapo that didn't like Czechs and he had Czechs in that detail they didn't have to be Jewish at all they could be just as Aryan as Czechs could ever be and they were always mistreated in the same way. So it depended on who it was that was the kapo rather then there being an organized plan to set the Jews apart as objects of persecution.[322]

This misrecognition of the particular suffering of Jewish victims, although common during the first decades after the war, was an unfortunate trait throughout all the concentration camp trials at Dachau.[323] However, it would be anachronistic to expect

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[321] Ibid.

[322] Ibid.

[323] See Elisabeth Yavnai's unpublished PhD dissertation 'Military Justice: The US Army War Crimes Trials' for a full discussion of the Dachau trials' missteps exclusively through the lens of Holocaust Studies. Elisabeth M Yavnai, *Military Justice: The U.S. Army crimes trials in Germany, 1944-1947,* PhD thesis, London School of Economics and Political Science, 2007. Donald Bloxham's work also places the Holocaust at the centre of World War Two: See his *The Final Solution: A Genocide* (Oxford: Oxford University Press, 2009); with Tony

an examination of the Holocaust to be at the centre of the Dachau trials - what is now a central memory of the 20th century; the Holocaust was not given the prominence it gained later on and, furthermore, it lacked the cultural power it would accrue over time in the post-Eichmann era.[324]

A. The Military Tribunal Programme at Dachau, 1945-1947

About 25,000-30,000 men were held on automatic arrest at Dachau by the autumn of 1945. Security concerns focused above all on the anticipated armed resistance of underground organizations and on neutralization of the ability of Nazi leaders to organize popular support against the occupiers. General Eisenhower's staff prepared a *Handbook for the Military Government in Germany*, which included categories encompassed in the automatic arrest of individuals who, because of the level of their stature in the Nazi party organizations, were felt to be certain security risks. Mandatory automatic arrest also applied to all members of certain security and police formations such as the Gestapo, SD, SA, and SS. In all, approximately 250,000 individuals fell into these categories. Automatic arrest, and ensuing internment without trial, was practised by all the occupying Allied powers. In addition to automatic arrest, the Allies were actively seeking individual war crimes suspects, who were also arrested upon identification as potential defendants for trials of major war criminals (what became the International Military Trial at Nuremberg). Their arrest, of course, was predicated upon suspicion of individual responsibility for particular war crimes rather than, as was the case with automatic arrest and internment, their status and affiliation within certain specified organizations. This entire process of

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Kushner, *The Holocaust: Critical Historical Approaches* (Manchester: Manchester University Press, 2005); *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford university Press, new edition 2003); and *Genocide, the World Wars, and the Unweaving of Europe* (Vallentine Mitchell, 2008).

[324] It was not until the Auschwitz trials in Germany and Israeli Eichmann trial in 1960s that the Holocaust became increasingly important and central to the memory of the twentieth century. For more on this argument see Tony Judt, *Postwar: A History of Europe Since 1945* (New York: Penguin, 2005); Devin O Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (Cambridge: Cambridge University Press, 2006); and Rebecca Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge MA: Harvard University Press, 2012); Hasia Diner, *We Remember with Reverence and Love: American Jews and the Myth of Silence after the Holocaust, 1945-1962* (New York: NYU Press, 2010)

weeding out of Nazi sympathizers from German life became known as the policy of 'denazification' (*Entnazifizierung)*.[325]

A directive issued on 7 July 1945 created the first manifestation of denazification policy in the American zone of occupation. It provided for the automatic dismissal of a wide range of individuals from their jobs. This included all members of the Nazi party who had joined before 1 May 1937 and all functionaries of the Nazi party and its associated functions as well as 'all SS men and officers of the Waffen-SS; in addition, all senior government and administrative personnel, together with prominent military and business persons if they actively participated in the regime, were to be removed'.[326] Only non- or nominal Nazis were allowed to work to senior positions. As a result, hundreds of thousands of former Nazi party members lost the right to most forms of employment besides manual labour.

The American denazification policy was widely criticised within Germany from the beginning of its implementation in the summer of 1945. Both ex-Nazis and anti-Nazis held, as Neil Gregor recounted:

> …the widespread conviction that party membership in itself was not a watertight criterion for judging guilt: both former party members and opponents pointed to the fact that many figures in elite circles in particular had been active in sustaining the regime in power or facilitating its criminal acts. For ex-party members, this reinforced the self-pitying belief that denazification was focusing excessively on the "little man", rather than on the regime's more powerful backers.[327]

In response to this criticism, in order to target the elite members of society who had supported the Third Reich, the military government introduced Law No. 8 on 29 September 1945. The law aimed at intensifying the denazification of the economy.

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[325] For more on denazification in the American zone of occupation, see discussions in L. Niethammer, *Das Mitläuferfabrik: Die Entnazifizierung am Beispiel Bayern* (Berlin: Verlag, 1982), Frederick Taylor, *Exorcising Hitler: the Occupation and Denazification of Germany* (London: Bloomsbury Press, 2013); Robert Wolfe (ed), *Americans As Proconsuls: United States Military Government in Germany and Japan, 1944-1952* (Carbondale, IL: Southern Illinois University Press, 1984); Perry Biddiscombe, *The Denazification of Germany 1945-1950* (Stroud, UK: Tempus Publishing Ltd, 2006) and Frank M Buscher, *The US War Crimes Trial Program in Germany.*

[326] Neil Gregor, *Haunted City: Nuremberg and the Nazi Past* (New Haven: Yale University Press, 2008), 91.

[327] Gregor, *Haunted City*, 94-95.

Law No. 8 forbade party members from managerial and supervisory roles, placed companies owned by former Nazi members in the hands of trustees, and threatened sanctions and closures of companies that employed party members.[328]

The American occupation forces introduced a new denazification law for their zone in March 1946 called 'The Law for the Liberation from National Socialism and Militarism'. The 'Liberation Law' (*Befreiungsgesetz*), as it was known, was processed through German political organs and presented as originating from the Germans' themselves. The aim of the law was stated thusly:

> To liberate out people from National Socialism and Militarism, and to secure a lasting base for German democratic national life in peace with the world, all those who have actively supported the National Socialist tyranny, or are guilty of having violated the principles of justice and humanity, or of having selfishly exploited the conditions thus created, shall be excluded from influence in public, economic, and cultural life and shall be bound to make reparations.[329]

According to the law, every adult had to fill out a questionnaire about his or her employment, income, and membership in Nazi organizations. Those found to be party members:

> …Were barred from all but menial labour pending their appearance before a tribunal. Officials allocated them into one of five categories: (I) Main Guilty Party, (II) Guilty/Incriminated, (III) Moderately Guilty/Incriminated, (IV) Fellow Traveller, (V) Not Incriminated. These assessments formed the basis for the tribunal hearings, usually conducted by local representatives of the main political parties, appointed by the Ministry for Special Tasks, which oversaw denazification.[330]

The tribunal either confirmed or altered the classification and gave out punishments. Most were classified as 'Fellow Travellers,' given a small fine and, with that, rehabilitated into society.

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[328] Full text of Law No. 8 found in: 'Denazification, cumulative review Report: 1 April 1947-30 April 1948, *Germany (territory Allied occupation, 1945-1955: U.S. Zone), No 34* (Office of Military Government, Civil Administration Division, 1948). From the digital collections of the University of Wisconsin Library.

[329] The Liberations Law is reprinted in Taylor, *Exorcising Hitler*, 270.

[330] Gregor, *Haunted City*, 96-97.

Although the denazification programme and the Dachau trials were operating at the same time, the difference between the Dachau trials programme and the denazification programme is captured in the statement of objectives in Control Council Law No. 38, issued in October 1946, which provided concrete and regular form to the denazification process. It stated:

The object of this paper is to establish a common policy for Germany covering:

(a) The punishment of war criminals, Nazis, Militarists, and industrialists who encouraged and supported the Nazi Regime.

(b) The complete and lasting destruction of Nazism and Militarism by imprisoning and restricting the activities of important participants or adherents to these creeds.

(c) The internment of Germans, who, though not guilty of specific crimes are considered to be dangerous to Allied purposes, and the control and surveillance of others considered potentially so dangerous.[331]

Internment was thus conceptualized as a preventative security measure rather than as punishment, but the conditions in many camps, particularly through the winter of 1945/46, made it seem punitive to both those interned and to many in the German public.

[331] 'Control Council Directive No. 38: The Arrest and Punishment of War Criminals, Nazis, and Militarists and the Internment, Control, and Surveillance of Potentially Dangerous Germans, 12 October 1946' reprinted in 'Occupation and the Emergence of Two States (1945-1961)', *German History in Documents and Images*, eds. Prof. Volker Berghahn and Prof. Uta Poiger (German Historical Institute, Washington, DC, USA).

The numbers of those interned in the occupied zones of Germany as of January 1, 1947, were as follows:

	American Zone	British Zone	Soviet Zone	French Zone
Interned	51,006	34,500	59,965	10,923
Released	44,244	34,000	7,214	8,040
Total	95,250	68,500	67,179	18,963

Table 1. The numbers of those interned in the occupied zones of Germany as of January 1, 1947. Source: Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006), 70.

With the exception of the 'major' war criminals (Goering etc.), those POWs suspected of committing war crimes were sent to the former Dachau concentration camp. A questionnaire, written by a Lieutenant Paul Guth, was given to every person interned at Dachau. He was a 'very astute, able young man,' as Denson recalled, 'and the questions that were asked were formulated by Paul Guth and were very adroitly done, and I think on a number of occasions we were able to pluck up from the answers and responses that were given in this questionnaire those who had been detained as automatic arrestees who also actually were war criminals'.[332] In general, the POWs answered the questionnaires truthfully because of the fear of denunciation from others in their own questionnaires or revelations from captured records. Slowly, a distinction was made between the 1500-1800 suspected war criminals (most of whom admitted in their questionnaires to committing crimes or had been accused as such in others' answers – this is how a majority of war criminals tried at Dachau came to the attention of the Americans) and automatic arrestees. These men were separated from one another.[333]

The courts of the Dachau tribunals would only try crimes that occurred after 1 January 1942, the date of the creation of the United Nations (the formal name of the Allies).[334] The entire Dachau trial programme included trials against members of the

[332] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

[333] Ibid.

[334] Tomaz Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge: Harvard University Press, 2012), 31.

German army or German civilians who had shot downed American airmen (and one curiously-misplaced case of American POWs at a subcamp of Buchenwald called Berga who were used as slave labourors), the trial of the Waffen-SS men accused of shooting American POWs during the 'Malmédy Massacre' and the trial against the staff of the Hadamar euthanasia centre (held at Wiesbaden, Germany), and - the focus of this study - trials against personnel from the main camps of Dachau, Buchenwald, Flossenbürg, Mauthausen, and Dora-Mittelbau, as well as their subsidiary camps.

All of the American trials relied on The Hague (1907) and Geneva Conventions (1929) for precedent and legality. However, the trials grew increasingly complicated in their approach to law as prosecutors confronted larger Nazi crimes. The 'Fliers Cases' required a relatively straightforward interpretation of the traditional legal provisions against mistreatment of POWs as established by international law as early as 1899 (the First Hague Convention). The legal issues in the Malmédy Massacre case were similar to the Fliers cases, although concerns were raised during the trial as to whether soldiers would be acquitted by using 'superior orders' as a defence. The Hadamar 'Murder Factory' Trial was more complicated: in order to stay within established international law, the accused could only be tried for crimes against *Allied* victims—with the consequence that thousands of German civilian victims were ignored during the American prosecution of this case. The concentration camp trials had the most complicated relationship with traditional international law: the nationalities of the victims was problematic as well as connecting each individual defendant to the crimes committed in the camp—particular if the defendant, although helping to run the camp, did not personally kill or injure any inmates. Legal innovation was required to prosecute concentration camp personnel effectively.

B. Downed Allied Airmen, the Berga Trial (*U.S. vs. Erwin Metz, et al.*), the Hadamar Trial (*Trial of Alfons Klein and Six Others*), and the Malmédy Trial (*U.S. vs. Valentin Bersin, et al.*)

1. Downed Allied Airmen: The 'Fliers' Cases', 1945-1947

The 'Fliers' Cases' made up the bulk of the trials held by the American armed forces in Europe. Throughout the American participation in the air war in Europe, there were widespread reports of the illegal killing of surrendered American airmen by shooting and beating 'at isolated and remote points, by planned and instigated

mobs in populated areas, and by participants in the execution of widespread "common designs" to kill such airmen'.[335] The first trials held by the American military of German (and Austrian) civilians began as early as June 1945. These cases had the oldest and clearest international legal basis of the American trials. The laws of war as stated in The Hague and Geneva Conventions specifically outlaw the killing of surrendered soldiers. The Hague Convention of 1899 stated, 'Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated'.[336] The Geneva Convention of 1929 specifically stated, 'They [POWs] shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity. Measures of reprisal against them are forbidden'.[337]

The most famous Fliers' Case was the Rüsselheim Case (*United States v. Hartgen, et al.)*, which involved the killing of six American airmen by a mob of townspeople at Rüsselheim.[338] On 24 August 1944 a B-24 Liberator aircraft was shot down. Nine crew members bailed out of their damaged bomber and made it safely to the ground. All men were captured and brought together; although one, who had stomach shrapnel wound, was separated out for medical treatment and eventually sent to a POW camp. The eight other airmen were being transported to an interrogation centre in southern Germany by train on 26 August, when they were forced to disembark in the town of Rüsselheim because of rail damage. The damage had been caused by an RAF air raid the night before on the Opel manufacturing plant in Rüsselheim. During that raid, 198 people had been killed (21 Germans and the rest forced labourers who were not able to go into the town's air raid shelters) and around 90% of the town had been damaged by this raid and others. Three Luftwaffe guards, unfamiliar with the town, escorted the 8 airmen through the town. During this transfer, townspeople watching the men began to form a mob instigated by two

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[335] Lt. Col. Straight, *Report of the Deputy Judge Advocate for War Crimes, European Command*: *June 1944 to July 1948,* 47. Also see brief discussion in Richard J Evans, *The Third Reich at War* (New York: Penguin Books, 2010).

[336] Article 4, The Hague Convention of 1899.

[337] Article 2, Geneva Convention 1929.

[338] Newspaper coverage in the US included the *New York Times,* '7 GERMANS DOOMED FOR KILLING FLIERS', 1 August 1945, 12.

sisters, and pelted the airmen with bricks, and eventually, beat them with sticks. All eight airmen were beaten severely and eventually dumped into a wooden wagon and taken to the town cemetery. A later report read, 'Two of the victims of the mob action, although thought to be dead, through an act of Providence escaped from a wagon loaded with ostensibly dead bodies during a second air raid alert, scaled the cemetery wall and survived to tell the story'. They were captured four days later and survived the war in POW camps. The other six men were buried in the town cemetery.

The War Crimes Branch brought 11 townspeople to trial, held in Darmstadt, Germany, in July 1945 under charges that they had violated the Geneva Convention of 1929. The two primary prosecutors for the case were Col. Leon Jaworski (later famous as the Watergate prosecutor) and Luke Rogers. American officers and several German civil attorneys represented the German townspeople. Jaworksi wrote that this was the first trial after the war that used the Geneva Convention. (Technically, it was the first trial prosecuted after combat ended in Europe, but there were six military commissions that held investigations and charged defendants prior to Rüsselheim. Two involved the lynching of fliers by German citizens.) The prosecutors sought the death penalty for all 11 defendants whom pleaded 'not guilty'. Verdicts of the defendants as follows: 5 men were sentenced to hang, 1 man was sentenced to 25 years (he was paroled in February 1954), 2 were sentenced to 15 years (both were paroled in December 1953), and 1 not guilty. Two women (named Witzler and Reinhart) were found guilty and sentenced to hang, but upon review their sentences were changed to life imprisonment. They were paroled in December of 1953. In 1947, another man, named Stolz, who administered additional death blows to the fliers at the cemetery was also tried, convicted and hanged in 1948. One of the Luftwaffe guards, named Umstatter, was also found after the war and tried, convicted and sentenced to hang in 1946.

Dates	Number of Defendants	Number of Trials	Sentences					
			Death	Life	20+ years	10-19 years	<10 years	Ac-quitted
Jan-Jun 1945	6	2	6	0	0	0	0	0
Jul-Dec 1945	59	25	28	0	3	2	10	14
Jan-Jun 1946	88	37	24	9	4	7	31	11
Jul-Dec 1946	160	36	59	28	6	11	40	16
Jan-Jun 1947	188	67	50	25	8	11	54	40
Jul-Dec 1947	81	35	20	20	7	4	15	15
TOTAL	582	202	187 (32%)	82 (14%)	28 (5%)	35 (6%)	150 (26%)	96 (17%)

Table 2. Characteristics of the Fliers' trials

The peak of the Fliers' trials occurred in late 1946 and early 1947. In total 582 defendants were tried in 202 separate trials. The most common sentence presented was a death sentence, which was given for 187 defendants out of 582 in total (32%). In general there was suggestion of a bimodal distribution focused on the extremes of sentencing as 269/582 (46%) were given sentences of death or life imprisonment while 246/582 (43%) were either given sentences of less than 10 years or were acquitted.

2. The Berga Trial (*U.S. vs. Erwin Metz, et al.)* 3 September – 15 October 1946

During the successful beginning of the German counter offensive in the Ardennes Forest in December 1944 (the 'Battle of the Bulge'), thousands of American POWs were captured. Around 2,000 were interned at Stalag IX-B, a POW camp in Bad Orb. In mid-January 1945, all Jewish POWs were asked to identify

themselves at roll call. Anywhere from 80-130 did and were separated from their comrades and placed in a segregated barracks.[339] On 9 February 1945, these American-Jewish soldiers, long with at least 200 more American POWs chosen because they looked Jewish or were 'troublemakers', were shipped to Berga, a subcamp of Buchenwald. The journey was horrendous as the men travelled packed into boxcars without food or water for four days. Once at Berga, the POW joined inmates from Buchenwald digging tunnels for an underground munitions factory. The Americans were housed in a separate barracks from the other prisoners, but treated with the same brutality as the others. Disease, hunger, thirst, and beatings caused the American POWs to grow sick and die. By April 1945, twenty-five men had died and twenty-five others were hospitalised. Twenty others had escaped.[340]

With the American army approaching the camp, the remaining 280 of the original 350 American POWs, were forced, along with other inmates, on a death march from 3 April-23 April towards nowhere in particular.[341] The inmates left behind at Berga were liberated by 90th Infantry Division on 20 April 1945. The 11th Armoured Division liberated the men on the death march three days later near the town of Cham.[342] The men liberated were incredibly sick and weighed 36-40 kilograms.

Upon liberation and through the trial that followed (*US vs. Erwin Metz, et al*.), Berga's purpose, and the crimes committed there against American POWs, was immediately obfuscated. Whether a mistake on the part of war crimes investigators (although this hard to believe as surviving American soldiers could have testified differently) or a deliberate cover-up of the fact that American POWs were used as slave labourers. Before their return to the States each soldier had to sign a 'Security Certificate for Ex-Prisoners of War,' stating that, in order to protect '"the interests of American prisoners of war in Japanese camps" and any future wars, they would never "reveal, discuss, publish or otherwise disclose to unauthorized persons information on

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[339] American dog tags made it (dangerously) easy to identify Jewish soldiers as the dog tags were stamped to indicate the solder's religion for proper ministrations: "C" for Catholics, "P" for Protestants, and "H" for Hebrew. *Hitler's GI Death Camp*, National Geographic Channel, December 2011.

[340] Whitlock, 171.

[341] Whitlock, 174.

[342] Whitlock, 189.

escape from enemy prison camps" and that "the authorship of stories or articles on these subjects is specifically forbidden."'[343] The survivors interpreted this a signal that their government did not want them to ever talk about Berga.[344]

Two men were brought to trial, from 3 September – 15 October 1946, over the crimes against the America POWs at Berga: Erwin Metz, a non-commissioned officer of the *Volkssturm* and particularly cruel man, who was in charge of the American work detail, and his superior, Hauptmann Ludwig Merz.[345] The trial took place before the Dachau military commission courts, but was part of the POW (or 'Downed Fliers') cases, not the Buchenwald cases. This meant the 'common design' charge was not used and the two men were charged with specific 'violations of the laws of war': Metz was charged with killing an 'unknown member of the US Army' (Charge I) and assaulting others (Charge II). Both Metz and Merz were charged with mistreating unknown members of the United States Army 'by failing to provide adequate food, adequate drinking water, adequate medical care, adequate clothing, and adequate housing and sanitary facilities, said failure resulting in the death of several unknown members of the United States Army' (Charge III)[346].

In the trial (and Army review), although correctly identifying Berga as a 'work camp', Berga was misinterpreted as a sub-camp of the prisoner of war camp Stalag IX-B – not Buchenwald. At the trial, no mention of Buchenwald inmates working alongside the Americans was made. The former American POWs themselves, were not invited to testify in court. Though dozens of survivors were willing to testify, 'none was called in person to the Dachau trial, and only 12 of the prisoners' written testimonies were used to supplement the information gathered on Berga by the U.S.

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[343] Katherine Duke, 'Our Fellows Deserve to be Heard', Amherst Magazine, Fall 2009.

[344] See Roger Cohan, The Lost Soldiers of Stalag IX-B', New York Times Magazine, 27 Febrary 2005 and his book *Soldiers and Slaves: American POWs Trapped by the Nazis' Final Gamble* (New York: Knopf, 2005); interviews in Mitchell G Bard, *Forgotten Victims: The Abandonment of Americans in Hitler's Camps* (Boulder CO: Westview Press, 1994); and Flint Whitlock, *Given Up For Dead: American GIs in The Nazi Concentration Camp at Berga* (New York: Basic Books, 2005).

[345] 'One other Berga commander, Lt. Willy Hack, was executed, but not by the United States. He died by hanging, justice carried out by the Soviets'. Wayne Drash, CNN online, 'New photo: Nazis dig up mass grave of U.S. soldiers', 22 April 2009.

[346] U.S. vs. Erwin Metz, et al. Deputy Judge Advocate Office, 7708 War Crimes Group, European Command APO 407, 15 September 1947, The War Department and the Army Records, Records of the Office of the Judge Advocate General (RG 153), The National Archives and Records Administration, College Park, Maryland, USA.

War Crimes Investigating Team'.[347] Roger Cohen correctly noted that within the trial, 'the prosecution drew little attention to the ample evidence that the Nazis chose the POWs to labour and die at Berga specifically because they were Jewish or otherwise "undesirable".'[348]

Both Metz and Merz were sentenced to death by hanging and their sentences were upheld under initial review in September 1947. However, by June 1948, the Civil Affairs Division of the War Crimes Branch approved the commuting of Metz's sentence to life imprisonment and Merz's to five years. By 1955, both men were paroled.[349]

3. Hadamar (*Trial of Alfons Klein and Six Others*), October 8–15, 1945

The so-called 'Hadamar Murder Factory' trial (*Trial of Alfons Klein and Six Others)* ran from 8 – 15 October 1945. It helped lay the foundation for the mass-atrocity trials held at Dachau. As one scholar wrote, 'The Hadamar case introduced the novel concept of a *common intent* to commit war crimes. The success of this prototypical approach persuaded Dachau prosecutors to build future concentration camp cases on a similar model'.[350] Furthermore, the prosecutors did not attempt to charge the Germans with the deaths of fellow Germans (in excess of 15,000 people)—the lawyers focused on crimes against the Allied nationals, Russian and Polish forced labourers (approximately 476 people).[351] This kept the military trial within the confines of established international law. Furthermore, the Hadamar case established 'the jurisdiction of American commission courts over crimes committed against stateless victims' and 'affirmed the right of American military courts to try civilians'.[352]

Located near Limburg on the Lahn in west central German, the Hadamar euthanasia centre, active as part of the T4 Euthanasia Programme from 1941 – 1945,

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[347] Duke, 'Our Fellows'.

[348] Ibid. Also see Cohen, *Soldiers and Slaves*.

[349] Whitlock, *Given Up For Dead,* 218. Also see Duke, 'Our Fellows Deserve to be Heard'.

[350] Jardim, *The Mauthausen Trials*, 39. Emphasis in the original

[351] Patricia Heberer, 'Early Post War Justice in the American Zone: The Hadamar Murder Factory Trial', *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes,* eds. Patricia Heberer and Jurgen Matthäus (University of Nebraska Press, 2008), 25-47.

[352] Ibid., 41.

was discovered by American troops in late March 1945.[353] The United States military was unsure whether international law permitted a trial of the Hadamar staff as, 'international law restricted them to prosecute crimes committed against their own service personnel and civilian nationals, and those of their allies, in the territories that they held'.[354] The prosecution, headed by Col. Leon Jaworski, whom also headed the prosecution for the Rüsselsheim Case, 'initially hoped to try staff members for the murders of some 15,000 German mental patients killed at Hadamar but could not, since military commissions of the occupying armed forces were empowered solely to try cases involving crimes against Allied nationals under international law'.[355] However, at least 476 Polish and Russian labourers had been killed by lethal injection at the centre between 5/6 June 1944 and 13 March 1945 and this allowed the American to begin prosecutions. The accused were charged with 'violations of international law'. The wording of the charge bore similarity to the charge used in the concentration camp cases at Dachau in the following years, specifically the reuse of the phrase 'deliberately and wrongfully, aid, abet, and participate ' in the crime.[356]

The accused were not members of the German army, 'but personnel of a civilian institution. The decision of the Military Commission [was], therefore, an

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[353] For more on the Nazi euthanasia program see Michael Burleigh, *Death and Deliverance: 'Euthanasia' in Germany, C. 1900-1945* (Cambridge: University of Cambridge Press, 1994); Ernst Klee, *'Euthanasie' im NS-Staat: die 'Vernichtung lebensunwerten Lebens'* (Fischer S. Verlag GmbH, 1983); Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995); and Aly Gotz, (ed.), *Aktion T4, 1939-1945: Die 'Euthanasie' im NS-Staat: Die 'Vernichtung lebensunwerten Lebens'*. 2nd Edition (Berlin: Edition Hentrich, 1989).

[354] 'The Hadamar Trial,' United States Holocaust Memorial Museum, Washington, DC. Accessed online 30 November 2015

[355] *News of Germany*, 16 October 1945: 'Letters naming friends who died in the Hadamar Insane Asylum have been received by the Military War Crimes Commission. Col. Leon Jaworski said the letters addressed to him and the judges offered testimony about thousands of Germans killed there. Some of the letter asked that the defendants be prosecuted also for deaths of Germans'. From the *New York Times*, 'Hadamar Prosecutor Cites Confessions In Summing Up Case,' 15 October 1945.

[356] The Hadamar charge reads, 'In that Alfons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber and Philipp Blum, acting jointly and in pursuance of a common intent and acting for and on behalf of the then German Reich, did, from on or about 1 July, 1944, to on or about 1 April, 1945, at Hadamar, Germany, wilfully, deliberately and wrongfully, aid, abet, and participate in the killing of human beings of Polish and Russian nationality, their exact names and number being unknown but aggregating in excess of 400, and who were then and there confined by the then German Reich as an exercise of belligerent control'. The United Nations War Crimes Commission, *Law-Reports of Trials of War Criminals: Volume I* (London: His Majesty's Stationery Office, 1947), 47.

application of the rule that the provisions of the laws and customs of war are addressed not only to combatants but also to civilians, and that civilians, by committing illegal acts against nationals of the opponent, may become guilty of war crimes'.[357] This was controversial, because in common practice, an occupying power can try offences against civilians by military commission only if the offence was against their own forces and occurred during the occupation (not before). None of Hadamar's victims was American and all the offences had happened before American occupation of the region. Indeed, during the trial, the defence counsel Lt. Col. Juan Sedillo argued that the military commission did not have jurisdiction over the accused. Col. Jarwarski argued that because the Soviet and Polish workers were in Germany as part of the German war effort, 'the murder of those deported aliens represented a war crime;'[358] a view upheld by the court.

The defence pleas of 'superior orders, of alleged legality under German Law, and of coercion and necessity were held not to free the accused from responsibility'.[359] The head of the prosecution, Col. Jaworski used a similar strategy to that which he first used in the Rüsselshiem trial, stressing that 'each of the defendants had played an integral role in the killing process'.[360] Furthermore, he emphasised the 'assembly line' nature of the Hadamar institution in killing its inmates. In order to avoid discussion of Hitler's authorization of the murder of thousands of German mental patients at Hadamar–'which might be construed as a state directive'[361] and thus used by the defence council as proof that the accused acted within the law, Col. Jaworski sought to prove that the Soviet and Polish workers did not suffer from mental illness or incurable tuberculosis.

After a seven-day trial, the military commission sentenced Hadamar chief administrator Alfons Klein, and two male nurses, Heinrich Ruoff and Karl Willig, to death by hanging. Chief physician Adolf Wahlmann received a life sentence, which was eventually commuted due to his old age. Two Hadamar administrative staff

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[357] Ibid., 54.

[358] Heberer, 'Early Post War Justice in the American Zone', 36. Also see Earl W Kintner, (ed.), *The Hadamar Trial* (London: William Hodge, 1949).

[359] The United Nations War Crimes Commission, *Law-Reports of Trials of War Criminals: Volume I* (London: His Majesty's Stationery Office, 1947), 46.

[360] Heberer, 'Early Post War Justice in the American Zone', 34.

[361] Ibid., 34.

received sentences of 35 and 30 years, respectively. Irmgard Huber, the only female defendant, received 25 years imprisonment.

4. Malmédy (*United States of America v. Valentin Bersin et al*), 16 May - 16 July 1946

Photo 5. Former U.S. Army sergeant Kenneth Ahrens demonstrates how he surrendered to SS soldiers, during his testimony at the trial of 74 SS men charged with perpetrating the Malmédy atrocity. Courtesy of the USHMM Photo Archives.

The trial of the Waffen-SS soldiers responsible for the 'Malmédy Massacre' was held from 12 May to 16 July 1946 at the Dachau concentration camp.[362] The soldiers of the First SS Panzer Regiment were charged with twelve different incidents of massacring approximately 350 American soldiers and 100 Belgium civilians

[362] For more on the Malmédy Massacre and trial see James J. Weingartner, *Crossroads of Death: The Story of the Malmédy Massacre and Trial* (Berkley: University of California Press, 1979). Also see Danny S. Parker, *Fatal Crossroads: The Untold Story of the Malmédy Massacre at the Battle of the Bulge* (New York: Da Capo Books, 2012) and John M. Bauserman, *Malmédy Massacre* (PA: White Mane Publishing Company, 2001).

throughout Belgium.[363] The worst incident, which became known as the 'Malmédy Massacre,' took place on 17 December 1944. Members of the Sixth Panzer Army, First SS Panzer Regiment, led by SS Colonel Joachim Peiper, shot 86 disarmed American soldiers who had surrendered on the second day of the German Ardennes offensive, the so-called 'Battle of the Bulge'. Defendants in the trial included the commander of the Sixth Panzer Army, General Josef 'Sepp' Dietrich, commander of *Leibstandarte-SS Adolf Hitler*, and Col. Joachim Peiper, the commanding officer of the armoured battle group '*Kampfgrüppe Peiper*,' which led the German Ardennes offensive. The trial was one of the most publicized of the Dachau trial programme. Like the Dachau concentration camp trials, an eight-man court sat in judgment (following a two-thirds majority rules), the 73 defendants were all tried at once, and each defendant was assigned a number to make them easier to identify by the court. The defendants were prosecuted and represented by American military lawyers.

Like the concentration camp trials, the Malmédy trial dealt with 'violations of laws and customs of war long recognized as such; specifically, the murder of prisoners of war and noncombant civilians' based on the Geneva conventions of 1929, and the Annex to Hague Convention No. IV of 1907 which 'sets out a positive duty to protect prisoners of war against acts of violence and prohibits the killing or wounding of an enemy who had laid down his arms and no longer has a means of defending himself'.[364] After deliberating for approximately 2 hours and 20 minutes (less than 2 minutes per defendant), the court found all defendants guilty and 43 were sentenced to death including Col. Peiper.[365]

As part of an established post-trial procedure the Malmédy trial sentences were reviewed. Because of complaints of the use of torture to procure confessions, made on behalf of the accused men by defence attorney Lt. Col. Willis M. Everett, the standard review procedure was supplemented by a special commission created by the Secretary of the Army, Kenneth Royall, to review the proceedings of the Malmédy trial and other military tribunals in Europe. Commission members, Judge Gordon Simpson (the commission was subsequently know as the Simpson Commission),

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[363] United States Senate, *Malmédy Massacre Investigation: Report of the Subcommittee of the Committee on Armed Services, October 13, 1949* (Washington: United States Government Printing Office, 1949).

[364] Ibid.

[365] Other sentences: 22 to life imprisonment; 2 to 20 years prison; 1 to15 years; 5 to10 years.

Judge Edward Van Roden and Lt. Col. Charles Lawrence Jr., reviewed the Malmédy trial and 65 mass trials of German war criminals. The Simpson Commission wrote a report recommending the commutation of a total of 29 death sentences to life, including 12 Malmédy defendants, due to pre-trial investigations being improperly conducted. The Commission showed considerable bias in favour of the accused, interviewing defence counsellors and even American and German religious leaders, while neglecting to interview a single member of the pre-trial investigation team or of the prosecution staff at the trial. Despite this bias, the commission could not definitely prove that torture took place, although the report fastidiously neither disputed nor denied Everett's accusations of torture of the Malmédy defendants. Within 16 months of the trial, all the Malmédy defendants had withdrawn their confessions.

A subsequent United States Congressional investigation of the trial, led by Ray Baldwin, Lester Hunt and Estes Kefauver, rejected the charges of beating, torture, mock executions and starvation, but approved the commutation of sentences because of 'procedural irregularities'—misconduct by members of the prosecution team and that the defence team had not represented the men to the best of their ability (Defence attorney Lt. Col. Willis M. Everett encouraged the men not to testify on their own behalf, so many did not, although he continued to advocate for the men and helped to bring their case before Congressional review). During the Congressional investigation of alleged mishandling of the case, a young Senator McCarthy, who represented Wisconsin, a state with a large contingent of German-Americans, supported the defendants' accusations of torture to elicit confessions. Incidentally, 'no Malmédy defendant mounted the scaffold, and by the end of 1956 the last convict had been released as the result of a controversy that reverberated in the halls of Congress and helped start the climb to national prominence of McCarthy'.[366]

[366] James Weingartner, *Crossroads of Death: The Story of the Malmédy Massacre and Trial (*Berkeley: University of California Press, 1979), 3. Col. Peiper was the last prisoner released from Landsberg prison in 1956. He worked for Porsche and Volkswagen after the war, but was let go after concerns from American car distributors about his notoriety. He retired to France. In 1976, a French communist newspaper released his name and address, and he was murdered when his house was firebombed. Peiper's postwar career in not mentioned in Bernhard Rieger, *The People's Car: A Global History of the Volkswagen Beetle* (Cambridge MA: Harvard University Press, 2013).

C. Overview of the Concentration Camp Trials, November 1945 – December 1947

The concentration camp trial courts at Dachau were in session from the autumn of 1945 through the winter of 1947. The selected camp personnel who became the defendants were charged with 'violating the laws or customs of war' and tried by a rotating, eight-man commission made up of ranking military officers who voted on conviction and sentencing with a two-thirds majority rules. One member of the court was required to be a 'law member', learned in the rules of general courts-martial. The form of the Dachau trials was different than a court-martial or a criminal civilian prosecution. The main difference was that in a military tribunal the rules of evidence were relaxed. The court members could chose to hear any evidence they felt was reliable and relevant to the case, evidence that would normally be considered hearsay and thus ineligible for consideration in a court-martial or civilian court. The concentration camp trials were conducted according to the 'Procedure for Trial before a Military Government Tribunals' and the 'Technical Manual for Legal Officers' prepared by the Supreme Headquarters Allied Expeditionary Force (SHAEF).[367] The manual contained a guide to procedure in military government courts. The following quote from the manual highlights one of the basic differences between the procedure followed by the Dachau military commissions and that normally followed by American civilian or military courts:

> 9. Evidence.—Rule 12 does not incorporate the rules of evidence of British or American courts, or of courts martial. The only positive rules binding upon the military government courts are found in rule 12 (3), rule 17, and rule 10(5). Hearsay evidence, including the statement of a witness not produced, is thus admissible, but if the matter is important and controverted, every effort must be made to obtain the presence of the witness, and an adjournment may be

[367] The 'Procedure' was written at Third Army Headquarters, approved by USFET (United States Forces, European Theatre), by Colonel Cheever and Colonel O'Connell (a classmate of William Denson's at West Point). It was first applied to American military trials in Italy under the Fifth Army. William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

> ordered for that purpose. The guiding principle is to admit only evidence that will aid in determining the truth.[368]

The spirit of the trial was meant to be the same as an American court-martial or criminal trial; 'guilty had to be established beyond a reasonable doubt and to a moral certainty'.[369] Denson strove, as he later said, 'to attempt to present these cases in the same way that I would in the United States District Court for the Southern District of New York and the Northern District of Alabama'.[370]

The concentration camp trials introduced legal precedent in the charge of 'common design,' which was used to convict personnel of the camps on the assumption that the concentration camps were criminal organizations and anyone participating in their upkeep was guilty of all the abuses therein. The phrase 'common design' was a product of Lord Wright, Lord Chancellor of England, who suggested the concept as an expansion of the more strictly interpreted charge of conspiracy. As William Denson recalled, 'In order to justify the receipt in evidence of testimony which came from the lips of witness who were there [at the camps] at various periods of time, it was essential to have some mechanism that would justify the receipt in evidence of that type of testimony…In other words, there was a design which may be something less, if you please, than a conspiracy'.[371]

Despite this innovation, the concentration camp trials were military trials, in which soldiers and support personnel were prosecuted for violating the rights of other nations and their citizens during a time of combat. This basis in the older legal tradition was a point of pride for the men involved. Years later Lt. Col. William Denson, chief prosecutor at Dachau, felt uncomfortable when he was mistakenly known for participating in the Nuremberg Trials. '…I've always had the feeling…that I could in my heart and soul condemn [the charges at Nuremberg] because of the ex post facto nature of some of the charges that were made. I would rather much more to

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[368]United States Senate, *Malmédy Massacre Investigation: Report of the Subcommittee of the Committee on Armed Services, October 13, 1949* (Washington: United States Government Printing Office, 1949), 21.

[369] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven Connecticut, USA.

[370] Ibid.

[371] Ibid.

be affiliated with or associated with the trials at Dachau, than at Nuremberg'.[372] The American military tribunal programme at Dachau has avoided charges by contemporaries and historians of *ex post facto* law that plague the Nuremberg Trial (IMT), with its innovative charges of 'waging aggressive warfare' and 'crimes against humanity'. In contrast, the concentration camp trials were predicated upon the conventions of traditional laws of war, as discussed in Chapters 2 and 3, part of the general body of law in both the United States and Germany. The Hague Convention of 1907, of which Germany was a signatory, outlawed the ill treatment of civilians in occupied territories. Thus the military trials were an expected outcome for German soldiers and leaders as they engaged in such behaviour during the war.

In order to process such a large number of defendants as efficiently as possible, the war crimes trial process was largely centralized under the responsibility of the European Theatre Command and the major war criminal prison established at Landsberg, Germany with a further enclosure at Dachau. By November 1945, all war crimes tribunals were moved to Dachau. By 1947 eight war crimes tribunals were in session simultaneously at Dachau.

Photo 6. Headquarters of the War Crimes Group of the Dachau concentration camp. Courtesy of the USHMM Photo Archives.

[372] Ibid.

Although the 'parent trials' started at different times, the subsequent trials for the rest of the defendants of those trials overlapped and lasted until 1947 as seen in Table 3.

	'Parent trial' date	**Date of last trial**	**Number of trials**	**Number of defendants**
Dachau	Dec 1945	Sept 1947	124	540
Mauthausen	May 1946	Oct 1947	66	330
Flossenbürg	Jan 1947	Dec 1947	19	90
Buchenwald	Aug 1947	Dec 1947	25	60
Dora-Mittelbau	Dec 1947	Dec 1947	6	25

Table 3. The five concentration camp war crime tribunals at Dachau.

The number of staff involved in the prosecutions at Dachau grew rapidly, reaching its peak in December 1946 through June 1947. The Dachau trials were run by a separate detachment under the Judge Advocate General (JAG). The specially-created War Crimes Group and had its own administration, counsel, tribunal, and screening sections, although it used evidence and records collected by other sections of the army and relied on soldiers in charge of processing, to imprison wanted men, and the war crimes enclosure sections in order to gather material and men needed for the trials.[373]

The concentration camp trials' proceedings for each camp followed a similar pattern, designed by JAG for efficiency. First was a 'parent trial' over-viewing the camp and the atrocities that occurred within using evidence including documents and eyewitness reports. The 'parent trials' included a thorough examination of the evidence and the charges made against individuals chosen to stand for this first case, usually the highest ranking members of the camp staff and defendants representing as many sections of camp administration as possible. All other accused from the same camp were tried at 'subsequent trials'. At the 'subsequent trials' for a particular camp, the court would be furnished with 'the charges and particulars, the findings and the sentences pronounced in the original parent case'[374] and once the court had taken

[373] Lt. Col. Straight, *Report of the Deputy Judge Advocate*, appendix 10, 119.

[374] Ibid.

judicial notice of these findings, no examination of the original trial materials or witnesses was deemed necessary. Thus the burden of proof was passed on to the defendant, who was left with the option to prove whether he was not at the camp for a significant amount of time to participate in its criminal activity or that he had been mistaken for someone else whom had worked at the camp. The defence counsels complained that these subsequent trials were, in effect, 'trials in absentia' because the defendants and their counsellors were not given a chance to review or cross-examine evidence or witness statements given at the 'parent trial'. Despite this obvious problem, US occupation authorities believed the speed with which the trials could take place was the major positive aspect of this judicial system.

1. Chronological overview of the 'Parent trials' and their 'Subsequent trials'

Like all of the concentration camp 'parent trials', the Dachau 'parent trial' took place in a makeshift courthouse inside the south entrance of the camp. Over the courthouse's main door a 'large wooden sign read Dachau Detachment War Crimes Group, then in smaller letters, Judge Advocate Division, United States Forces European Theatre'.[375] The Dachau campsite was chosen as the American military tribunal headquarters because it had not been bombed heavily during the war so it contained a large number of spacious building with heating and plumbing (particularly in the SS barracks and training sections of the old camp)[376] and it was close to JAG headquarters in Munich. It is possible that the camp was chosen to fulfil the Allied promise stated in the 1943 Moscow Declaration that perpetrators of war crimes would be returned to the scene of their crimes to be judged.

[375] Greene, *Justice at Dachau*, 28-29.

[376] Marcuse, *Legacies of Dachau*, 69-70.

Photo 7. View of the judges bench of the Dachau trial. A large American flag hangs behind them. Courtesy of the USHMM Photo Archives.

The courtroom had space to seat 300 people. Behind the raised platform where the eight-member court sat was a large American flag. The order to form the court stated that, 'pursuant to the authority delegated to the Commanding General, Third United States Army by Commanding General, United States Forces, European Theatre, a General Military Government Court consisting of the following officers is hereby appointed to meet at the time and place designated by the President thereof for the trial of such persons as may be properly brought before it'.[377] This Court's president was Brig. Gen. John M. Lenz. The other court members were all full colonels: George E. Brunner, G.R. Scithers, Laird A. Richards, Wendell Blanchard, John R. Jeter, Lester J. Abele, and Peter O. Ward. The judges were chosen by Third Army Headquarters, with help from the War Crimes Branch, and were selected on the basis of 'their experience in combat and other activities which equipped them for this assignment, including temperament'.[378]

[377] 2 November 1945, HQ Third Army and Eastern Military District APO 403 Order, Records of United States Army, Europe (RG 549). The United States National Archives and Records Administration, College Park, Maryland, USA.

[378] William Denson, *Justice in Germany*, no page number given in the brochure.

The authorization document then lists the defence and prosecution counsels appointed by Col. Straight. The defence team sat on the right of the courtroom. Lt. Col Douglas T. Bates, an investigator of war crimes since May 1945, led the defence team. The other defence lawyers were Maj. Maurice J. McKeown, Capt. John A. May, and Capt. Dalwin J. Niles. Reporters were appointed by court. A German lawyer, and interestingly, a former Mauthausen prisoner, Baron Karl von Posern, was allowed as an additional defence counsel.[379] An old armchair sat in front of the judges' platform and served as the witness stand.

On the opening day of the first concentration camp trials, the 'Dachau parent' trial, the courtroom was packed with over 400 spectators and members of the press.

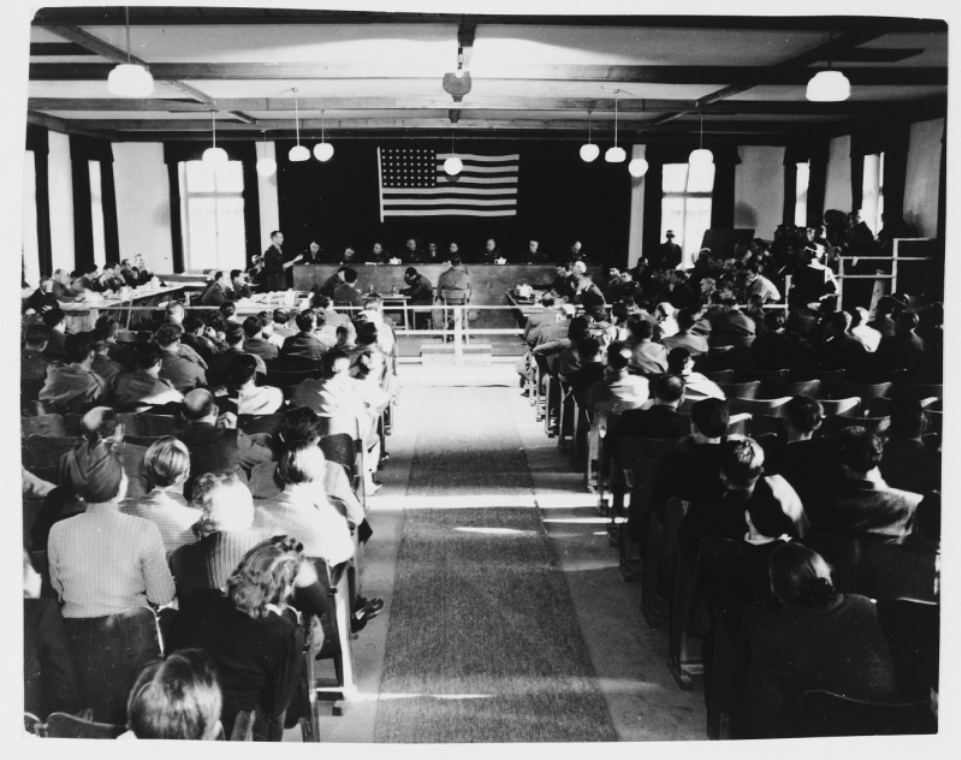

Photo 8. View of the courtroom of the Dachau trial as seen from the back of the room on opening day. Courtesy of the USHMM Photo Archives.

Observers included Gen. Walter Bedell Smith, chief of staff to General Eisenhower, and Lt. Col. Lucien B. Truscott Jr., 3rd Army commanding general.[380] Because of unforeseen delays in refurbishing the Nuremberg courtroom as well as delays in

[379] von Posern so impressed the American lawyers that he was recruited to serve on the prosecution team for the Mauthausen 'Parent' Trial. He also testified for the prosecution in that trial.

[380] Greene, *Justice at Dachau*, 19.

evidence gathering by the prosecution, the International Military Tribunal at Nuremberg had not started yet and Dachau was the first high profile trial held by the Americans. Originally, the American authorities planned that the Nuremberg trial would start four months before the Dachau case so the Dachau trial could serve as a specific case study of the overall criminality of the Nazi regime. This did not happen and the two cases remain largely separated in contemporary and historical memory. The press coverage and overflowing audiences would not last at Dachau. Most of the Dachau trial (and, indeed, all other trials at Dachau) was conducted in front of a very small audience. The Nuremberg Trial drew most onlookers away by the end of the week.

The prosecution based its case against all the defendants on the charge of ''. To prove this charge, 'the prosecution adduced evidence that Dachau Concentration Camp was run according to a system which inevitably produced the conditions described by all witnesses, and that the system was put into effect by the members of the camp staff and that every accused was at one time, though not all at the same time, a member of this staff'.[381] Throughout the trial, the defence, which never happily accepted that 'common design' was a legitimate charge/crime, would not argue against the statement that Dachau was a system designed to ill-treat prisoners or that the accused were not aware of this system. The defence focused on defending connections between the accused and the 'common design' of the camp.

Lt. Col. William Dowdell Denson led the prosecution team for all of the concentration camp 'parent trials'.

[381]The United Nations War Crimes Commission, *Law Reports on the Trial of War Criminals: Vol IX* (London: His Majesty's Stationery Office, 1949), 9.

Photo 9. Close-up portrait of William Denson, chief prosecutor for the Dachau, Mauthausen, Flossenbürg, and Buchenwald parent trials. Courtesy of the USHMM Photo Archives.

After earning his law degree, he received his orders in January 1942 to serve as an instructor in the Law Department at West Point and as an Assistant Staff Judge Advocate to the Superintendent of the United States Military Academy.[382] He was sent to the Headquarters of the Third Army at the end of January 1945 as a member of staff at the Judge Advocate's office charged with reviewing Court martial records. At the end of August, Lt. Col. Denson was assigned to serve as a legal member on a military commission to try a German citizen who had killed a downed American

[382] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

airman. In the last week of September 1945, Denson was assigned to be the Chief Counsel and Prosecutor of the 'parent trial' at Dachau.[383]

Approximately 1,045 defendants were tried at the concentration camp trials at Dachau. The leading prosecutor for the army at Dachau, Lt. Col. William Denson, prosecuted 177 individuals: the defendants in the 'parent trials' of the Dachau, Mauthausen, Flossenbürg, and Buchenwald cases.[384] Defendants were chosen as 'representatives [of] those people who really had an influence over the conduct of the particular activities at the camp'.[385]

	Camps				
	Dachau	Flossenburg	Mauthausen	Buchenwald	Total (%)
Commissioned officers	18	7	13	16	54 (31 %)
Non-commissioned soldiers	18	25	43	11	97 (55 %)
Kappos	3	13	3	4	23 (13 %)
Civilians	1	0	2	0	3 (1%)
Total	40	45	61	31	177

Table 4. Defendant rank/position according to associated camp.

Ninety-seven out of 177 (55%) defendants in the 'parent trials' could be considered non-commissioned soldiers (including the ranks of private, *SS-Mann*, through sergeant major, *Hauptscharführer*[386]). Thirty percent, or 53/177, of defendants were

[383] Ibid.

[384] According to Denson, the Russians were initially supposed to try the Buchenwald and Mauthausen cases because the camps were located in the Russian zone of occupation. He wrote, 'While Mauthausen and Buchenwald were both in the Russian zone and the Russian liaison had stated that, sure, they would prosecute those two cases by they wanted the United States to prepare them. Col. Cheever and others in the Third Army and in USFET determined that if we were going to prepare the cases, we should try them'. See William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven Connecticut, USA.

[385] Ibid.

[386] Non-commissioned ranks in the SS are as follows: *SS-Mann* (private), *Strummann* (Private first class), *Rottenführer* (Corporal), *Unterscharführer* (Sergeant), *Scharführer* (Staff

commissioned officers, 13% (23/177) were kappos, and 2% (4/177) were civilians. While there was a stronger consistency among the sentencing patterns for all commissioned officers and non-commissioned soldiers who were tried, the vast majority of which were given a death sentence, there was more variation among the sentences of the Kapos who were tried (See Figure 3).

D. Dachau (*United States of America v. Martin Gottfried Weiss et al*), 15 November - 13 December 1945

'For many Americans, Dachau concentration camp, like Bergen-Belsen for the British, came to symbolize the horrors of National Socialism. Opened in March 1933, it was the first official camp set up by the Nazis, and one of the first liberated by the Americans forces'.[387] At the 'parent trial' for the Dachau camp (formally known as *United States of America v. Martin Gottfried Weiss et al.)* forty men were charged. They all pleaded 'not guilty'.

Photo 10. Former camp commandant Martin Gottfried Weiss testifies at the trial of former camp personnel and prisoners from Dachau. Courtesy of the USHMM Photo Archives.

Sergeant), *Oberscharführer* (Technical Sergeant), and *Hauptscharführer* (Sergeant Major). See Nikolaus Waschmann, *KL*, Appendix 629.

[387] Jardim, *The Mauthausen Trial,* 44.

Defendant Number 1 was the last commandant of Dachau, Martian Gottfried Weiss. No. 2 was Friedrich Wilhelm Ruppert (who had also worked as a camp administrator at Majdanek); No. 3 was Joseph Jarolin, the deputy camp commandant at Dachau and 'one of the most vicious now in custody'.[388] No. 4 was Christof Ludwig Knoll, who 'repeatedly bragged that he had hanged ninety-eight Jews as well as many Russians, Poles, etc'.[389]

Photo 11. View of the defendants in the Dachau trial wearing identifying number tags seated in the dock. Courtesy of the USHMM Photo Archive.

Other notable defendants included: Franz Xavier Trenkle, a sergeant who was particularly abusive; Engelbert Valentin Niedermeyer, who 'liked to attend to the various tortures imposed on the inmates';[390] Johann Kick, the head of the political department who selected the punishments for inmates; and Vinzenz Schoettle, 'a tall robust youth characteristic of the SS bullies, [who] found himself being interrogated in the preparation for the prosecution by a former victim he had often beaten but who

[388] *The New York Times,* '42 Men Indicted in Dachau Crimes,' 4 November 1945.

[389] Ibid.

[390] Ibid.

was now wearing the uniform of a lieutenant in the United States Army'.[391] The single civilian arraigned was Dr. Klaus Karl Schilling. Dr. Schilling, who had conducted research on prisoners to study possible vaccinations against malaria, was committed to his work to the end. While on trial, 'he begged on the witness stand to be allowed to go on with the paperwork on the results [of his malaria experiments], saying he needed only a desk and a chair'.[392] After deliberating for one hour and thirty minutes, less then three minutes per defendant, the court declared all 40 defendants guilty; thirty-six were sentenced to death – twenty-three were hanged on the 28-29 May 1946, including the commandant, Martin Weiss and the camp doctor Karl Schilling.[393] Four hundred and eighty-one defendants were tried in 120 subsequent trials.[394]

E. Mauthausen (*United States of America v. Hans Altfuldisch et al*): 29 March – 13 May 1946

[391] Ibid.

[392] *New York Sun*, 'Dachau Nazis All Convicted of Atrocities' 12 December 1945.

[393] Robert Sigel, *Im Interesse der Gerechtigkeit. Die Dachauer Kriegsverbrecherprozesse 1945-1948* (Frankfurt: Main 1992).

[394] For more see Ludwig Einer and Robert Sigel (eds.), *Dachau Prozesse. NS-Nerbrechen vor amerikanischen Militärgerichten in Dachau 1945-1948.* (Verfahren Ergebnisse: Nachwirkungen 2007).

Photo 12. The American Military Tribunal hears the testimony of a witness at the trial of 61 former camp personnel and prisoners from Mauthausen. Courtesy of the USHMM Photo Archive.

In 1995, Denson wrote, 'At the start of the Mauthausen trial, the defendants' attitudes were substantially different from the attitudes of the Dachau defendants before their trial…The word had spread like wildfire. When we convened the trial at Mauthausen, the accused already knew that they were in serious trouble'.[395] Although Denson may or may not have been correct as to the state of mind of the soon-to-be Mauthausen defendants (no proof is available as to their inner thoughts and feelings), Denson felt confident about his prosecution strategy and success. William Denson considered Mauthausen the worst concentration camp of those he tried.[396] The army investigation conducted shortly after liberation mistakenly categorized Mauthausen as an extermination camp and estimated that as many as 1.5 million died there (current scholarship estimates that around 95,000 inmates were killed). This misrepresentation was due largely to the deathbed confession of the last commandant of Mauthausen, SS-Standartenführer Franz Ziereis, who was shot while trying to escape the

[395] Denson, *Justice in Germany*.

[396] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

Americans on 23 May 1945. Brought to an American hospital in Gusen for treatment and questioning (conducted by former inmates), Ziereis greatly exaggerated the number of inmates killed at Mauthausen.[397] Thus the prosecution at Dachau argued that Mauthausen ran a 'planned scheme of extermination'.[398]

Sixty-one former personnel were tried in the Mauthausen 'parent trial' (formally *United States of America v. Hans Altfuldisch et al.*).[399] Some major defendants included: the commandant of the SS death's head unit August Eigruber, SS-Obergruppenführer, Gauleiter of Oberdonau and Landeshauptmann of Upper Austria; and Eduard Krebsbach the chief physician of Mauthausen camp, as well as the deputy preventive detention camp commandant Hans Altfuldisch. Like every defendant at all the trials, on the first day of the trial, each defendant was asked for his full name, age, residence, nationality and whether he was a member of the armed forces for the Third Reich (including the distinction between *Allgemeine* SS or *Waffen* SS). Each defendant was assigned a number one to sixty. They were advised of their rights (entitled to copy of the charge, present at trial, examine evidence and witnesses, to call witnesses, have a United States force lawyer or lawyer or the defendant's choice). The charge against them was read. All of the defendants plead not guilty. The defence argued that some of them were insane, although this was not proven by the defence and no independent psychiatrist or psychiatric commission was convened to investigate the claim of insanity.

More than 100 witness testified over the six weeks of the trial.[400] After ninety minutes of deliberation, all sixty-one of the Mauthausen 'parent trial' defendants were

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[397] The prosecution team at Nuremberg, privy to this same confession, also exaggerated the number of deaths at Mauthausen.

[398] *New York Herald Tribune*, 'All 61 Mauthausen Defendants Convicted by US Army Court' 12 May 1946.

[399] The Mauthausen Tribunal consisted of Major General Ray B Prickett, Col. J.C. Ruddell, Col. Garnett H. Wilson, Col. John B. Smith, Col. Lyman D. Judson, Col. Laird A. Richards, Col. Raymond C. Conder, Col. John G. Howard and a ninth member who served as the law member, Col. A.H. Rosenfeld. The prosecution was William Denson, Lt. Col. Albert Barkin, Capt. Charles Mathews, Capt. Myron N. Lane, Second Lt. Paul Guth, and Col. William G. Holder. The defence was lead by Lt. Col. Robert W. Wilson as chief counsel. The team also included Maj. Ernst Oeding, Capt. Francis W. McGuigan, First Lt. Charles B. Diebel, First Lt. Patrick W. McMahon, Mr David P. Hervey (an American civilian), and Mr. Alexander Wolf (an American civilian).

[400] Greene, *Justice at Dachau*, 215. Also see, Florian Freund, "Der Lachauer Mauthausenprozess' in *Dokumentationsarchiv des österreichischen Widerstandes* (Jahrbuch, 2001) 35-66.

convicted. Most of the defendants snapped to attention when the court called their name during sentencing, although two, upon hearing their death sentence, collapsed and had to be helped from the courtroom.[401] On 13 May 1946, fifty-eight were sentenced to death and three to life imprisonment. Forty-nine of the death sentences were carried out. In sixty-six subsequent trials, 330 men were tried over the next seventeen months.

F. Flossenbürg (*United States of America v. Joseph Becker et al*), 12 June 1946-22 January 1947

Lt. Colonel Robert J. Shaw, the original prosecutor for the Flossenbürg case, died of a stroke in June 1946. Lt. Col. Denson took over. The case lasted until 22 January 1947. Col. Shaw, Denson noted, had 'prepared the case as though he had 45 separate murder cases. And those cases just didn't admit [sic] that type of presentation. For that reason the cases dragged on from June until January of 1947'.[402] Denson introduced a similar strategy to those he had used at the Dachau and Mauthausen 'parent trial'. Forty-six Flossenbürg personnel were brought to trial.[403] The defendants included kapos, SS men, and a civilian leader Konrad Blomberg, age 47, the civilian chief of the Political Department at Flossenbürg and a column leader on the evacuation march. He admitted to recommending execution as a punishment for prisoners and participating in the execution of Russian and Polish nationals. Christian Eisbusch, age 28, was witnessed beating Belgian inmates to death with a pick handle. Willi Olsschewski, a (rare) Dutch citizen put on trial, age 43, was the kapo of the road building and quarry details and had been witnessed severely beating inmates including beating one to death. Another defendant was SS Capt. Ludwig

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[401] *Daily News*, 'US tribunal Sentences 58 Nazi Murderers to Gallows',14 May 1946.

[402] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

[403] The Court Members for Flossenbürg were as follows: Col. Don E. Carleton, Major Clyde B. Lanham (the law member), Col. Walter A. Elliot, Col. Edward B. Jackson, Lt. Col. James W. Smyly, Lt. Col. Lewis S. Sorley, Lt. Col. Clyde A. Burcham, and Lt. Col. Walter H. Skielvig. Lt. Colonel Robert J. Shaw, the original prosecutor for the Flossenbürg case, died of a stroke in June 1946. Lt. Col. Denson took over. Lt. Col. Technical Sergeant Henry L. Newell, Mr Henry Berkowitz, and Mr Stephen Pinter rounded out the prosecution team. Robert W. Wilson led the defence council. Other defence members were Dr. Richard Wacker (German), Dr. Wolfgang Engelhorn (German), Mr. Charles E. O-Connor (US Civilian), Mr. Russell S McKay (US Civilian), Mr. Albert W. Hall (US Civilian).

Buddensieg, age 61, who was the guard company and battalion leader who admitted to giving furloughs to guards who shot inmates near the barbedwire border of the fence.

The defence had three weeks of preparation for the Flossenbürg case (31 July – 19 August). Major Oeding was initially assigned but was relieved 8 October 1946 because his time of duty was up and he returned to the United States.[404] The Flossenbürg defence counsel decided to divide the accused between them, so each council was in charge of defence for ten to twelve of the accused. The defence called 143 witnesses and thirty-four accused testified on their own behalf. Forty-one defendants were found guilty.[405] Fifteen were sentenced to death by hanging, eleven received life sentences and the remaining fourteen received various jail terms. Those sentenced to death were executed on 2 October 1947. In the subsequent trials for the Flossenbürg camp personnel, the charges were much more particular then in the 'parent trial'. The men were accused of specific crimes such as 'killing 40 non-Germans near Flossenbürg in February 1942' or 'using a handle of a shovel to beat a Russian inmate to death in the quarry in March 1944'. Just under 100 defendants were tried in eighteen subsequent trials.

G. Buchenwald (*United States of America v. Josias Prince of Waldeck et al*), 11 April – 14 August 1947

Around the time the Buchenwald 'parent trial' began on 11 April 1947, a closing date for the American tribunal programme was set – 31 December 1947—just nine months away.[406] Pressure on Denson and the prosecution teams to start, and finish, prosecuting the more then fifteen hundred men still left in custody was enormous. Buchenwald was a high profile camp in American minds—it was to Ohrdruf, a subcamp of Buchenwald, that General Eisenhower, General Omar Bradley, and General Patton had taken a high profile visit on 12 April 1945. Congressional Senators and reporters, including the famous Edward R. Murrow, followed. Like the

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[404] 'Flossenbürg Defence Report,' William Dowdell Denson Papers: Series II Box 13, University Library Manuscript Collection, New Haven, Connecticut, USA.

[405] Rudolf Schlaffer, *GeRechte Shüne? Das Konzentrationslager Flossenbürg: Möglichkeiten und Grenzen der nationalen und internationalen Strafverfolgung von NS-Verbrechen* (Verlag Dr. Kovac; Auflage: 1. Aufl, 2001).

[406] Greene, *Justice at Dachau*, 232.

other ‘parent trials’, Denson chose thirty-one defendants to be representative of the camp’s departments as a whole. The highest ranking defendant was SS-General Josias Erbprinz (hereditary prince of) Waldeck und Pyrmont, the Higher SS and Police Leader for Weimar, who thus had authority over the district where Buchenwald was. Waldeck-Pyrmont was convicted for his role in the ‘common design’ of the camp and sentenced to life imprisonment – he was released after serving three years for health reasons and given amnesty by the West German government in 1953. Other defendants included SS-Oberfuhrer Hermann Pister, the camp commandant of Buchenwald from January 1942 until liberation; *SS-Unterstrumführer* Hans Eisle, a notoriously brutal doctor at the Ohrdruf subcamp; and a former American citizen-turned German kapo and then medical officer, Dr. Edwin Katzen-Ellenbogen.

The most notorious defendant at the Buchenwald trial was also the only woman tried in the ‘parent trials’—Ilse Koch, ‘The Witch of Buchenwald,’ the notorious wife of the former commandant. She was witnessed hitting inmates with her riding crop on several occasions after enticing them to look at her, as well as reporting inmates for punishment to her husband for breaking glassware when they were working in her house. She was alleged to have a photo album and gloves made of human skin – although neither were found in her possession, and noticing tattoos on inmates who were later killed and their tattoos removed. Koch’s presence in the court room caused a stir, not only because of her notoriety but also because was pregnant during the trial. She protested her complete innocence, presenting herself as a simple mother and housewife with nothing to do with the camp’s operations. She was convicted and sentenced to life imprisonment.

The other thirty defendants tried in the ‘parent trial’ were all found guilty; twenty-two received death sentences, four got life imprisonment sentences, three received fifteen years imprisonment, and one received ten years. In twenty-four subsequent trials, thirty-one defendants were arraigned; seven were acquitted, five received the death sentence, three received life imprisonment, two got twenty years, three got fifteen years, five for ten years, and the rest received four to seven years (with two unknown sentences – archival material missing).

H. Dora-Mittelbau (*United States vs. Kurt Andrae, et al.)*, 7 August – 30 December 1947

The chief reason for the existence of Dora-Mittelbau, and its sub-camps, was to provide workers for a *Vergeltungswaffen* factory housed in one of the neighbouring Harz Mountains.[407] However, very few of the men responsible for the camp associated with the V-2 factory ever came to trial. The Dora-Mittelbau[408] 'parent trial' (formally *United States vs. Kurt Andrae, et al.*) and 'subsequent trials' were the smallest of the concentration camp trials. Twenty-four men were tried in six trials. The trials ran from 7 August to 30 December 1947. Nineteen men were tried in the 'parent trial;' one man was sentenced to death, seven to life imprisonment, seven to various terms of imprisonment, and four were acquitted. The four acquittals in the Dora-Mittelbau 'parent trial' were the only acquittals in any of the concentration camp 'parent trials'.

The small number of those trials and defendants was partly because the military trial system was shut down shortly after the Dora-Mittelbau trials began (discussed in full in Chapter 6). Another reason for the small number of defendants was the American desire to secure cooperation with the scientific minds that worked on the V-2 and other Nazi weapons programmes. A product of the early Cold War arms-race, Operation Paperclip, the procurement of Nazi scientists and their research, run by the OSS, eventually brought over 1600 men and their families to live and work in the United States. For example, as early as September 1945, Dr Wernher von Braun, a major in the SS and lead scientist on the V-2 project, and six other scientists, had arrived in the United States to continue their work on the V-2 and other rockets. The American military had no interest in digging up the scientists' Nazi pasts and thus the Dora-Mittelbau trials were a paltry affair with few defendants available for trial. In five subsequent trials, five men were tried; two received twenty-five year

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[407] For more on the move of V2 weapons production underground See Michael Neufeld, *The Rocket and the Reich: Peenemünde and the Coming of the Ballistic Missile Era* (Harvard MA: Harvard University Press, 1996).

[408] In the records of the US National archives the camp is referred to as 'Nordhausen Concentration Camp,' while I have referred to it as 'Dora-Mittelbau'. This is the same camp complex. Dora-Mittelbau was not one camp but a complex of camps clustered in and around the town of Nordhausen, Germany. Composed of a main camp, 'Dora,' and 31 subcamps, the complex was known variously as 'Nordhausen,' 'Dora,' or 'Mittelbau' after the location of each of several camps or sections.

imprisonment sentences, one man to two years, one man to four years, and the last man was acquitted.

I. Sentencing

> I never asked for the death sentence for any defendant. I simply told the court that each of the accused had "forfeited this right to live and to move among other human beings" and left it at that…I did not prosecute a single man who I was not willing to hang by personally putting the noose around his neck and pulling the trap.
>
> - Chief Prosecutor, Lt. Col. William Denson[409]

The Dachau concentration camp cases were plagued by inconsistent punishment. For example, in the subsequent Flossenbürg trials, the following three men were accused of either directly shooting an inmate or encouraging others to do so: a 56 year old German SS technical sergeant and deputy camp leader at out-camp Plattling, witnessed shooting and killing three prisoners including a Polish inmate during the evacuation march as well as beating a man who later testified against him, received a sentence of fifteen years; SS Master Sergeant Karl Keiling, also a guard on the evacuation march, although he was in charge of an inmate evacuation column, witnessed shooting a Czech inmate, and was sentenced to death (although the reviewing authority recommended a life sentence instead); SS Captain Ludwig Buddensieg, a guard company leader who admitted to encouraging his men to shoot inmates near the barbed wire fence by offering them vacation time as an incentive, and admitted that over 100 inmates were shot during his time as guard leader, was sentenced to life imprisonment.

[409] Denson, *Justice in Germany*, no page numbers given in the brochure.

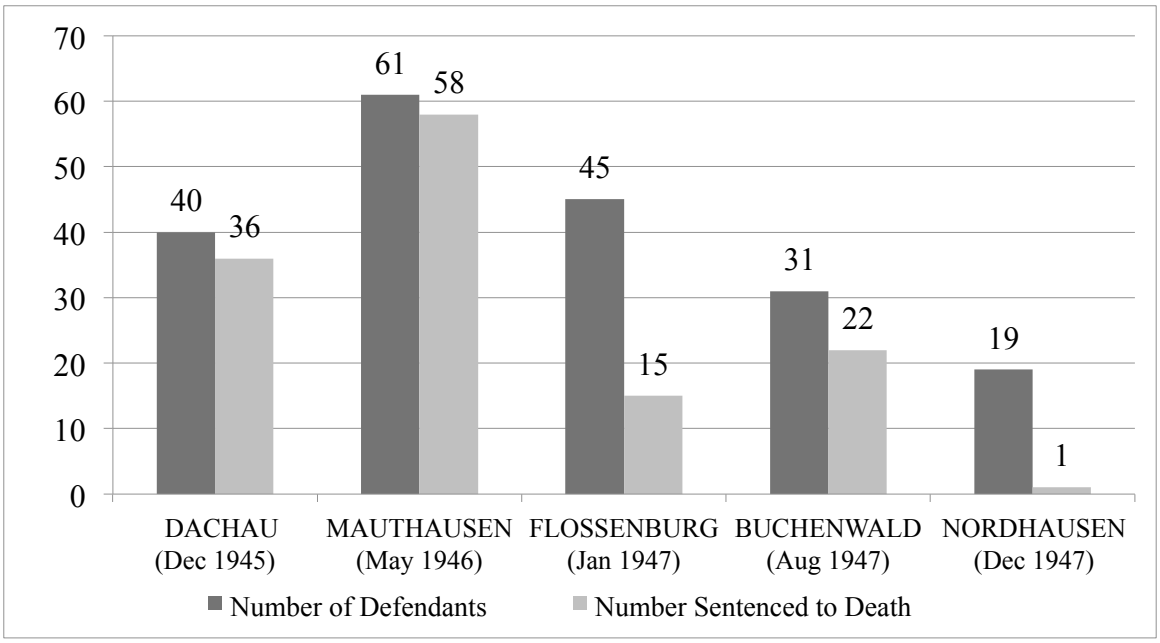

Figure 2. Variations in number of total defendants and those receiving death sentences in the five 'parent' concentration camp trials

Historians can only speculate on how the judges came to their sentencing decisions. Unlike American civilian court judges, or the judges at the IMT at Nuremberg, the military commission judges at Dachau did not publish or even read their judgements into the record. How they came to their decisions remain a private matter. However, some educated inferences can be made. Differences in sentences must have emanated from the court's assumptions about how brutal the camp or how criminal the position or action the defendant engaged in.

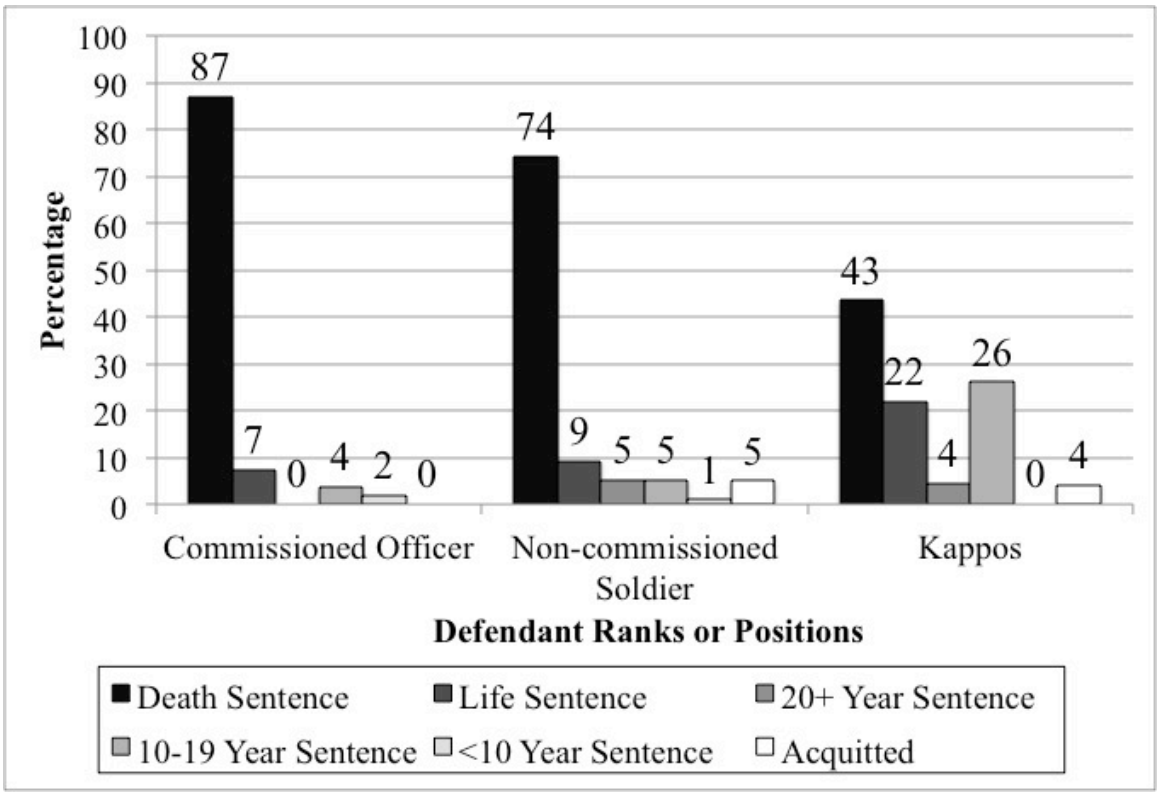

Figure 3. Variations in sentencing according to rank for the Dachau 'parent trials'.

Commandants, doctors, and commissioned officers were given harsher sentences, in most cases resulting in the death sentence (Figure 3). Non-commissioned soldiers were also often convicted with a death sentence, however there is slightly more variation in the sentencing with approximately one-fourth of these soldiers receiving a sentence other than death. An important factor also appears to be the perceived criminality of the camp itself. For example, perhaps the defendants at the Mauthausen trials (see Figure 2) were given the most death sentences because both army reports of the camp and the prosecution described Mauthausen as an extermination camp like those found in Poland—thus personnel who worked at Mauthausen were judged to be more criminal then personnel at other camps like Dora-Mittelbau or Flossenbürg. Former *kapos,* who were, in general, repeat-German-criminal offenders, often received harsh sentences. However, there was more variability in their sentences overall. All three of the inmate-kapos tried at Mauthausen 'parent trial' were sentenced to death as were the two inmate-kapos in the Dachau 'parent trial'. Nevertheless, the sentences were uneven for the three kapos at Dora-Mittelbau (Life, twenty-five, twenty, and five years), for the three inmate kapos tried at the Buchenwald 'parent trial' (Death, Life, fifteen years), and for the

thirteen kapos tried at Flossenbürg (three given death sentences, four given life sentences, five given from 10 to 30 years, and one acquitted). Without written judgements, it is hard to surmise why sentences were so different for these kapos. The same unevenness arises with doctors/medical officers – all (five) Dachau and (six) Mauthausen medical personnel defendants were sentenced to death, while the four Buchenwald, one Flossenbürg, and two Dora-Mittelbau medical personnel were given a wide-variety of sentences from death to acquittal.[410] Some of this variation in sentencing was likely due to the camp at which the accused had worked.

Although all five 'parent trials' were prosecuting the highest-level personnel at each camp, the percentage of individuals subsequently sentenced to death varied widely between the five trials. Figure 2 details the number of defendants tried and also sentenced to death at the five 'parent trials'. At the Dachau and Mauthausen trials, over 90 percent of the defendants were sentenced to death. At the 'parent trials' at Buchenwald, Flossenbürg, and Dora-Mittelbau, the percentage of defendants sentenced to death was seventy percent, thirty-three percent, and five percent respectively. A significant variation can also be seen when looking into the number of defendants tried, both in the 'parent' trials (Figure 1) and in referring back to the trials in their entirety (Table 1).

A series of explanations has been presented to account for such variations. The most common explanation is that the emerging politics of the Cold War and changing goals in American politics affected the trials leading to declining commitment to punish Nazi crimes. Tomaz Jardim, one of the few scholars who has written on the subject, correctly declared that 'uneven punishment was [common and was] due to the flexibility of trial procedure at Dachau, in particular to the absence of sentencing guidelines. Because American army judges were not required to explain their

[410] Doctors' sentences are as follows: All five doctors at Dachau were sentenced to death; At Mauthausen, sixe doctors were sentenced to death (the chief post physician Entress, chief dental officer Henkel, Chief Dental officer Haehler, Camp Physician at Ebensee subcamp Jobst, Chief post physician at Gusen Krebsbach, and Medical non-com officer at Ebensee Kreindl); At Buchenwald, four doctors received varying sentences–camp physician Bender got ten years, second camp physician Eisele received a Death sentence, Assistant Doctor at Buchenwald and chief doctor at subcamp Ohrdurf Greunuss got a life sentence, chief doctor at the 'small camp' and Kapo Katz-Ellenbogen received Life; Flossenbürg's chief pharmacist, Reupsch, received twenty years; Dora-Mittelbau's medical assistant Maischein received five years while Doctor Schmidt was acquitted.

verdicts, previous trials involving similar crimes did not provide a good source of precedent when sentencing'.[411]

The Cold War played more of an effect during later commuting of sentences, not during the initial trials or even the first review of the sentences. If the Cold War was the major driving force behind more lenient sentencing, it would be expected that there would be a significant increase in lenient sentences in the latter half of the trials as this effect became more prominent. However, analysis of the subsequent Dachau trials, which ran from October 1946 through November 1947, does not support this hypothesis. As seen in Figures 4 and 5, the reverse was seen when comparing trials during 1946 to trials in 1947.

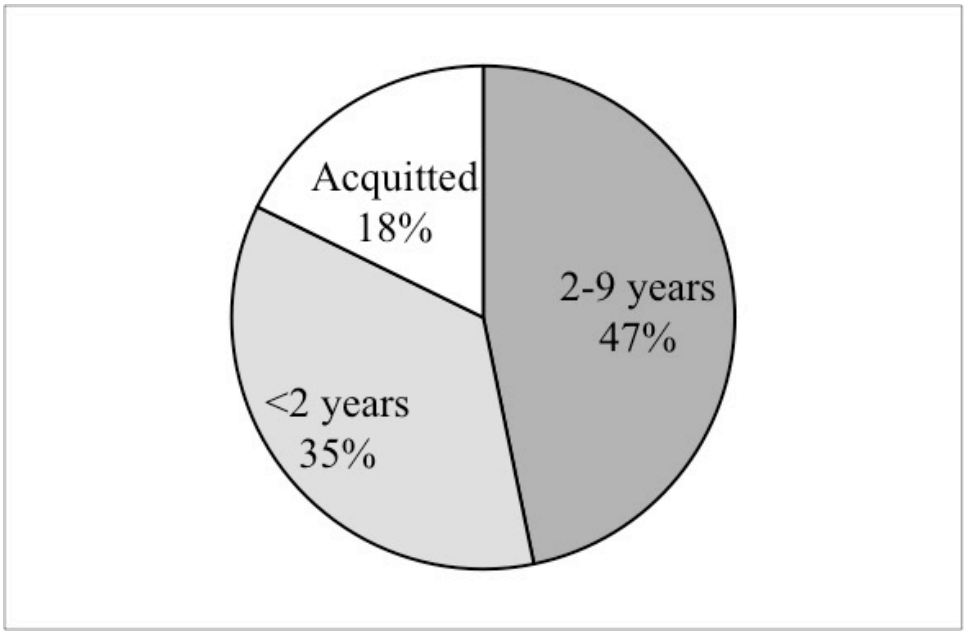

Figure 4. Variations in sentencing for Dachau subsequent trials during 1946.[412]

[411] Jardim, *The Mauthausen Trial*, 185.

[412] Source of numbers is Lt. Straight's *Report of the Deputy Judge Advocate for War Crimes European Command, June 1944 - July 1948*. All Dachau trials, excluding 'parent trial,' were randomly sampled and 20 per cent of trials were included in the analysis. Samples were generated randomly to maintain the characteristics of the whole group.

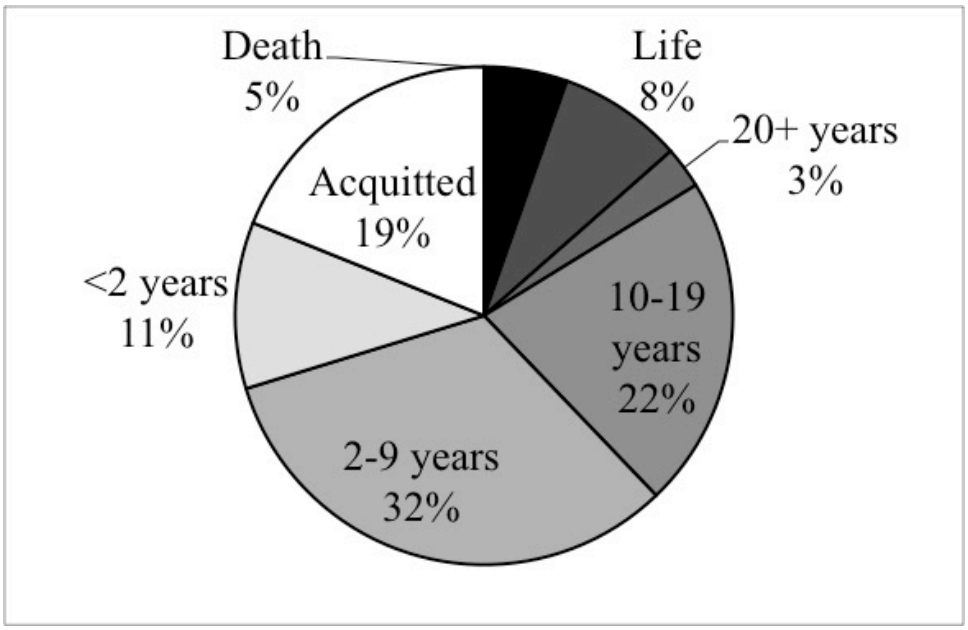

Figure 5. Variations in sentencing for Dachau subsequent trials during 1947.[413]

All individuals tried in the later months of 1946 received a sentence of ten years or less, with a majority of them receiving a sentence of less than two years or a full acquittal by the court. In contrast, for the trials of 1947 almost one in four defendants received sentences of twenty years or more. In fact, the court handed down nearly all of the most severe sentences of this period in the last few months of 1947. While the Cold War played a role, and definitively affected overall American policy towards occupied Germany, these data support the explanation that some crimes and criminals were viewed more leniently then others without regard to when they were tried.

With their large number of defendants, 1,045 defendants in 240 trials, the Dachau concentration camp trials played a central role in the American prosecution of Nazi crimes. The next chapter will further assess the 'parent trials' through the lens of several themes found in the trials including establishing jurisdiction over the crimes committed by the defendants, as well as the form of the trials, the use of the 'common design' charge for persecution, the use and rejection of 'superior orders' as a legal defence, the interaction between the press and the trials, and finally some unevenness in administering justice due to external politics.

[413] Source of numbers is Lt. Straight's *Report of the Deputy Judge Advocate for War Crimes European Command, June 1944 - July 1948*. All Dachau trials, excluding 'parent trial,' were randomly sampled and 20 per cent of trials were included in the analysis. Samples were generated randomly to maintain the characteristics of the whole group.

Chapter 4: Legal Arguments, the Press, and Politics in the Courtroom.

Compared to the International Military Tribunal (22 defendants), and all of the Subsequent Nuremberg trials (185 defendants), the Dachau trials dealt with the vast majority of American prosecution of Nazi criminals—1,045 in 240 trials in all. For example, the largest of the concentration camp trials, the Mauthausen 'parent trial', tried sixty-one defendants, lasted a mere thirty-six days, and produced the most death sentences, forty-nine, handed out in one trial in American history.[414] With their large number of defendants the Dachau concentration camp trials played the numerically central role in the American prosecution of Nazi crimes and further assessment is useful as it can challenge the dominant Nuremberg archetype. The Dachau trials, and its legal arguments, interaction with the press and politics, represent the 'norm' of the American attempt to prosecute Nazi crimes.

Although each concentration camp trial had its own idiosyncrasies (after all as each dealt with a different camp and different defendants), the 'parent trials' as a whole had similarities. Each of the 'parent trials' of the concentration camp personnel of Dachau, Buchenwald, Mauthausen, Flossenbürg, and Dora-Mittelbau contended with the following challenges: establishing jurisdiction over the crimes committed by the defendants as well as the form of the trials, using the 'common design' charge for persecution, using and rejecting 'superior orders' as a legal defence, the interaction between the press and the trials, and finally some unevenness in administering justice due to external politics.

A. Legal Arguments, I: Jurisdiction and Trial Structure

At the 'parent trials' prosecutors portrayed the crimes committed at the concentration camps as excessive manifestations of traditional war crimes. This strengthened the military court's jurisdiction over the defendants under traditional rules of warfare. In particular, the primary legal foundation, which both established the Dachau military courts and governed its processes, consisted of the rules of warfare as stated in The Hague Convention of 1907 and the Geneva Convention of 1929. The countries involved in the creation of the Hague convention attempted to

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[414] Tomaz Jardim, *The Mauthausen Trial: American Military Justice In Germany* (Cambridge MA: Harvard University Press, 2011), 1.

codify the 'Rules of Land Warfare,' a broad term describing the conduct of combatants towards each other and their relationship to their occupied territories. The 'First Hague Peace Conference' of 1899 was convened to revise a declaration elaborated in an earlier conference (1874) in Brussels concerning the laws and customs of war. The Convention was revised at the 'Second International Peace Conference' in 1907, with very few changes. Germany and the United States, along with many other countries, were signatories to these conventions and bound by these terms.[415] The Geneva Convention of 1929 mainly concerned the standards of conduct to be followed for victorious nations as well as by the conquered, particularly the treatment of Prisoners of War and citizens of occupied countries. Again, Germany and the United States signed and ratified the Geneva Convention, vowing to be bound by its tenets. In fact, the Geneva Convention of 1929 was ratified by Germany in February 1934 by the Nazi government.

As discussed in Chapter 2, it was clear that the conduct of the personnel at the Nazi concentration camps towards the (Allied) inmates violated most of the tenants of both treaties. What was not made clear in the conventions was the precise means by which the enforcement of the conventions was to be carried out. This left the method and form of the enforcement largely to the discretion of the signatories at the end of hostilities. Lt. Col. William Denson, lead prosecutor for the concentration camp trials at Dachau, argued that not only had Germany signed the Geneva and Hague Conventions, but also that German civil and domestic law corresponded with the conventions' edicts against ill-treatment. Denson wrote, 'Germany had laws against committing murder, Germany had laws against committing mayhem, and assault and battery was always an offense under the civil law of Germany…so that these offences committed individually by the accused in Dachau, Mauthausen, Flossenbürg, and Buchenwald were all condemned by German law'.[416]

The use of The Hague and Geneva Conventions at the Dachau trials contrasted directly to the indictment at Nuremburg, which used the Kellogg-Briand Pact and other non-aggression treaties Germany had with its neighbours to charge individuals with waging aggressive war as a crime. However, the Kellogg-Briand Pact and the

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[415] For more on The Hague Conventions see D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Martinus Nihjoff Publisher, 1988), 69-93.

[416] William Dowdell Denson Papers: Series II Box 8, Yale University Library Manuscript Collection, New Haven Connecticut, USA.

non-aggression treaties made no mention of prosecuting individuals for breaking the treaties, only nations. In contrast, the Geneva and Hague Conventions were directed against individual perpetrators of war crimes. Despite this strength, there arose problems when using the conventions as a legal basis to prosecute crimes committed by the Nazis in the concentration camps.

A challenge for the US prosecutors in using The Hague and Geneva Conventions was the specificity with which the treaties were written concerning over whom military courts had jurisdiction and which individuals might be considered 'prisoners of war'. In addition to the persons listed in the Hague Convention of 1907, Geneva Convention Article 1 added that prisoners of war included 'all persons belonging to the armed forces of belligerents who are captured by the enemy in the course of operations of maritime or aerial war'.[417] Despite the precedent set at the Hadamar trial (see Chapter 4), at the beginning of every 'parent trial' the prosecution and defence argued over whether the court had the jurisdiction to try German concentration camp personnel as war criminals as defined by the treaties. The defence alleged the court did not have jurisdiction over the defendants because they were members of the *Wehrmacht* or the *Waffen-SS* and thus prisoners of war, not war criminals.[418] To this challenge, the prosecution argued that all major conventions, and, by the Mauthausen 'parent trial' in the spring of 1946, a recent Supreme Court decision, each contended that men who had committed war crimes were classified as unlawful belligerents and thus not entitled to the protections afforded to soldiers.

Furthermore, in defending the court's jurisdiction over the accused, the Mauthausen prosecution team referenced the Dachau 'parent trial' as a precedent for this case saying:

> 'There has been tried between November 15 and December 15, 1945, here in the Third Army at Dachau the Dachau concentration camp case and the same question that is presented here at this time was presented in substantially the form, almost exactly the same form as was presented in that case. The court held that these people were unlawful belligerents and as such were not entitled to the protection of the Convention. That decision of the court has been

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[417] *The Geneva Convention of 1929.*

[418] Mauthausen Transcript, 6-7, William Dowdell Denson Papers: Series II Box 8, University Library Manuscript Collection, New Haven Connecticut, USA.

affirmed on review by the Judge Advocate General of the Third United States Army'.[419]

A further objection, regarding the legality of trial structure and form, was the use of a mass trial – in which many defendants were tried at once. Mass trials were used because of the scarcity of officers and the time elements involved in trying so many accused in a short amount of time, which made it extremely difficult to conduct large numbers of trials for separate defendants. However mass trials caused objections among the defence attorneys. At the Mauthausen trial, for an example, the defence moved for severance of the accused as defendants because it 'is a basic right of the accused [sic] when the defence of certain alleged offenders at joint trial would be antagonistic to that of others'.[420] With so many accused of varying ranks being tried together on a single charge there was bound to be some conflict of interest, particularly between superiors and their subordinates. Furthermore, because so many men were being tried, they were required, for practicality's sake, to wear numbers to make identifying them easier. The defence took objection to the numbers during the Mauthausen trial to the defendants. Lt. McMahon, of the defence argued that 'from time to time these witnesses of the Prosecution on this stand will remember not the face of the defendant but will merely remember the defendant or accused number and will merely look for the number, and not the person or identity of the accused'.[421] This objection was overruled and the trial got underway.

A further objection, regarding the jurisdiction of the concentration camp trials, made by the defence to the trial at Dachau was the form of the trial and the rules of evidence allowed. Each defence team argued that the court was illegally constituted because it did not follow the same form and rules of evidence of the regular US army courts ('the detaining power', in Convention parlance). For example, as soon as the court for the Mauthausen 'parent trial' was constituted, the able lawyer and leader of the defence team, Major Oeding, cited section V ('Prisoners' Relations with the Authorities'), chapter 3 ('Penalties Applicable to Prisoners of War'), section 3 ('Judicial Suits') of the Geneva Convention of 1929 and moved that the case be dismissed on the grounds that the court had no jurisdiction over the accused because

[419] Ibid., 10-11

[420] Ibid., 68.

[421] Ibid., 129.

the rules of the court were illegal. The section of the Geneva Convention Major Oeding cited assured POWs certain privileges' including the right to counsel, the right to defend himself, the right to not indict himself through his own testimony, and the right to the same judicial procedure as the detaining power's own soldier enjoyed. This was the sticking point. As already discussed, the procedures for the concentration camp trials at Dachau differed from those of an American army court martial. Mainly, the rules of evidence were significantly relaxed for the concentration camp trials, allowing hearsay evidence. Major Oeding argued that because the rules of evidence differed, the court did not meet the requirements set out by the Geneva Convention for judicial proceedings against POWs; thus the court did not have jurisdiction over the accused. This basic argument was made at the beginning of every 'parent trial'. In every case, the court overruled this defence motion.

The inclusion of certain 'inflammatory' and hearsay witness testimony and evidence, particularly photograph evidence, was problematic throughout the trial. The defence and prosecution had many a heated exchange about the nature of the evidence being presented. In one case a witness mentioned the horrors he saw upon visiting Buchenwald concentration camp, as a way of comparing with his visit to Dachau concentration camp. The defence objected:

> Major Oeding: If it pleases the Court, evidence of this type is definitely inflammatory. I don't want to detract from the intelligence of any member of the Court of the Prosecution or the Defence, but we are all human beings and subject to emotions, and I can't see how any human being can listen to evidence of this type without being emotionally aroused, myself included.
>
> Prosecution: I agree with that statement may it please the Court. It certainly is inflammatory. The whole nature of the subject this Court is trying is inflammatory.
>
> Defence:…We are digging into a terrible state of affairs, but we are trying to find out and mete out justice to the various defendants. I think the Court might even take judicial notice that the entire concentration camp situation is a frightful thing, but unless the testimony has some bearing on the guilt or degree of guilty of an individual accused, we submit that it is not relevant to the functions of the court—to the trial.[422]

[422] Ibid., 133-134.

The unprecedented nature of the crimes at the concentration camps made it difficult for the military tribunal members to remain cool and impartial. Military tribunals had never had to deal with crimes of this magnitude before.

While Commander Jack H. Taylor was testifying, the defence objected. Major Oeding held, 'If it please the Court, we request that the last two answers of the witness be stricken out of the grounds that they are conclusions and that they refer to the intention of someone, some unknown persons which the witness is incapable of determining'.[423] The Court overruled the defence objection. The defence later objected to any photographic evidence showing the camp as 'it does not involve any of these defendants'.[424] The court allowed all of the pictures into evidence. While interviewing another witness, the defence insisted that the witness clarify for each event he was describing whether he witnessed it personally or heard about it. They would insist on this with most other witnesses.

> If the Court please, in the interests of time and expediting this trial, may we have the record reflect that the Defence objects to all testimony which is along the lines of expectations, which reports to give the intent of the minds of personnel unknown, and which does beyond single hearsay; in other words, it wasn't told to me by the man who saw it, but it was told to me by somebody who heard it from somebody else, and on down the line.[425]

B. Legal Arguments, II: Challenging and Defending the 'Common Design' Charge

Central to the proceedings of the concentration camp trials was a robust, and often contentious, discussion regarding the 'common design' charge. Lt. Col. William Dowdell Denson, the chief prosecutor for all the concentration camp 'parent trials,' introduced the concept of 'common design' at the Dachau 'parent trial'. In practice at the concentration camp trials, the prosecution team sought to prove that the concentration camps were criminal organizations and any defendants participating in

[423] Ibid., 114.

[424] Ibid., 115.

[425] Ibid., 135.

the upkeep of the camp was guilty of all the abuses therein because they were acting in the 'common design' of the camp.

'Common design' was similar to the International Military Tribunal at Nuremberg (IMT) use of 'conspiracy'. The two charges accomplished a similar objective – it highlighted the alleged criminal nature of the entire Nazi or concentration camp enterprise and allowed prosecutors to introduce evidence or planning to commit criminal acts. 'Common design' charge was more elastic then the conspiracy charge. Conspiracy required a conscious collaboration among individuals gathered for the purpose of committing an illegal act but 'common design' allowed for the arraignment of individuals who never met at the same time or place and were involved in a crime committed over the course of years. Their crime would not meet the legal definition for conspiracy, but Denson and the prosecutors insisted that no person could work at Dachau (or any of the other camps) and remain ignorant of the torture, beatings, and killings that took place within.[426] This provided a challenge to the defence team of each trial, as they could not seriously contend that anyone in contact with the camp, much less an employee, was not aware of the deprivations happening inside – emaciated and suffering inmates were everywhere.

The Dachau defendants were arraigned with two charges, the first read:

> In that Martin Gottfried Weiss…[et al.], acting in pursuance of a common design to commit the acts hereinafter alleged…did at or in the vicinity of Dachau and Landsberg, Germany, between about January 1, 1942 and about April 29, 1945, wilfully, deliberately and wrongfully encourage, aid abet and participate in the subjugation of civilian nationals of nations then at war with the German Reich[427] to cruelties and mistreatment, including killings beatings, tortures.[428]

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[426] Good discussion in Joshua Greene, *Justice at Dachau: The Trials of an American Prosecutor* (New York: Broadway Books, 2003), 42-42.

[427] The 'nations then at war with the German Reich' by or after 1 January 1942 were as follows (with the month and year they were attacked or formally declared war against Nazi Germany in parenthesis): Great Britain and her oversees processions including India (September 1939), the United States (December 1941), the Soviet Union (June 1941), Poland (September 1939), France (September 1939), Australia and New Zealand (September 1939), South Africa (September 1939), Canada (September 1939), Denmark (April 1940), Norway (April 1940), Belgium (May 1940), the Netherlands (May 1940), Luxembourg (May 1940), Greece (April 1941), Yugoslavia (April 1941), Egypt (April 1941), China (December 1941), Czechoslovakia (December 1941), Italy (October 1943), Romania (August 1944), Bulgaria (September 1944), Finland (September 1944), Hungary (December 1944), San Marino

The second was the same crimes except towards 'members of the armed forces of nations then at war with the German Reich'. These are the same two charges used to prosecute all 1,045 defendants in the 240 'parent' and 'subsequent' concentration camp trials at Dachau.

The 'common design' charge was simpler to prove than conspiracy. As one scholar noted, 'common design' required prosecutors to demonstrate that the accused had participated in the maintenance of a criminal enterprise that resulted in the deaths of inmates; furthermore:

> As with the Hadamar case, the underlying principle was that of vicarious liability. There was no need to prove that the actions of each defendant resulted in the death of a specific individual, but only that the defendants were aware of the ultimate purpose or product of the institution they helped to maintain. At least in theory, the camp cook was therefore as criminally culpable as the hangman, and could be caught within the same judicial net.[429]

To prove 'common design' the prosecution had to prove that the Dachau camp was a criminal operation, so Denson choose representatives from each of the camp's functional divisions (the political department, the commandant's office, productive custody, labour allocation, medical, crematory, and administration) to be defendants in the 'parent trial'. The prosecution's strategy consisted of three steps: first, to prove all the accused were guilty of administering and executing a 'common design' to support the functioning of Dachau by presenting the general conditions in the camp; second, that the accused were part of the organization responsible for running the camp; third, that the accused were all guilty for the murderous conditions of the camp. Finally, the prosecution focused on proving specific instances of ill treatment.

The defence in all the 'parent trials' argued that the defendants could not understand the charges against them, in particular the charge of 'common design'. Capt. Dalwin Niles, defence attorney at the Dachau 'parent trial', argued:

(February 1945), Turkey (February 1945). A number of Latin and South American countries declared war on Nazi Germany in the waning months of the war in 1945 but did not send troops, and are not included here.

[428] *Military Government Court—Charge Sheet, Dachau, Germany*, 2 November 1945. Reprinted in United Nations War Crimes Commission, *Law Reports of the Trial of War Criminals: Vol. XI* (London: His Majesty's Stationery Office, 1949), 5.

[429] Jardim, *The Mauthausen Trial,* 47.

> I am not exactly sure just what is to be said on behalf of these defendants. As the court will recall, at the beginning of this case we asked what the charge against the defendants was. I find myself wondering the same thing at the conclusion of the case. Where is the alleged 'common design'? Who made it? Where did it take place? When? If that 'common design' has not been proved, how can we prove that 'common design' has *not* been made?[430]

This is not entirely true; the defendants were charged not with 'common design' but with violating the laws of war – the prosecution strove to prove that all the accused had acted 'in pursuance with a "common design" to violate the laws and usages of war'—as stated in the particulars of the charge. But the 'common design' charge was fundamental to the prosecution's strategy and the defence attacked this.

In later trials, such as the Mauthausen 'parent trial', the defence continued to object strenuously to the 'common design' charge. Major Oeding of the defence team at Mauthausen said:

> The day before yesterday defence counsel stated to the accused that they were charged with the "common design", that it was the opinion of defence counsel that by "common design" was meant that the accused were part of a gigantic machine, some of them large cogs and some of them smaller cogs. Defence counsel further stated that to date they had been unable to find a legal definition of the phrase "common design", and that they could endeavour in the near future to find such a definition.[431]

In response, Denson pointed to the definition of 'common design', which was mentioned in association with conspiracy law, in several standard works of legal philosophy.[432] The sources stated, '"common design" in criminal law has been defined as a community of intention between two or more persons to do an unlawful act'.[433] The prosecution and defence had a heated debate about whether 'common design' should be explained to the defendants.

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[430] Quoted in Greene, *Justice at Dachau,* 105.

[431] Mauthausen Transcript, 51, William Dowdell Denson Papers: Series II Box 8, University Library Manuscript Collection, New Haven Connecticut, USA.

[432] Denson quoted from *Black's Law Dictionary*, *Bouvier's Law Dictionary*, and *On Criminal Law* (pages 232 and 233 under the title 'Community of Unlawful Purposes').

[433] Mauthausen Transcript, 52, William Dowdell Denson Papers: Series II Box 8, University Library Manuscript Collection, New Haven, Connecticut, USA.

> Prosecution: May it please the Court, it's the function of the defence counsel so far as possible, to explain to their accused the meaning and interpretation of the Charge with which they stand before this Court.
>
> Major Oeding: If it please the Court, defence counsel feels capable of explaining the meaning of the words 'common design', but defence counsel does not feel capable of defining any crime named 'common design'. It is the contention of defence counsel that all crimes contain certain elements and defence counsel has been unable to determine what elements are contained in the so-called crime of 'common design'.
>
> Prosecution: In reply to that may it please the Court, I would like to say this, that the crime is not 'common design'. The crime is acting in pursuance of a 'common design'. They did certain acts; namely, torture those people, beat those people, kill them…as set forth there in the Particulars. There is no crime in and of itself that goes by the name 'common design'. Those are words that are merely descriptive of the type of conduct with which these men are charged.
>
> Major Oeding: Prosecution has just stated if I interpret correctly, that certain acts were a crime. Defence still cannot understand what crimes are charged. If the crime is murder, then let the Charges so state. If the crime is indignities, then let the Charges so state.
>
> Prosecution: If it pleases the Court, I would like to add one thing, and that is this, that this is identical with modifications that are not pertinent here, the identical Particulars that were use in the trial of the Dachau Concentration Camp case, which has been affirmed on the review by the Third Army.
>
> Major Oeding: Modifications however change the pleadings. Was the question brought up at this point in the trial at the Dachau case? Did any of the accused state they did not understand the so-called crime of 'common design'?[434]

The prosecution then suggested that the definition of 'common design' be read aloud in the court and be translated into German for the defendants. The defence grudgingly agreed to this.

The defence filed a further motion to quash the charges and particulars saying, '"Common design" is not a crime and has never been a crime…it is well settled that

[434] Ibid., 52-54.

"common design" is one of the elements of a conspiracy, but it is not in itself conspiracy'.[435] The defence argued, 'Gentleman, the defence submits that exactness in definition of crimes is not an unnecessary technicality. It's not a mere legal quibble, It's a very vital thing that a man know what is a crime and what is not a crime and it is only by exactness of definition that this standard can be obtained'.[436] Major Oeding accused the prosecution of 'making new law instead of interpreting the present law'.[437] The Court denied the motion. Finally, the defence made a long plea that the Court direct the prosecution to make more definite and certain the particulars as to the accused. The Court denied this motion.

'Common design' remained controversial for the involved parties long after the Dachau trials ended. After returning home, and until his death, Chief Defence Counsel for the Dachau 'parent trial' Douglas T Bates, 'maintained the position he had taken during the Dachau trial: if the Germans were guilty of a "common design", so was every citizen of Germany who had contributed to waging total war'.[438]

C. Legal Arguments, III: Rejection of Superior Orders as a Defence

Intertwined with the discussion regarding 'common design' was the heated debate regarding the acceptability of the 'superior orders' defence – this was a repeatedly used defence in the Dachau 'parent trial', as well as the other 'parent trials'. The defence did not try to disprove the prosecution's evidence of the basic conditions in the camp. Instead their defensive strategy was to try to disprove (or minimize) their clients' responsibilities at the camp by exercising a 'superior orders' defence; i.e. the concentration camp was run by Heinrich Himmler and the Reich Main Security Office in Berlin and thus the men at Dachau had little control over the conditions of the camp. Furthermore, the defence lawyers used a variety of strategies when defending their clients against charges of specific abuse, including introducing mitigating circumstances and questioning the intensity or truthfulness of the alleged ill-treatment. Overall, however, the defence most stalwartly employed the 'superior orders' defence for the defendants arraigned at the 'parent trials'; this despite the

[435] Ibid., 58.

[436] Ibid., 60.

[437] Ibid., 60.

[438] Greene, *Justice at Dachau,* 125.

American (and German) legal precedent of rejecting this defence as a legitimate reason for acquitting a defendant.

As early as the Mexican-American war (April 1846 – February 1848), the Supreme Court, the highest court in the United States, refused to consider the plea of 'superior orders' as a reason for acquittal. In this early case, an American officer seized property from inhabitants in an occupied area (an illegal act under the U.S., and international, 'laws of war'), claiming that he was acting under orders of his superior officer to do so. The court ruled that the soldier could not justify his trespass by showing the orders of his superior officer. In his decision for *Mitchell v. Harmony (1851)*, Chief Justice Taney wrote, 'It can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may *palliate*, but cannot justify'.[439] Although settling the matter of the criminality of following an illegal order in American military-legal tradition, Taney's decision left the door open for using 'superior orders' as a mitigating factor in sentencing.

German law, as established in the Leipzig trials, agreed with the American view. In the *HMHS Llandovery Castle* case (1921), a captain and the lieutenants of U-86 were charged with 'war crimes' for firing on lifeboats from a sinking hospital ship during the First World War. The highest German court, the *Reichsgericht* (or Imperial Court of Justice), declared:

> Military subordinates are under no obligation to question the order of their superior officers, and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everyone, including the accused, to be without any doubt whatever against the law…They should, therefore, have refused to obey. As they did not do so, they must be punished.[440]

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[439] *Mitchell v. Harmony* (1851). The case involved an American officer who seized a Mexican trader's goods. When sued, he claimed to have acted under orders from a superior officer.

[440] Quoted in 'Are Superior Orders a Legitimate Defense?', The G.I. Roundtable Series, pamphlet printed by the American Historical Association for the United States Army, c.1941-1945, (reprinted by the American Historical Association online and accessed 22 January 2016). For more discussion on superior orders see, George Creel, *War Criminals and Punishment* (New York: Robert M. McBride and Company, 1944); Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford: Oxford University Press, 2012); and L.C. Green, *Superior Orders in National and International Law* (Leiden, Netherlands: AW Sijthoff-Leyden, 1976).

As discussed in Chapter 2, the court at the Leipzig trials was notoriously soft on the accused and despite killing over 200 people, the men were only sentenced to four years in prison. But the legal precedent of rejecting the defence of 'superior orders' remained. Interestingly, British law, although seeing 'superior orders' as a possible mitigating factor, differentiated in degree to German and American law. As established by *Regina v. Smith* (1900), a case arising from the Boer War in which a soldier shot an uncooperative native under the direct orders from a superior. The British court afforded a soldier more protection from 'illegal' superior orders. The leading justice of the special court wrote:

> I think it is a safe rule to lay down that if a soldier believes he is doing his duty in obeying commands of his superior, and if the orders are not so manifestly illegal that he must or ought not to have known they were unlawful, the private solder would be protected by the orders of his superior officer.[441]

A United States Supreme Court case decision that affected the Dachau trials from 1946 onwards was the case known as *In re Yamashita*[442] (1946). This case established several precedents for the American military commission war crimes programme including: supporting the military commission jurisdiction over war criminals, and holding officers responsible for the actions of those under their command. General Tomoyuki Yamashita was the Commanding General of the 14th Army Group of the Imperial Japanese Army in the Philippine Islands. After his surrender, he was charged with violations of the 'laws of war' before a United States military commission in the western Pacific. The essence of the accusation was that 'the petitioner had failed in his duty as an army commander to control the operations of his troops, "permitting them to commit" specified atrocities against the civilian population and prisoners of war'.[443] General Yamashita was found guilty, and sentenced to death. Yamashita's military lawyers appealed his case to the Supreme Court. Upon review the Supreme Court upheld the right of the military commission to try war criminals ('A violation of the law of war, committed before the cessation of hostilities, may lawfully be tried by a military commission after hostilities have ceased -- at least until peace has been officially recognized by treaty or proclamation by the political branch of the

[441] Ibid.

[442] See the excellent discussion of the entire case in Richard L Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Wilmington, 1982).

[443] *In re Yamashita* (1946).

Government'.[444]) and that a superior officer was legally responsible for the actions of those under his command. The justices wrote in their opinion:

> The law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and he may be charged with personal responsibility for his failure to take such measures when violations result'.[445]

Validating the responsibility of a superior over his men may at first glance to strengthen the defence of superior orders. But instead it strengthened the case for personal responsibility of individual soldiers for crimes they committed.[446]

At the Dachau 'parent trial,' the defence attorneys sought to shift their clients' guilt to the accused's superiors. For example, when a prosecution witness, Dr. Blaha, was cross-examined by lead defence attorney Lt. Col. Bates, Bates attempted to establish who exactly had given the orders to punish Dr Blaha. His line of question was meant to imply that the soldiers in the camp were at the mercy of orders from above:

> Lt. Col. Bates: You said this man Jarolin was present when you were hung by your wrists. Did he hang you up by your wrists?
>
> Dr Blaha: No.
>
> Lt. Col. Bates: Then he was merely a spectator.
>
> Dr Blaha: Yes.
>
> Lt. Col. Bates: Did Jarolin give the order to hang you up?
>
> Dr Blaha: No, that was done at headquarters.
>
> Lt. Col. Bates: In other words, Jarolin was only following orders from someone else, is that correct?

However, the prosecution, on redirect, shattered Bates's argument that the accused were only acting under superior orders:

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[444] Ibid.

[445] Ibid.

[446] For more see Mark J Osiel, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (New Brunswick, New Jersey: Transaction Publishers, 2002) and Peter Rowe, *Defence: The Legal Implications: Military Law and the Laws of War* (London: Brassey's Defence Publishers 1987).

> Col. Denson: You stated that Jarolin was present at your hanging by the wrists. Did Jarolin give any orders?
>
> Dr Blaha: Several of us were hanging slightly low, and our shoes touched the floor. Jarolin gave the order that we should be hung up higher.
>
> Col. Denson: No further questions.[447]

Another example from the Dachau 'parent trial' came when former camp commander Wiess was under cross-examination by Denson:

> Col. Denson: During your time here, Weiss, how many prisoners did you ship out of Dachau?
>
> Weiss: By order of the Reich Security Main Office several thousand were transferred to other camps and armament industries.
>
> Col. Denson: Is it not a fact, Weiss, that requisitions for prisoners had to be approved for you before those prisoners were made available to Dr Schilling?'
>
> Weiss: It was an order from Berlin that the prisoners were to be given to him…
>
> Col. Denson: Just answer my question, Weiss. Did you have to approve the requisitions?
>
> Weiss: Yes.
>
> Col. Denson: The same was true for Rascher's experiments, was it not?
>
> Weiss: Yes.[448]

Still, perhaps in the hope it would be considered a mitigating circumstance when it came time to sentencing, the defence team continued throughout the trial, and into closing arguments, to emphasize the men were acting under 'superior orders'. In his closing arguments for the Dachau 'parent trial', German defence counsel von Porsen (speaking in rudimentary English):

> May it please the court, *Befehl ist Befehl*—an order is an order. It had to be obeyed; however its quality was. This was not only a custom in the Third Reich, where the duty to obedience was more severe, but the USA seems to have great attention to this. Studying the country was order of the USA, I found the following text: "individuals of armed forces will not be punished for

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[447] Testimony originally recorded at the Dachau Military Tribunal (US vs. Martin Gottfried Weiss, et al) and used at the Nuremberg Trial (IMT) in court on 11 January 1946. Found in *Trial of the Major War Criminals, Proceedings Vol. 5*, Nuremberg, 1947.

[448] Ibid.

> these offenses, violations and customs and laws of war, in case they are committed under the orders or sanction of their government or commanders.'"[449]

This is a slight misquote from an out-of-date *Rules of Land Warfare 347* by the Department of the Army.[450] This part of the manual is meant to clarify that commanders can be punished. 'The commanders ordering the commission of such acts, or under whose authority they are committed by their troops may be punished by the belligerent into whose hands they may fall'. The manual was revised on 15 November 1944 and stated that:

> Individuals and organizations who violate the accepted laws and customs of war may be punished therefor…the fact that the acts complained of were done in pursuant to the order of a superior or government sanction may be taken into consideration in determining culpability, wither by way of defence, or in mitigation of punishment. The person giving such orders may also be punished.

Although this rule originally was intended to allow for the punishment of superiors who gave orders but had not necessarily dirtied their own hands, defence counsellors used the rule to present 'orders' as a defence, particularly to argue that mitigating circumstances should result in a reduced sentence.

Despite his mistaken reading of the *Rules of Land Warfare 347,* von Porsen continued; 'If the USA gave their GIs the upper-mentioned protection, it must appeal as equitable and fair to give the same protection to the victims of National Socialism, those who had to keep quiet and obey, for they too were the victims'.[451] Von Porsen argued that the court should acquit the men, or, at the very least, give them light sentences, because they were simply soldiers obeying orders. Although the Dachau court rejected 'superior orders' as grounds for acquittal, it most likely played a role in lightening the sentences given to some men during the concentration camp trials.

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[449] Quoted in Greene, *Justice at Dachau,* 104-105.

[450] *Field Manual 27-10* (Washington, DC: United State Department of the Army, 1940), 129-130.

[451] Quoted in Ibid., 105.

D. The Press and the Courtroom: The Case of Ilse Koch

The press played an important role in shaping public perceptions of the American postwar trial programme. While the prosecution at the IMT at Nuremberg had a comprehensive press strategy for engaging and modelling coverage, the attorneys at the concentration camp trials at Dachau trial did not – leaving coverage of the trials, and which subjects they chose, to the whims of individual press men.

Press engagement with the postwar trials varied from day to day and trial to trial. Because the International Tribunal at Nuremberg was delayed beyond its original start time, the international press flocked to the opening of the Dachau 'parent trial'. The opening day of the Dachau 'parent trial' saw more then 400 spectators, including General Water Bedell Smith, chief of staff to General Eisenhower and Lt. Col. Lucian B Truscott, the commanding general of the Third Army, and members of the press, who were allowed to film and take photographs. The press would return for the opening days of Mauthausen and Buchenwald as well.[452] Press interest in the trials at Dachau would wax and wane throughout the two years of trials. In general, very little attention was paid to the trials. Part of the reason that the press abandoned covering the Dachau trials was the tediousness of endless translations. Not many of the translators spoke both German and English well enough to translate directly between them. Thus sentences spoken in the courtroom in German were translated to, say Polish, which was translated to English.

> American journalist Walter Lippmann, co-founder of the weekly the New Republic, came to listen in. His secretary had wired ahead that he planned to stay for three days…Lippman arrived at nine o'clock the first day. By ten thirty, he was gone. Then Margaret Higgins arrived. Her reports of liberation of the camps, filed as she followed Allied forces across Europe, had made her one of America's most popular war correspondents. Her assistant had written to say she might stay as long as a week. Within two hours, she, too, had left the courtroom.[453]

Journalists covering the IMT on a daily basis complained of the Nuremberg courtroom as a 'citadel of boredom boredom on a huge, historic scale'[454] as Jackson

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[452] Greene, *Justice at Dachau,* 135.

[453] Greene, *Justice at Dachau,* 55.

[454] Rebecca West, 'Reporter at Large,' *New Yorker*, 7 September 1946.

produced document after document, and joked that journalists assigned daily coverage of the trial were 'the last victims of Nazi persecution'.[455] Journalists were apparently not satisfied with either listening to the evidence of victims – which made up a majority of the Dachau trial testimony – or with documentary evidence in the Nuremberg courtroom. However the International Military trial at Nuremberg drew reporters from more than twenty nations, 'with over eighty representing American publications'.[456]

Lead American prosecutor, Robert Jackson, went on a press offensive, aiming to legitimize the trial through public support. Pre-trial Gallup polls indicated that 'as few as 1% of the [American] population favoured judicial proceedings over summary executions'.[457] In the face of the public's feelings, Jackson chose to emphasize the IMT's higher aim – criminalizing aggressive war – both to the press and in the court room. His opening speech on 21 November 1945 was a masterful stroke to set the tone for the American prosecution at that trial, and the press coverage:

> In the prisoners' dock sit twenty-odd broken men. Reproached by the humiliation of those they have led almost as bitterly as by the desolation of those they have attacked, their personal capacity for evil is forever past…Merely as individuals, their fate is of little consequence to the world.
>
> What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have been returned to dust. They are living symbols of racial hatreds, of terrorism and violence, and the arrogance and cruelty of power, They are symbols of fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes and impoverishing its life.[458]

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[455] *Charlotte Observer*, 6 October 1946.

[456] Brian K. Feltman, 'Legitimizing Justice: the American Press and the International Military Tribunal, 1945-1946', *The Historian* (300-319), 305.

[457] Ibid., 306. See William J Bosch, *Judgment on Nuremberg: American Attitudes towards the Major German War-Crime Trials* (Chapel Hill, NC: University of North Carolina Press, 1970) and Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton NJ: Princeton University Press, 2002).

[458] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November-1 October 1946, Volume 2* (Nuremberg, 1947), 155.

Jackson's press strategy worked. The American press coverage of IMT focused largely on the higher/noble effort to criminalize war. By the end of the IMT, a Gallup poll established that 90 per cent of Americans had heard or read about the trial's result and 53 per cent agreed with the verdicts of the trial, a huge change from the unsupportive, unforgiving population before the trial.[459]

In contrast, the Dachau trials lacked this cohesive higher aim. It was the carrying out of traditional military justice, albeit in the context of the horrific crimes of the camps. There was no concerted press effort on the part of the prosecution to frame Dachau as part of a larger goal. This is partly to blame for the Dachau trials' inability to capture the public imagination. Press coverage, when there was any, focused almost exclusively on salacious details of crimes or individuals, such as the horrors of the railroad car full of corpses outside the Dachau camp. Verdicts were written as informative pieces without editorialisation praising their successes (or failures). However Ilse Koch entered the public's imagination as the 'Bitch of Buchenwald,'[460] a rare exception to this rule, while the concentration trials at Dachau, as a whole, did not.

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[459] Gallup Poll, 5 October 1946-10 October 1946. Martha Strausberg, Gallup Poll Organization Library Database.

[460] Ilse Koch continues to be a part of public imagination—for an example from this century, she is said to have inspired Kate Winslet's character in the movie *The Reader* (2008). See *The Guardian*, 'Nazi behind Winslet film role is revealed', 17 January 2009, and *The Telegraph*, 'Kate Winslet's character in *The Reader* inspired by "notorious female guard"', 18 January 2009. (Note the misrepresentation of Ilse Koch as a concentration camp guard.)

Koch also inspired the whole subgenre of Nazi exploitation films in the 1970s. See Sara Buttsworth and Maartje Abbenhuis (eds.) *Monsters in The Mirror: Representations of Nazism in Postwar Popular Culture* (Westport: Greenwood Publishing Group, 2010) or Daniel H. Magilow, Elizabeth Bridges, and Kristin T. Vander Lugt (eds.) *Nazisploitation!: The Nazi Image in Low-Brow Cinema and Culture* (New York: Continuum, 2011).

Photo 13. Ilse Koch on the stand in the Mauthausen 'parent trial'. Courtesy of the USHMM Photo Archives.

Ilse Koch garnered the most press of all the defendants at the Dachau concentration trials. In most press reports, she is the only defendant named.[461] When she took the stand in her own defence over 200 spectators filled the usually empty Dachau courtroom.[462] The press alternatively called Ilse, 'The infamous mistress of the Buchenwald concentration camp,'[463] the 'Beast of Buchenwald'[464] '…a degraded, sadistic specimen of humanity…', the 'Butcher's Wife,' the '*Hexe von Buchenwald'* (Witch of Buchenwald), or simply 'The Bitch'.[465] Ilse Koch (neé Margarete Ilse

[461] *Chicago Daily Tribune*, 'Demand Death for 31 Killers of Buchenwald', 12 April 1947, 7; *Chicago Daily Tribune*, 'Convict 31 Who Ran Death Camp at Buchenwald', 13 August 1947, 16.

[462] Flint Whitlock, *The Beasts of Buchenwald: Karl and Ilse Koch, Human skin lampshades, and the war-crimes trial of the century* (Brule, WI: Cable Publishing Company, 2011), 219.

[463] *The Washington Post*, 'Army Orders Secrecy About Ilse Koch Case', 16 October 1949, M3.

[464] *The Washington Post*, 'Beast of Buchenwald', 28 December 1948, 10.

[465] *New York Times*, 'The Butcher's Wife', 21 September 1948; *Time*, 'The Bitch Again', 4 October 1948; *Newsweek*, 'The Witch of Buchenwald: The Good, and the Horrible', 28 July 1947. Modern scholars continue to title their books with these nicknames; two examples include: Arthur Smith, *Die Hexe von Buchenwald: Der Fall Ilse Koch* (Weimar, 1995) and

Köhler) was the wife of Buchenwald commandant Karl Otto Koch (served as commandant 1 August 1937 – September 1941). She was a secretary who had joined the Nazi party in 1932 before marrying Karl in 1936. They had two sons together. Ilse accompanied her husband, first to Sachsenhausen in 1936, and then to Buchenwald, where she remained when her husband was sent to establish and command Majdanek concentration and extermination camp (September 1941 until August 1942). While at Buchenwald, Ilse became notorious among the prisoners for her excesses and cruelty. In 1940, Ilse used Buchenwald inmates (and 250,000 *Reichsmarks* stolen from inmates) to build an indoor riding arena. Prisoners later told of her riding through the camp, or walking around her gardens (staffed by inmates) in revealing clothing and ordering any inmate beaten who looked at her. Even among the ranks of the SS, Ilse and Karl were excessively criminal in their behaviour – they were arrested on 24 August 1943 by the SS police and charged with private enrichment through embezzlement and the murder of prisoners for personal reasons (namely to hide Karl's case of syphilis, treated by two inmate-doctors at the camp, who were killed immediately after treating Koch). Karl was convicted and imprisoned in early 1944 and, eventually, executed in April 1945. Ilse was acquitted by the SS court due to lack of evidence. She moved, with her children, to live with her family.

After being recognized and reported by a former inmate, Ilse was arrested by US forces in Ludwigsburg on 30 June 1945. During her trial, Ilse was 8 months pregnant. This revelation, clear as she took the defence stand in court, caused a sensation in the courtroom and 'German inmates snickered, photographers snapped away'.[466] A month later *The New York Times* reported the birth of her baby with the sensationalist headline 'Isle Koch Has Baby: Buchenwald Camp Persecutor Bears Illegitimate Son'.[467] How she came to be pregnant was the subject much speculation as she had been kept in solitary confinement by the Americans, only interrogated by American officers. Who was the father? An American officer? An old lover, Fritz

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the dramatic Flint Whitlock, *The Beasts of Buchenwald: Karl & Ilse Koch, Human-skin Lampshades, and the War-crimes Trial of the Century* (Brule, WI: Cable Publishing, 2011)

[466] Greene, *Justice at Dachau,* 274.

[467] *New York Times*, 'Isle Koch has baby: Buchenwald Camp persecutor Bears Illegitimate Son', 30 October 1947, 16. The article is relatively restrained reading: 'The baby was conceived last winter while the 41-year-old widow was imprisoned at Dachau awaiting trial by a United States war crimes court for atrocities. The father of her child has not been officially identified'.

Schäffer, who was being confined at Dachau? Although the latter possibility is most likely, Ilse never revealed the answer publicly.

One of the most salacious and widely reported crimes was that Ilse alleged to have collected tattooed skins from inmates, whom she had killed if she saw and liked a tattoo they had, for lamp shades, gloves and book covers. Despite doubts about the claim, the rumour that Frau Koch had lampshades made from the tattooed skins of murdered inmates persisted in the American press for years after her trial.[468] The skins were most likely all for the use of Dr Erich Wagner, a physician in the pathology department of Buchenwald, who was working on a dissertation about tattoos and both photographed and collected samples from dead inmates (most likely killed for his project on his orders) for his work.[469]

The evidence given at the trial as to Ilse's involvement in the procuring of human skin for souvenir objects was circumstantial at best, and based on camp rumours. Lampshades and other items made of tattooed skins were never found in her procession and she always denied being involved. The SS Judge Konrad Morgen, who investigated the Kochs during their wartime trial for embezzlement and murder, testified that the stories of Frau Koch's human skin lampshades were merely a legend: he had personally searched Koch's home near Buchenwald and found nothing of the kind. This did not stop the press from obsessively reporting about Ilse Koch and the skins. For example *The Chicago Tribune* led their story about the convictions at the Buchenwald Trial under the subtitle: 'Used Skins for Shades'. It goes on: 'Frau Koch, 41, who became pregnant while in prison, was accused of sending tattooed camp inmates to death chambers so she could use their skins for lamp shades and purses'.[470] Purses made of human skin were never found or even mentioned in evidence. Two days later, *The Tribune* wrote again about Ilse Koch's sentence along with publishing

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[468] For example, 'Frau Koch was first sentenced to life imprisonment by a military court on circumstantial evidence that she had ordered lampshades made from the tattooed skins of murdered prisoners' (*The Washington Post*, 'Germans Plan Koch Trial' 8 June 1949, 5) and 'Witnesses at the original trial testified she had lampshades and other articles made from the tattooed skin of slain inmates…three sample of tanned human skin were among prosecution exhibits' (*The Washington Post*, 16 October 1949, M3).

[469] After the war, Dr Wagner successfully lived under an assumed name, even taking up medical practice in and around Bavaria. He was finally arrested in 1958 and committed suicide in prison in 1959.

[470] *Chicago Daily Tribune*, 'Convict 31 who ran Death Camp at Buchenwald', 13 August, 1947, 16.

a picture of her: 'Frau Ilse Koch, 41, red haired widow of a former commander, who was said to have collected tattooed skins of inmates for lampshades, received a life sentence'.[471] *The Los Angeles Times* covered the human skins writing: 'Denies Lampshades: Frau Koch was accused of having shared the camp rule with her husband and of ordering tattooed prisoners killed so she could make lampshades, purses and bookbindings of their decorated skins. This she denied'.[472] As can be seen, the accusation of using human skin was the focus of press coverage, mentioned every time Koch was covered in the press, even after the trial-where no definitive evidence was presented that the skins were Koch's.[473]

Koch's case is an interesting comparison to the press coverage of defendant Irma Grese, who was tried at the First Belsen Trial by the British. Twenty-one of the defendants at the First Belsen Trial were female, a much higher number then any Dachau trial, where Ilse Koch was the only female tried at a major concentration camp trial. Like Ilse Koch, Irma Grese was a young woman and press favourite. For example *The Times* breathlessly covered her testimony (*The Times*, 'Irma Grese in the Box', 17 October 1945, and *The Times*, 'Irma Grese's Whip' 18 October 1945). Grese was 22 during the trial and described as the 'Beautiful Beast' (compared to camp commandant, Josef Kramer, who was known in the press as 'The Beast of Belsen'). Grese, known not only for her meticulous grooming but also for her cruel beatings of prisoners and taking part in selections at Auschwitz and Belsen, was sentenced to death and executed. As one scholar notes, the press focus on Koch and Grese, 'may have stifled a more nuanced discussion of women's participation and culpability. The trials generated sensationalistic stories of female sadism'.[474]

In her defence, Ilse Koch maintained that she was simply a housewife and mother and had no knowledge of what was happening in the camp. The Court did not believe her. She was sentenced to life imprisonment. Controversially, General Lucius Clay, Military Governor of American occupied Germany (1947-1949), reduced

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[471] *Chicago Daily Tribune*, '22 Torturers Doomed; Widow Get Life Term', 15 August 1947, 5.

[472] *Los Angeles Times*, '22 Sentenced to Hang For Buchenwald Crimes', 15 August 1947, 7.

[473] Other examples of headlines: from *The New York Times*, 'US Commutes Term of Nazi Torturer': 'Frau Koch was accused of having used the skin of camp inmates to make lampshades' and 'US Commutes Term of Nazi Torturer', 17 September 1948, 1.

[474] Wendy Lower, *Hitler's Furies: German Women in the Nazi Killing Fields* (Boston, MA: Houghton Mifflin Harcourt, 2013), 10.

Koch's sentence to 4 years upon review. This caused a press fury, which led directly to a Congressional review of the Buchenwald 'parent trial' and the Dachau trial programme as a whole (further discussed in Chapter 6). Ilse Koch continued to dominate press reports whenever the Dachau trial programme was mentioned. Because Denson and the prosecutors at Dachau did not have a press strategy to shape public perception to the Dachau trials, the pressmen and women themselves chose for the public what to focus on—namely individual, female sadism that was not in any way representative of the trial programme or defendants as a whole.

E. Politics and the Courtroom: The Case Study of Dora-Mittelbau and 'Operation Paperclip'

External politics, particularly the needs of the growing intelligence apparatus, did not have a large impact on the performance of the 'parent trials' or the initial and first review of sentencing. Nevertheless, both before and after the trial, the American concentration camp trials were subject to external political pressure. This caused complications in the carrying out of justice – particularly in the availability of defendants to stand trial. One of the most obvious breakdowns of the American programme of concentration camp trials was exemplified by the Dora-Mittelbau trial. Despite the horrific work conditions of the camp for the 60,000 inmates who passed through the camp, which caused the death of at least 20,000 inmates, the trials held for personnel of the Dora-Mittelbau were the smallest set of trials at Dachau.[475] In six proceedings from 7 August – 30 December, one civilian, eighteen members of the SS, and five Kapos were tried for engaging in a 'common design' to violate the 'the laws and usages of war', mainly killing, beating, and torturing prisoners. 19 men were tried at the Dora 'parent trial,' most of low ranks.[476] The highest-ranking member tried of the personnel responsible for conditions at Dora was the Director General of Mittelwerke GmbH (from May 1944 to liberation), a civilian, Georg Rickhey. Although originally moved to Ohio in the United States as part of an American intelligence programme design to bring German scientists to the United States to work

[475] Jean Michel and Louis Nucera, *Dora: The Nazi Concentration Camp Were Modern Space Technology Was Born and 30,000 Prisoners Died* (New York: Holt Rinehart and Winston, 1979).

[476] This is the only prosecution team of 'parent trial' not led by Denson. The lead prosecutior was Capt. William McGarry.

for the US government (Operation Paperclip), he was sent back to Germany to stand trial at the Dora trial. Rickney was acquitted for lack of evidence.[477] No other technical or scientific members of staff of the Dora-Mittelbau camp were tried. These scientist and technical staff were largely protected by the Americans' desire to use their expertise to advance the American's own rocket programme.

The American urgency to acquire German technology, equipment, and the people responsible for developing and manufacturing these technologies began in 1940 and continued at a frenzied pace for roughly the next 10 years.[478] Even before the beginning of the Second World War the US feared German scientific advancements; fleeing German (Jewish) physicists had warned the US government that Germany was developing an atomic bomb and the American (and Allied) intelligence community was worried about other 'wonder weapons'. In 1944, as the armies of the Western Allies invaded Europe and moved towards Germany, the American intelligence community's top priority was recovering atomic and aeronautic technological material and scientists.[479] By late 1944 the hunt for German scientists and technicians involved thousands of Allied soldiers and officers.[480]

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[477] He never returned to the US. Dennis Piszkiewicz, *The Nazi Rocketeers: Dreams of space and crimes of war* (PA: Stockpole Books, 2007), 231-232 (originally published in hardcover by Westport, Conn: Praeger, 1995).

[478] For a full accounting, ordered by the United States Congress in the 1998 'Nazi War Crimes Disclosure Act', of all documentation held by the government relating to the US intelligence community and the recruitment of Nazis. The initial report was published as Richard Breitman, Norman J.W. Goda, Timothy Naftali, and Robert Wolfe, *US Intelligence and the Nazis* (New York: Cambridge University Press, 2005) and the follow up report as Richard Breitman and Norman J.W. Goda, *Hitler's Shadow: Nazi War Criminals, U.S. Intelligence, and the Cold War* (Washington DC: National Archives, 2010).

[479] Other priorities included material and experts in chemical and biological weaponry, and secondarily, capturing suspected war criminals. See Michael Bar-Zohar, *The Hunt for German Scientists* (New York: Avon Books, 1970); Ure Deichmann, Biologists *Under Hitler*, translator Thomas Dunlap (Cambridge, Massachusetts: Harvard University Press, 1996); and Robert Harris and Jeremy Paxman, *A Higher Form of Killing: The Secret History of Chemical and Biological Warfare* (New York: Random House, 2002).

[480] As compared to only a handful of scientific officers charged with seeking out men suspected of medical and scientific war crimes. See Sean Longden, *T-Force: The Race for Nazi War Secrets, 1945* (London: Constable and Robinson Ltd., 2009) and Wolfgang W.E. Samuel, *American Raiders: The race to capture the Luftwaffe's secrets* (Jackson, Mississippi: University Press of Mississippi, 2004).

The American intelligence operation was partly fuelled by a race against the Soviets for German scientific spoils.[481] For example, when the Americans arrived in Nordhausen in April 1945, they found the factories at Dora-Mittelbau largely intact, with thousands of weapons, and hundreds of sick and dying workers. Americans stripped Mittelbau as fast as they could before the Russians would arrive—Dora-Mittelbau was to be in the Soviet zone of occupied Germany. The hunt for Nazi scientists was the cause of some of the earliest operations against the Soviets in what would come to be called the Cold War. As early as a few weeks after Germany's surrender, American and British agents were mounting clandestine missions into the Russian sector of Berlin and the Russian zone of Germany to smuggle out scientists and their families.[482]

The man in charge of the American effort to find and recruit German scientists was Lt Colonel Rozamus, the deputy director of JIOA (Joint Intelligence Objectives Agency). He knew the moral cost of his decision to recruit these men. At the end of the war, he had participated in the liberation of the Dora complex used to manufacture rocket and jet engines and was well aware of the thousands of prisoners who had died in building and maintaining the facilities. Still, in his duties, Lt Colonel Rozamus routinely asked that reports from denazification tribunals and postwar interrogations with incriminating information on individuals be sent back with requests for 'a different interpretation.' Usually the bit that needed 'reinterpretation' was related to Nazi activities. The 'Paperclip Operation' takes its name from the process of paper clipping new backgrounds on the US entry applications and documents of German scientists.[483]

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[481] See Norman M Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945-1949* (Cambridge MA: Belknap Press, 1997)

[482] See Clark Clifford, *American Relations with the Soviet Union* (Washington DC: Special Counsel to the President, 24 September, 1947).

[483] For particularly excellent overviews of 'Operation Paperclip' see Tom Bower, *The Paperclip Conspiracy: The Hunt for the Nazi Scientists* (Boston: Little, Brown and Company, 1987) and Annie Jacobsen, *Operation Paperclip: the secret intelligence programme that brought Nazi scientists to America* (Boston: Back Bay Books of Little, Brown and Company, 2014). Also see Linda Hunt, *Secret Agenda: The United States Government, Nazi Scientists, and Project Paperclip, 1944-1990* (New York: St. Martin's Press, 1991); Clarence G Lasby, *Project Paperclip: German Scientist and the Cold War* (New York: Atheneum, 1971); and the overly-dramatic Christopher Simpson, *Blowback: The First Full Account of America's Recruitment of Nazis and Its Disastrous Effects on our domestic and foreign policy* (New York: Weidenfeld & Nicolson, 1998).

The Americans' top priority recruitment was Werner von Braun, a pioneer of rocketry, obsessed with space travel, and the mind behind the V-2 rockets. A brilliant man by all accounts, in his mid-20s Von Braun found the German military an interested and deep-pocketed patron and, in a Faustian deal (there rockets were for weapons, not for travelling to the moon) he was offered an unlimited budget from the military to design missiles.[484] By 1940, von Braun was a member of the Nazi Party and the SS. At the Peenemunde Rocket Centre on 3 October 1942, von Braun and his team launched the first man-made object to reach outer space, a V-2 rocket.[485] In order to secure further funding, he personally showed Hitler the film of the successful launch. After the bombing at Peenemünde, rocket production was transferred to the Harz Mountains into a huge underground factory complex built and staffed by slave labourers. The conditions were terrible, and as head of rocket research and production, von Braun and other top rocket men must have known about the use of slave labour.

Von Braun, and his team members, were highly sought after by all the Allies. At the end of the war, von Braun decided to surrender himself, his team, and his knowledge, to the Americans. He was immediately dispatched to the US to continue his research. The US Justice Department chose to overlook his membership in the SS and his use of slave labour.[486] Von Braun had an enormously successful career in the US; he became a leader in the American space programme,[487] including designing and

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[484] John Cornwell, *Hitler's Scientists: Science, War, and the Devil's Pact* (New York: Penguin, 2004).

[485] See Walter Dornberger, *V-2: The Nazi Rocket Weapon* (New York: Ballantine Books, 1954); Michael J. Neufeld, *The Rocket and the Reich: Peenemunde and the Coming of the Ballistic Missile Era* (New York: The Free Press, 1995); and Dieter K Huzel, *Peenemunde to Canaveral* (United States: Prentice-Hall, Inc., 1962).

[486] While Truman opposed any acceptance of Nazi scientists and sympathizers into the US and had agreed to it at Potsdam, later presidents had few qualms; President Eisenhower saw the programme of recruiting Nazi scientists as a way to gain 'economic reparations' from the Germans. See John Gimbel, *Science, Technology, Reparations: Exploitation and Plunder in Postwar Germany* (Palo Alto, CA: Stanford University Press, 1990).

[487] Throughout his very successful career von Braun held the positions of director of the National Aeronautics and Space Administration's Marshall Space Flight Center, Vice President at the aerospace company Fairchild Industries, Inc., and founder of the National Space Institute. See Boris E Chartok, *Rockets and People* (Washington, DC: NASA History Office, 2005) and the standard American biography of Von Braun, Michael Neufeld, *Von Braun: Dreamer of Space, Engineer of War* (New York: Alfred A Knoft, 2007). See also Neufeld's more general work *The Rocket and the Reich: Peenemünde and the Coming of the Ballistic Missile Era* (Cambridge MA: Harvard University Press, 1996).

building the Saturn V rocket that carried Apollo 11, the first-manned space flight to the moon. In 1977, he died, a celebrated man. Upon his death, President Carter released a statement:

> To millions of Americans, Wernher von Braun's name was inextricably linked to our exploration of space and to the creative application of technology. Not just the people of our nation, but all the people of the world have profited from his work. We will continue to profit from his example.[488]

No mention was made of his SS status or connection with his crimes at Dora-Mittelbau. He was never charged with war crimes.

Another man implicated in the use of slave labour at Dora-Mittelbau and a close associate of von Braun, Arthur Rudolph, was also recruited through Operation Paperclip and was never prosecuted for war crimes. Rudolph was a rocket engineer who worked on the V-2 for Germany during the war. Specifically he helped to design the production plant at Peenemünde and, starting in 1943, at Dora-Mittelbau. After the Dora plant and camp was created, Rudolph became operations director of V-2 production at Dora.[489]

By November 1945, Rudolph and his family (along with von Braun) were brought to the US to continue work on rocket development and production through Operation Paperclip. At the time of his entry into the United States,

> Mr. Rudolph was described by the American military government in Germany as an "ardent Nazi," but he was not classified as a war criminal. Army documents from two years later showed, however, that Mr. Rudolph had indeed been classified as a war criminal by West German and United States officials.[490]

Despite this, Rudolph went to work for NASA and was granted US citizenship. At NASA, Rudolph worked to develop the Saturn V Moon rocket, which put the first man on the moon. In November 1983, after catching the attention of the OSI for his work at Dora-Mittelbau, Rudolph entered a deal with the Justice Department to

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[488] Quoted in Michael Neufeld, *Creating a Memory of the German Rocket Programme for the Cold War* (Washington DC: NASA Special Publications, 2008).

[489] Thomas Franklin, *An American in Exile: The Story of Arthur Rudolph* (Huntsville AL: Christopher Kaylor Company, 1987). A notably sympathetic account of the life of Arthur Rudolph.

[490] *The New York Times*, 'Arthur Rudolph, 89, Developer Of Rocket in First Apollo Flight', 3 January 1996.

renounce his US citizenship in return for not being prosecuted for war crimes (as well as being allowed to keep his social security benefits). He returned to Germany where, in 1987, the West German government ruled there was insufficient evidence to justify trying Mr Rudolph for war crimes. He lived in Germany until his death in 1996. He was never prosecuted for war crimes.

It was not just the Dora-Mittelbau trials that were affected by Operation Paperclip. For example, Dr Hubertus 'Strugi' Strughold was never tried for war crimes despite being implicated in human experimentation, particularly at Dachau. Dr Strughold, an expert on aviation medicine, was director of the Aeromedical Research Institute in Berlin, an organization controlled by the Luftwaffe beginning in 1935. His major research interests were high altitude and supersonic speed flight and their effects on the human body and later the physical and psychological effects of manned spaceflight.[491]

Evidence implicating Strughold in the human experimentations at Dachau was presented at the IMT. A memo showed that Dr Strughold attended a 1942 medical conference in Germany in which there was a presentation about the results of the hypothermia experiments on inmates at Dachau.

> In minutes from the conference, Dr. Strughold was recorded as saying: "With regard to the experimental scientific research, but also for the orientation of the Sea Distress service, it is of interest to know what temperatures are to be counted on in the oceans concerned during the various seasons." Critics of Dr. Strughold and his award argue that his participation at the conference shows, at a minimum, that he was aware of some of the most perverse activities of the Third Reich.[492]

At the end of the war, Dr Strughold was never tried for war crimes, despite the fact that several physicians associated with him, including Strughold's former research assistant Hermann Becker-Freyseng, and the Institute for Aviation Medicine were convicted of crimes against humanity in connection with the Dachau experiments at

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[491] See Maura Phillips Mackwoski, *Testing the Limits: Aviation Medicine and the Origins of Manned Space Flight* (College Station: Texas A&M University Press, 2006).

[492] *The Wall Street Journal*, 'A Scientist's Nazi-Era Past Haunts Prestigious Space Prize', 1 December 2012

the 1947 Nuremberg Doctors' Trial.[493] In the fall of 1945, Dr Strughold returned to academic life working as director of the Physiological Institute at Heidelberg University. Around this same time, he began working for the US Air Force at the Aeromedical Centre, located on the campus of the former Kaiser Wilhelm Institute for Medical Research. In 1947 Strughold was brought to the US by the Americans through Operation Paperclip and eventually named chief scientist of NASA's Aerospace Medical Division in 1962.[494] He played a central role in designing the first pressure suit for astronauts and on-board life support systems for the first manned space flights. He also directed the training of the medical staff of the Apollo programme for the mission to the moon.[495]

In recent years, German scholars have disclosed that Dr Strughold's institute in Berlin 'conducted experiments on young children from a psychiatric asylum'.[496] Nevertheless, even today, Dr Strughold is revered as the 'Father of Space Medicine' in his research community. Every year since 1963, the Space Medicine Association has given out the Hubertus Strughold Award to a top scientist or clinician for outstanding work in aviation medicine.[497]

The 'Paperclip' process became top secret after 1948. By early 1948, The US Congress, afraid of the communist-inspired labour strikes that had toppled Eastern European governments and the rumours of communist coups suggested that Moscow was either masterminding the early stages of a revolution or was on the brink of launching an invasion of Europe, approved a $500 million budget for scientific military research. German scientists were needed; as one anonymous senator stated, 'Hefty principles and solemn promises, the Pentagon argues, must no longer be allowed to stand in the way of defending the nation'.[498] 'Operation Paperclip'

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[493] During these proceedings, Strughold contributed several affidavits for the defence on behalf of his accused colleagues.

[494] See Robert J Benford, MD, *Doctors in the Sky: The Story of the Aero Medical Association* (Springfield IL: Charles C Thomas Publisher, 1955).

[495] Mark R Campbell, Stanley R Mohler, Viktor A Harsch, and Denise Baisden, 'Hubertus Strughold: the 'Father of Space Medicine', *Aviation, Space and Environmental Medicine,* 78:7 (July 2007): 716-19.

[496] *The Wall Street Journal*, 'A Scientist's Nazi-Era Past Haunts Prestigious Space Prize', 1 December 2012.

[497] Ibid.

[498] Quoted in Tom Bower, *The Paperclip Conspiracy,* 233.

scientists' backgrounds now begin to state that espousing Nazism was done 'to combat communism' and 'improve Germany's economic plight.' 'Operation Paperclip' would not become public knowledge until 1984.[499]

Because of their usefulness to American intelligence, most of those complicit in the Dora camp were never put on trial. The trial itself suffered from lack of evidence, as much of it was in the hands of the American intelligence community and not available to prosecutors. The Dora trial represents a miscarriage of justice in the sense that few of those responsible for the horrendous conditions of the camp were ever tried. Although Dora is the most extreme example, other camps trials suffered from defendants not being available for prosecution, as the case of Dr Strughold shows.

F. Conclusion

Despite firm commitment in 1945 to prosecuting Nazi criminals, the politics of the emerging Cold War affected the United States administrative aims in Germany. The trials, and their legacy, were plagued by controversy caused in part to the ill-conceived, largely, non-existent appellate process. Also playing a large role in the controversy were challenges brought by the defendants themselves claiming mistreatment. These challenges were brought in a politic climate where German goodwill was increasingly important to American foreign policy. In their closing years, the trials were to assist, or at least not deter, the economic and political unification of Germany by quickly processing the criminals of the old regime so Germany could be 'cleansed' and retake its place among the (American-allied) nations in Europe.

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[499] When Arthur Rudolph, rather then face denaturalization court, returned to Germany and renounced his US citizenship. For more on the public accounting for the men of 'Operation Paperclip' and other former Nazis in the US, see Judy Feigin, *The Office of Special Investigations: Striving for Accountably in the Aftermath of the Holocaust* (Washington DC: Department of Justice Criminal Division, December 1996).

Chapter 5: Clemency, Controversy, and Congressional Review

By the late 1940s new foreign policy goals, resulting from amplified tensions with the Soviet Union, affected the United States' occupational objectives in Germany despite a firm commitment in 1945 to prosecuting Nazi criminals. The war crimes trial programme was now perceived as a hindrance to securing the increasingly important German goodwill. The statistics for convictions from the Dachau 'parent trial' in 1945 through the Buchenwald 'parent trial' in late 1947 (and the initial review by the JAG) indicate that, initially, most of the sentences were upheld or only slightly altered. However, amnesty programmes for those effected by denazification policy and by the Dachau courts began in the late 1940s and resulted in mass amnesties and commutations by the early 1950s. Furthermore, two major controversies arose from the Dachau trials; the methods used by interrogators in the Malmédy trial and the reduction of the notorious Ilse Koch sentence upon review from life imprisonment to four years'. The resulting public outcry, and an internal army investigation, triggered Congress to review both cases; the Dachau tribunals were scrutinized in particular for fairness.

A. Clemency: An Overview of the Review Process for Dachau

1. The Changing Political Situation

The sentences handed down by the courts at the concentration camp trials at Dachau were increasingly at odds with the contemporary political concerns of the US in Germany in the late 1940s and early 1950s.[500] American policy in Germany

[500] Particularly useful overviews of the mammoth subject of American policy concerns in Germany in the late 1940s to early 1950s were Thomas A Schwartz, *America's Germany: John K McCoy and the Federal Republic of Germany* (Cambridge MA: Harvard University Press, 1991); Jeffry M. Diefendorf, Axel Frohn, and Hermann-Josef Rupieper, *American Policy and the Reconstruction of West Germany, 1945-1955* (Cambridge: Cambridge University Press, 1994); Norbert Frei, *Adenauer's Germany and the Nazi Past: The politics of Amnesty and Integration*, translated by Joel Golb (New York: Columbia University Press, 2002); Ruhm Von Oppen Beate (ed.), *Documents on Germany under Occupation, 1945–1954* (Oxford: Oxford University Press, 1955); Lucius D. Clay with Jean Edward Smith (ed.), *The Papers of General Lucius D. Clay: Germany, 1945–1949*, 2 volumes (Bloomington IN: Indiana University Press, 1974); Dennis L. Bark and David R. Gress, *A History of West Germany Volume 1: From Shadow to Substance, 1945–1963* (New York: Blackwell

became more concerned with checking the expansion of the Soviet Union's influence in Germany and Eastern Europe. In the summer of 1946, as the 60 Mauthausen 'parent trial' defendants were being sentenced and the Flossenbürg 'parent trial' was beginning, there was unrest in Germany as 'large numbers of people demonstrated for increased food rations, and for the collectivization of industry in the Ruhr industrial region. There was also evidence that communism was becoming more popular among the German people'.[501] This concerned the Americans, as the Cold War was getting under way. Furthermore, some tenets of the Potsdam Agreement, the end-of-war settlement concerning the future of Germany between the Soviets and the Americans (and the British), were beginning to break down.[502] At Potsdam, the Soviets had agreed to supply the (more heavily industrialized) US and British occupied zones with foodstuffs from their zone; the Americans and British, in return, would supply the (more agricultural) Soviet zone with industrial equipment. When the Soviets failed to ship much-needed foodstuffs General Clay stopped shipments of industrial equipment to the Soviets. The Soviets responded with an angry publicity campaign against the Americans within Germany and at home.

The Soviets continued to tighten control over Eastern Europe, and concerned politicians in the US began to look for ways to counterbalance growing communist power in the east.[503] In January 1947, as the court at Dachau delivered the Flossenbürg 'parent trial' sentences, the German bizone economic region was created, which united the US and British zones of occupied Germany, in order to help advance the growing economic and political cooperation in western Germany. The Americans and British, in large part, were allowing the German states to govern themselves through representation at the national level—a system that was at odds with the

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Publishers, 1989); Richard Bessel, *Germany 1945: From war to peace* (New York: Simon and Schuster, 2012); Carolyn Eisenberg, *Drawing the Line: The American Decision to Divide Germany* (Cambridge: Cambridge University Press, 1998); Petra Goedde, *GIs and Germans: Culture, Gender, and Foreign Relations, 1945-1949* (New Haven: Yale University Press, 2014).

[501] Harold Marcuse, *Legacies of Dachau: The uses and abuses of a concentration camp 1933-2001* (Cambridge: Cambridge University Press, 2008), 87.

[502] See Michael Neiberg, *Potsdam: The End of World War II and the Remaking of Europe* (New York: Basic Books, 2015) and Herbert Feis, *Between War and Peace: The Potsdam Conference* (Princeton, NJ: Princeton University Press, 1960).

[503] For more on the dominate personalities in US politics at the time see an excellent study in Walter Isaacson and Evan Thomas, *The Wise Men: Six Friends and the World They Made*, reissued edition (New York: Simon and Schuster, 1986).

centrally controlled Soviet administration (The *Zentralverwaltungen*, a subdivision of the Soviet Military Administration in Germany (SVAG)). In March 1948, the Soviets formally left the Control Council for Germany, thus ending cooperation between the former wartime allies on the occupation of Germany.[504]

Relations with the Soviet Union deteriorated rapidly across all aspects of foreign affairs. After the British government announced that it would no longer be able to offer support to the Greek Government in its civil war against the Greek Communist Party, on 12 March 1947—one month before the opening of the Buchenwald 'parent trial', before a joint session of Congress, President Truman asked Congress to support the Greek Government against the Communists and to provide assistance for Turkey, since that nation, too, had previously been dependent on British aid. Truman argued that the defeat of Greek (and Turkish) communism was an immediate foreign-policy concern because communism would destabilize this important region. Truman argued that the United States were compelled to assist 'free peoples' in their struggles against 'totalitarian regimes,' because the spread of authoritarianism would 'undermine the foundations of international peace and hence the security of the United States'.[505] This was the beginning of the so-called 'Truman Doctrine', which came to describe the American commitment to provide economic, political, and military aid to any democratic regime that felt threatened by authoritarian forces (namely the Soviets or Soviet-backed internal groups). To support the new interventionist direction of American foreign policy the 'Marshall Plan', named after the popular Secretary of State George Marshall who announced the plan in June 1947.[506] The 'Marshall Plan' was to provide money to rebuild and modernize (and Americanize) Europe's shattered economies. By April 1948, four month after the end of the Dachau trials, 'the US Congress approved George Marshall's European Recovery Programme, so that millions of dollars could begin to flow into the

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[504] Richard L. Merritt, *Democracy Imposed: U.S. Occupation Policy and the German Public, 1945-1949* (New Haven, Connecticut: Yale University Press, 1995) 336. See also Carolyn Eisenberg, *Drawing the Line: The American Decision to Divide Germany, 1944-1949* (Cambridge: Cambridge University Press, 1996).

[505] Speech reprinted in full in Denise M. Bostforff, *Proclaiming the Truman Doctrine: The Cold War Call to Arms* (College Station, Texas: Texas A&M, 2008).

[506] George Marshall would receive the Nobel Peace Prize in 1953 for his part in helping the economic recovery of Western Europe after World War II.

devastated economies of (Western) Europe, including Germany'.[507] The Soviet Union refused to let its satellite states in Eastern Europe to accept assistance from the 'Marshall Plan', as the plan required recipients to accept Western democracy, thus further dividing Europe into West and East.

2. The Military Review Process

Throughout the escalating tensions between the occupation powers, the rulings of the Dachau court underwent the Army review process. The following was the standard review process for sentences given to Dachau defendants as set up by the United States army: First, the Deputy Theatre Judge Advocate for War Crimes reviewed the trial and issued a review document and recommendation for the Theatre Judge Advocate. Then, the Theatre Judge Advocate could confirm or reduce the sentences. In addition, in cases where a defendant faced the death penalty, a third review was conducted by the Army's EUCOM (United States European Command) or, later, the Military governor, who could uphold or reduce the death sentence. This review process took the place of any formal appeals courts.[508]

There were notable, and, as it turned out, controversial, aspects of this military administrative review. The first was how few written records the reviewing officers generated. This lack of written reports began before the review; as mentioned before,

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[507] Marcuse, *Legacies of Dachau,* 87. Again, there are inexhaustible sources on US-Soviet relations in the early years of the Cold War; many coming to mutually exclusive conclusions exemplified by those of John Lewis Gaddis (in his *Strategies of Containment: A Critical Appraisal of American National Security Policy during the Cold War*, Revised and Expanded Edition (Oxford: Oxford University Press, 2005) as well as *The Cold War: A New History* (New York: Penguin, 2006)), who, for all intents and purposes, celebrated American triumph in the Cold War, compared to William Appleman Williams (see his *The Tragedy of American Diplomacy*, 50th Anniversary Edition (New York: W.W. Norton and Company, 2009)), who rejected the celebratory tone of early historians of the Cold War era and declared the Cold War a tragic episode of diplomatic diplomacy. Other helpful sources include: Tony Judt, *Postwar: A History of Europe Since 1945* (New York: Penguin, 2005);); Walter Issacson and Evan Thomas, *The Wise Men: Six Friends and the World They Made* (New York: Simon and Schuster, 1986); Melvyn Leffler and David S. Painter, *Origins of the Cold War: An International History*, Second Edition (New York: Routledge, 2005); William Glenn Gray, *German's Cold War: The Global Campaign to Isolate East Germany, 1949-1969* (Chapel Hill: The University of North Carolina Press, 2003), and Petra Goedde, *GIs and Germans: Culture, Gender, and Foreign Relations, 1945-1949* (New Haven: Yale University Press, 2003).

[508] Summarized from Lt. Col. C.E. Straight, *Report of the Deputy Judge Advocate for War Crimes European Command, June 1944 - July 1948* (Washington, DC: US Government press, 1949).

unlike common practice in American criminal and civil courts, the judges at Dachau did not write judgements explaining their decisions. Thus, the Army review process did not have any explanation as to why the original judgement and sentence (or acquittal) had been handed down by the court. It was forced to make judgements based on the trial transcript and inferred from the sentences. The written record left by a reviewing officer was a short report that summarized the evidence given, the witnesses' perceived credibility, clemency petitions received post trial, and a recommendation for approval or disapproval of the sentences for each defendant in the trial. Furthermore, after the first reviewing officer, no other officer read the entire trial transcript, only a summary. Whether sentences were approved or recommended for reduction, the reviewing officers did not leave written explanations for their decisions.[509]

Further practices used by the army in its review process for Dachau derived their controversial nature from the fact that they were at odds with normal legal practice in American appellate courts. Reviewers, when examining the trial transcript made an attempt to judge the credibly of the witness based solely on the written record, and had available post-trial petitions made by defence lawyers, family members and the accused themselves, which were not available at the time of the original trial. Reviewers appeared (again, no definitive record is available) to be looking for evidence of individual criminal acts, which was not the prosecutor's original intention. The Dachau defendants had been charged, and convicted of, participating in the 'common design' of the camp. Col Densen would later complain to the investigating congressional committee that had he known that the reviewers would look for evidence of individual criminality, he would have provided it instead of focusing during the trial on proving 'common design'.[510]

Despite the obvious issues with the administrative review process, the impression that initial reviews of the sentences handed out at Dachau frequently overturned initial sentencing is not supported by analysis of the 'parent trials' at

[509] Summarized from Ibid.

[510] United States Senate, *Conduct of the Ilse Koch War Crime Trial, Hearings before the Investigations subcommittee of the Committee on expenditures in the Executive Departments*, United States Senate, Eightieth Congress, 8-9 December 1948, (Washington DC: Government Printing Office, 1949), 1025.

Dachau (Table II).[511] The percentage of cases where sentences were reduced upon initial review was limited in all the trials. Furthermore, for the cases where the sentence was reduced, the majority of reductions would have been limited in scope, i.e. reducing a death sentence to a life sentence or a five-year sentence to a three-year sentence. The controversial reduction of Ilse Koch's sentence from life to four years' imprisonment, the subject of the Senate review discussed below, was exceptional.

	Number changed/Total number (percentage change)
Dachau	9/40 (22%)
Mauthausen	9/61 (15%)
Flossenbürg	2/45 (4%)
Buchenwald	12/31 (39%)

Table 5. Percentage of initial sentences reduced upon initial review for four major concentration camp 'parent trials' at Dachau.

However, while the initial review process did not cause large-scale sentence reductions, the lack of a separate justice system meant that the Dachau sentences and their administration were in the power of the military occupation administration in the long term. The military war crimes administration was intimately connected with Army occupation policy, and rapidly-changing American foreign policy. Or, as the historian Frank Buscher succinctly put it:

> …the main problem was that the war crimes procedures of the Dachau and Nuremberg programmes did not allow for appellate reviews of the judgments and verdicts. As a result, US occupation authorities increasingly resorted to administrative processes and to granting executive clemency to ensure equal sentences for comparable offenses and procedural consistency'.[512]

[511] The impression is given by Dachau trial scholars such as Frank M Buchser, *The US War Crimes Trial Programme in Germany, 1946-1955* (New York: Praeger, 1989) and Tomaz Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge, Massachusetts: Boston University Press, 2012) and by more general histories of postwar Germany such as Harold Marcuse, *Legacies of Dachau,* and Neil Gregor, *Haunted City: Nuremberg and the Nazi Past* (New Haven, Connecticut: Yale University Press, 2008).

[512] Buscher, *The United States War Crimes Trial Programme,* 50.

As clemency and amnesty increasingly became part of larger American policy towards former Nazis in Germany from 1948 onwards, the Dachau sentences were included in the movement towards general amnesty.

3. Clemency

As early as 1946, with still a year and a half left of trials at Dachau, the American military government, as Neil Gregor has noted, 'whose policies began to betray the preoccupation of the emerging Cold War, slowly moderated its commitment to a firm line against the majority'.[513] As early as the summer of 1946, in Buscher's view, 'two military officers and two civilian attorneys within the War Crimes Branch began to formulate plans for a clemency programme…the equalization of sentences was to be the foremost goal of a future clemency programme'.[514]

As 'denazification' in the American zone was handed over to German control (and grew more and more lenient), the Dachau tribunals were increasingly at odds with larger American policy. There were practical reasons for giving the denazification tribunals to the Germans. The 'Law for the Liberation from National Socialism and Militarism' (*Befreiungsgesetz)* of March 1946, which, as discussed in Chapter 4, barred all members of the Nazi party (as well as its formations) from employment (besides menial work), affected a huge number of the German population: 'over 27 per cent of the adult population of the U.S. Zone (3,669,239 persons)'.[515] The work needed to acquit or convict all of these men (and women) was enormous and put huge pressure on the occupation government. As General Clay explained in a phone call with a member of the occupation government, 'Actually, if you gave me 10,000 people over here, I couldn't do that job. With 10,000 people I couldn't do the job of denazification. It's got to be done by the Germans'.[516] General

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[513] Gregor, *Haunted City,*100-101. For more on amnesty and clemency for Nazis see Marcuse, *Legacies of Dachau*; Tom Bower, *Blind Eye to Murder: Britain, America, and the Purging of Nazi Germany--A Pledge Betrayed* (London: Wm Collins & Sons & Co, 1989); and Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration*, translated by Joel Golb (New York: Columbia University Press, 2002).

[514] Buscher, *The United States War Crimes Trial Programme,* 51.

[515] U.S. High Commissioner John J. McCloy, 'The Present Status of Denazification (December 31, 1950)', Volker Berghahn and Uta Poiger (ed.) *Occupation and the Emergence of Two States, 1945-1961, Volume 8.* Accessed online at http://germanhistorydocs.ghi-dc.org 31 July 2016.

[516] Clay personal to Hildring, 8 December 1945, in Jean Edward Smith (ed.), *The Papers of General Lucius D Clay: Germany 1945- 1949,* volume 1 (Bloomington: Indiana University Press, 1974), 130.

Eisenhower complained that the denazification of the American zone would take 50 years.[517] However, because the economic and social elite were the majority of the members of the denazification courts (*Spruchkammern*), 'it instituted a quasi-judicial process through which local communities could impose strict punishment on radical Nazis while rehabilitating the mass of ordinary party members'[518] and 'in practice, this meant that responsibility for denazification…was placed into the hand of a self-regulating community: unsurprisingly, the great majority of appeals were successful'.[519]

In 1946, amnesty programmes in the American zone began; first, the so-called 'Youth Amnesty' law, which reprieved all men and women born after 1919 from conviction by the denazification courts (as long as they were not in category I (Main Guilty Party) or II (Guilty/Incriminated); and then the 'Christmas Amnesty' of December 1946 in which all low-income or physically disabled individuals were amnestied. This affected a huge number of people and took denazification personnel until mid-1947 to process. As a result, when the courts returned to more serious offenders in fall 1947, 'enthusiasm for the process had waned further; disillusionment was great, even among its supporters; the inconsistencies and inadequacies of the system meant that it was widely discredited'.[520]

By the end of 1947, the Office of Military Government for the United States (OMGUS) came under increasing pressure from the US government to end the denazification programme and the Dachau tribunals. In October 1947, occupying authorities gave more authority to local denazification courts, allowing the courts to reclassify people, including downgrading classifications (for example, from Fellow Traveller (category IV) to Not Incriminated (category V)), 'unless he had been a member of one of the organizations declared criminal at Nuremburg'.[521] By January 1948, 400,000 men and women had been cleared in this way. As historian Harold Marcuse argued:

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[517] *The Oregon Statesman*, 'Eisenhower Claims 50 Years Needed to Re-educate the Nazis', 13 Oct 1945, 2.

[518] Gregor, *Haunted City,* 96.

[519] Ibid., 96.

[520] Ibid., 101.

[521] Marcuse, *Legacies of Dachau,* 93.

> Although by late 1947 the denazification programme was no longer taken seriously, in order to save face and preserve the appearance of fairness Allied policymakers wanted to pursue it to completion. In January 1948 denazification prosecutors were further empowered to downgrade suspected "offenders" without approval from Military Government…In a face-saving attempt to complete the denazification programme by that date [May 1948], the chambers began rubber-stamping the remaining cases, releasing thousands of the heavily suspect internees without hearings in early spring 1948.[522]

By August 1948, only about a thousand cases remained. By the end of September, tribunal personnel were given notice of their imminent dismissal and the closing of the tribunals. Historian Gregor commented, 'The fact that 1000 difficult cases could be dealt with in a month or so demonstrated in itself how perfunctory the procedure had become, even when committed former Nazis were concerned'.[523]

While overarching political aims would play a significant role in clemency for Dachau defendants in the 1950s, based on the sentencing statistics amnesty politics did not play a major role in the original Dachau trials or in their initial sentence review. If emerging Cold War political concerns were a major force driving force for more lenient sentencing during the trial and upon initial review of the sentence, one would expect to see a significant increase in lenient sentences in the latter trials in late 1946 and 1947. However, analysis of the subsequent Dachau trials, which ran from October 1946 through November 1947, does not support this hypothesis. The reverse was seen when comparing trials during 1946 to trials in 1947 and there was an increase in more significant sentences (such as life imprisonment or death) in 1947 compared to 1946.

Consequently, while clemency and amnesty policies affected the denazification courts as early as 1946, it was not until after 1949 that the Dachau trials' sentences were disturbed by the new direction in American foreign policy in Germany.

The United States military governor General Clay established the Board of Clemency early in 1947 to review the Army trials sentences (from Nuremberg and Dachau). Although the Board of Clemency became the final reviewing authority, its

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[522] Ibid., 94.

[523] Gregor, *Haunted City,* 102.

members did not have jurisdiction over death sentences and 'defendants whom military tribunals had found guilty of war crimes and crimes against humanity'.[524] A Board of Review replaced the Board of Clemency in August 1947. (Eventually four more Review Boards would be established within the Theatre Judge Advocate) The Board's task was to ensure fair trials by examining the Deputy Theatre Judge Advocates' reports and recommendations. The Board also investigated charges of prisoner mistreatment. After 'the initial examination by the deputy theatre judge advocate, the Board of Review, the theatre judge advocate and the military governor, the number of court-assessed death sentences fell from 426 to 298…. Altogether, the theatre judge advocate and the military governor rejected only sixty-nine recommendations for sentence reduction'.[525] One of these approved sentence reductions was that of the notorious Ilse Koch. Her sentence reduction, along with an investigation into accusations of torture made by the defendants of the Malmédy massacre, put the Dachau trial process in the spotlight.

B. Controversy: Questions of mistreatment at the Malmédy Trial and the Sentence Reduction for Ilse Koch

Two scandals undermined the perceived legitimacy of the Dachau trial process: the reduction of Ilse Koch's sentence from life to four years and the accusation by defendants from the Malmédy trial that they had been tortured for confessions while in US custody. These two scandals were widely covered in the US and German press and 'reinforced growing perceptions within Germany that those convicted at Dachau were victims of a vengeful and unjust trial system'.[526] A 'beast' got a reduced sentence, while 'ordinary soldiers' were tortured for confessions. These scandals put those in charge of the trials on the defensive. The Theatre Judge Advocate Division of the Army's European Command and, beginning in 1949, the US High Commission 'mainly concentrated on ensuring the programme's integrity to avoid additional charges of misconduct and becoming the targets of attacks from critics.'[527] This furthered the pressure for an organized withdrawal from prosecuting

[524] Buscher, *The US War Crimes Trial Programme,* 52.

[525] Ibid., 53.

[526] Jardim, *The Mauthausen Trial,* 208

[527] Buscher, *The United States War Crimes Trial Programme,* 3.

former Nazis and, while defending the trial programme in public, for the quiet implementation of mass clemency for those convicted by American military courts.

1. Allegations of mistreatment from the Malmédy defendants

The Malmédy defendants, the Waffen-SS soldiers of the Sixth Panzer Army accused and convicted of shooting 84 American soldiers who had surrendered during the Battle of the Bulge, alleged mistreatment by American authorities before their trial at Dachau.[528] The Malmédy defendants were not the only Germans in US custody to complain of mistreatment. For example, Colonel-General Gert Naumann, a member of Hitler's general staff published his diary in 1984, which he criticized the supposed mistreatment of German POWs while they were interned at Dachau 1945-1946.[529] He wrote that the internees were pushed and punched, especially when entering the camp and when forced to tour the crematorium, which held pictures of the dead inmates and other atrocities the Americans had discovered there. He felt this was unjust treatment. However, within his diary, he undermined his complaints by admitting that daily life in Dachau was 'downright comfortable', even as he grumbled about the lack of letters and packages allowed through to the inmates.[530] More serious charges of mistreatment were brought by a group of American lawyers on behalf of their clients, the defendants in the Malmédy trial. The complaints included the practice of physical and psychological torture by American interrogators to obtain confessions used to convict the men.

The Malmédy trial ended in July 1946 with 43 of 74 defendants sentenced to death. Upon review, all but 12 death sentences were commuted. Colonel Willis M Everett Jr, the court-appointed US military attorney for the defendants, petitioned early in 1948 for the army to further review the case as his clients had not received a fair trial. Colonel Everett alleged that 'the majority of confessions signed by his clients…had been acquired through the use of physical abuse, mock trials, stool

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[528] Similar POW narratives in Karl Vogel, *M-AA-509: Elf Monate Kommandant eines Internierungslagers* (Memmingen: Salbstverlag, 1951) and Ernst von Salomon, *Der Fragebogen* (Hamburg: Rowohlt, 1951). Also see Antony Beevor, *Ardennes 1944: The Battle of the Bulge* (New York: Viking, 2015).

[529] Gert Naumann, *Besiegt und 'Befreit:' Ein Tagebuch hinter Stacheldraht in Deutschland, 1945-1947* (Leoni: Druffel, 1984)

[530] Quoted in Marcuse, *Legacies of Dachau,* 82.

pigeons, of phoney priests'[531] while the SS-men were detained at Schwabisch Hall from December 1945 to April 1946 for pre-trial investigations. This alleged mistreatment had been mentioned to the court during the trial, when three of the nine defendants who took the stand (out of seventy-four defendants in total) spoke of mistreatment that had forced them into signing their confessions.[532] The court did nothing; its inaction indicating the court members did not believe the accusations merited belief. However, within a year of their conviction, almost every one of the accused 'began submitting affidavits repudiating their former confessions and alleging aggravated duress of all types'.[533] Col Everett used these affidavits in May 1948 when he petitioned the US Supreme Court on behalf of his clients for writs of *habeas corpus*.[534] Col Everett's petition failed, but only narrowly. The justices voted 4-4, which, in US law, left the judgments of the Malmédy military court intact. Nevertheless, the Supreme Court's tied vote prompted Secretary of the Army[535] Kenneth C. Royall, himself a Harvard-educated lawyer, to 'appoint a commission under the leadership of Texas Supreme Court Justice Gordon Simpson to investigate Col Everett's allegations and review 127 other death sentences handed down by the Dachau courts.'[536] The military governor of Germany, General Clay, also investigated the allegations surrounding Malmédy, and ordered an examination of the case by the Administration of Justice Review Board.

The two investigations came to differing conclusions. In September 1948, the Simpson Commission, the board convened by Secretary Royall, submitted its report first. The Simpson report exonerated the methods used by the investigators together with the trial programme as a whole. It concluded that there had been 'no general or

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[531] Jardim, *The Mauthausen Trial,* 207.

[532] United States Senate, *Malmédy Massacre Investigation: Report of the Subcommittee of the Committee on Armed Services* (Washington DC: United States Printing Office, 1949), 4.

[533] Ibid. 4

[534] In US law, if granted, a writ of *habeas corpus* (usually translated to mean 'produce the body') is used by a federal court, such as the Supreme Court, against a state court to determine if a prisoner's detention is lawful and can be used to examine court jurisdiction over the prisoner. In the Malmédy petition, the Supreme Court denied to issue a writ, thus did not examine the case.

[535] The Secretary of the Army replaced the cabinet position of Secretary of War. Royall was the last Secretary of War, serving in that position for two months, before it was converted to the Secretary of the Army.

[536] Jardim, *The Mauthausen Trial,* 207.

systematic use of improper methods to secure prosecution evidence'.[537] However, in a move perhaps undermining its report, it also suggested that all the remaining Malmédy death sentences be commuted. The Administration of Justice report, delivered in February 1949 to General Clay, was much more critical of the army's behaviour. The Administration report stated that violations had taken place including mock trials, in which the prisoners were forced to wear black hoods. This 'at times exceeded the bounds of propriety'.[538] Furthermore interrogators had threatened to harm family members of prisoners. It added that 'undoubtedly in the heat of the moment…interrogators did use some physical force on a recalcitrant suspect'.[539]

In the same month as the administration report was delivered, Judge Edward Van Roden, a member of the Simpson Commission who had originally signed off on its conclusions, claimed, in an article in *The Progressive* with the explosive title 'American Atrocities in Germany', that 'beatings and mock trials were in fact commonplace and that such activities had caused "permanent and irreparable damage" to "the prestige of America and American justice". Military authorities at Dachau, Van Roden insisted, had "abused the powers of victory and prostituted justice to vengeance"'.[540] This article and the Administration report appeared to support Willis M Everett's claim that the Malmédy defendants had been mistreated. In response to the administration report and furor over *The Progressive* article, Secretary Royall and General Clay agreed to a temporary halt of all executions resulting from the American trial programmes (from both NMT and Dachau) and the Senate called for an investigation into the Malmédy investigation and into the American trial programme as a whole.[541]

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[537] Ibid., 207.

[538] Headquarters European Command, 'Final Report of Proceedings of Administration of Justice Review Board', 14 February 1949, General Administration, box 13, Records of United States Army, Europe (RG 549). The United States National Archives and Records Administration, College Park, Maryland, USA.

[539] Ibid.

[540] Jardim, *The Mauthausen Trial,* 208; also see Buscher, *U.S. War Crimes Trial Programme,* 41.

[541] Jardim, *The Mauthausen Trial,* 207.

2. Buchenwald: Ilse Koch Sentence Reduction

In 1948, five review boards set up by the US army under JAG were busy re-examining the sentences given in each trial at the military trials at Dachau (and NMT). The JAG members reviewed the trials and then wrote a report, which after approval eventually was intended for General Clay, recommending reaffirming or reducing each sentence. The boards were lenient towards defendants –the 426 death sentences handed down by American courts were reduced to 298 (representing a 30% reduction). For example, among those who had their sentences reduced were ten members of the *Einstazgruppen*, responsible between them for killing at least two million people.[542] Upon review of the Buchwald 'parent trial', the theatre judge advocate board members recommended the reduction of Ilse Koch's sentence from life in prison to four years on the 'grounds that there was insufficient credible evidence to sustain a life sentence.'[543] General Clay approved all of the reductions, including Koch's.

When Secretary of the Army Kenneth Royall received word about Ilse Koch's sentence reduction, he confidentially asked for a second opinion from another Theatre Judge Advocate General, Thomas H Green. Green was the first outsider to examine the JAG recommendation and General Clay's decision to reduce Koch's sentence. After reviewing the case, Green wrote to Royall stating that in his opinion,

> …the defendant's conviction and a substantial prisoner term [was] justified due to credible proof that Koch participated in the administration of Buchenwald, struck inmates, and repeatedly reported them for punishment. Despite his own feelings that Koch should have served a long sentence, Green

[542] 10 were reduced out of 14 death sentences given to the *Einstazgruppen* defendants. Statistic in Greene, *Justice at Dachau,* 322. Also see the following sources on the *Einstazgruppen*: Helmut Krausnick, and Wilhelm Hans-Heinrich, *Die Truppe des Weltanschauungskrieges. Die Einsatzgruppen der Sicherheitspolizei und des SD 1938–1942* (Stuttgart: Deutsche Verlags-Anstalt, 1981); Knut Stang, Knut, *Kollaboration und Massenmord: Die litauische Hilfspolizei, das Rollkommando Hamann und die Ermordung der litauischen Juden* (Frankfurt am Main: Peter Lang, 1996); Timothy Snyder, *Bloodlands: Europe Between Hitler and Stalin* (New York: Basic Books, 2010); Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945–1958: Atrocity, Law, and History* (Cambridge: Cambridge University Press, 2009); Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (London; New York: Penguin, 1992) and Browning's *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939-March 1942* (London: Heinemann, 2004); Ernst Klee, Willi Dressen, and Volker Riess (eds.) *The Good Old Days: The Holocaust as Seen by Its Perpetrators and Bystanders* (New York: Free Press, 1991)

[543] Quoted in Ibid., 322

> discovered no irregularities in the review process…in the rather surprising reduction of the court's initial punishment.[544]

Both the general public and chief prosecutor Lt Col William Denson were furious. General Clay had appeared to understand that Ilse Koch's sentence reduction would be poorly received by the American public and kept the board review recommendation and his approval confidential for several months.[545] However, three months after the Koch reduction in September 1948, *Stars and Stripes* reported the reduction. There was a 'world-wide storm of angry and disgusted protest'.[546] The press covered the reduction heavily, taking the opportunity to rehash the lurid details of Koch's crimes (including, again incorrectly, the stories of her human skin tattooed gloves and purses and lampshades). *The Harvard Law School Record* wrote:

> The Army on the whole has seemed to be somewhat reticent to make a full and adequate disclosure of the record and other important facts. The press, however, took the initiative. In its entirety, the story had several sensational aspects, all of which made good copy.[547]

Lt Col Denson, now retired to the private sector, found out about the reduction by reading it in the paper. He reacted by launching 'an aggressive campaign in the press. His letter to editors drew praise and support nationwide and was [were] reprinted in dozens of papers across the country'.[548] Lt Col Densen opinioned that, perhaps 'Clay fell into the same pitfall I fell into when I first heard these stories [namely, not believing that anyone could be so cruel]'.[549]

In 1950, in his autobiography, General Clay gave his own explanation of why he chose to approve this particular reduction. In over 500 pages, he mentioned the Ilse Koch trial just once:

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[544] Buscher, *The US War Crimes Trial Programme,* 55; United States Senate, *Conduct of the Ilse Koch War Crime Trial, Hearings before the Investigations subcommittee of the Committee on expenditures in the Executive Departments*, Eightieth Congress, 8-9 December 1948, (Washington DC: Government Printing Office, 1949), 1254.

[545] Buscher, *The US War Crimes Trial Programme,* 54; Mendelsohn, 'War Crimes Trials and Clemency in Germany and Japan', Wolfe, (ed.) *Americans as Proconsuls*, 247-248.

[546] Greene, *Justice at Dachau,* 322; *Los Angeles Times,* 'Opinions of Other Newspapers: Ilse Koch and the Realities', 3 November 1948, A4.

[547] *Harvard Law School Record,* 1 December 1948, 3.

[548] Greene, *Justice at Dachau,* 323.

[549] Quoted in Ibid., 322.

> …as I examined the record [of the Buchenwald 'parent trial'] I could not find her a major participant in the crimes of Buchenwald. A sordid, disreputable character, she had delighted in flaunting her sex, emphasized by tight sweaters and short skirts, before the long-confined male prisoners, and had developed their bitter hatred. Nevertheless these were not offenses for which she was being tried and so I reduced her sentence, expecting the reaction which came. Perhaps I erred in judgement but no one can share the responsibility of a reviewing officer. Later the Senate committee which unanimously criticised this action heard witnesses who gave testimony not contained in the record before me.[550] I could only take action on that record.[551]

General Clay was incorrect about the reasons for Ilse Koch's conviction – she was not convicted to life imprisonment by the court for wearing short skirts, although inmates did testify to this detail. She was convicted for beating inmates, and ordering others to beaten to death. Still, General Clay was angered at being 'charged with deliberate softness in war crimes' as he 'had approved the death sentences of more than 200 war criminals'.[552] Despite General Clay's protests, the Ilse Koch sentence reduction caused enough of furore in the American press, for Senate to warrant the creation of a subcommittee to inspect it. Furthermore, the Malmédy accusations of mistreatment also received thorough inspection by the US Senate.

C. Congressional Review of Malmédy and Koch Cases: Judgement on the Dachau Trial Programme

1. The Koch Review (December 1948)

While the Malmédy Review, held four months later and focusing largely on pretrial interrogation methods, resulted in a generally positive judgement of the procedure of the trials at Dachau, the Koch Review resulted in a critical judgement on the review process after the trials. The majority of the Koch congressional review

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[550] The congressional subcommittee did call three inmate witnesses, but these were the same witnesses that were at the original 'parent trial' and the three men gave similar testimony in both instances.

[551] Lucius D Clay, *Decision in Germany* (New York: Doubleday & Company, Inc., 1950), 254.

[552] Ibid., 254.

focused on the Buchenwald trial and the subsequent Army review that led to Koch's sentence reduction. The Senate subcommittee had no authority to change Koch's sentence or even for the army to change its practices. It could simply make recommendations. The subcommittee described its *raison d'etre* as 'to analyse the judicial processes involved in the conduct of this trial by the United States military government authorities to make certain that, in the event flaws were discovered in the system, these deficiencies would be promptly brought to the attention of the appropriate authority'.[553]

Congress empowered a subcommittee to investigate the sentence reduction of Ilse Koch. The subcommittee was chaired by Senator Homer Ferguson (MI); other members were Senator Herbert O'Conor, subcommittee Chief Counsel William Rogers, and assistant chief counsel Francis Flannagan. All the major players in the Dachau trial programme were called as witnesses before the subcommittee: along with Lt Col Denson, the chief prosecutor, Army Secretary Kenneth Royall, was called, as was Emil Kiel, the president of the court for the Buchenwald 'parent trial'; the chief defence counsel at the Buchenwald 'parent trial', Carl Whitney; Lt Col Clio Straight, now Chief of the War Crimes Branch of Judge Advocate General (JAG); and Col Edward Young, chief of the Litigation Branch of the War Crimes Branch of JAG. The subcommittee met in executive (closed) session, not in public hearings, although both the subcommittee's report and transcripts from the hearing were made available to the press and public just days after the hearings ended.[554]

The first man interviewed by the subcommittee was Secretary of the Army Kenneth Royall; Secretary Royall was also the man in charge of investigating the charge of torture of the Malmédy trial defendants; Royall, who would be called to testify four months later in the Malmédy investigation, was spending quite a bit of time in front of Congressional subcommittees defending the Dachau trial programme. Senator Ferguson began with preliminary questions about the organization and operation of the war crimes military courts at Dachau. This was followed by a discussion of the likelihood of repealing the reduction of Koch's sentence. Royall

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[553] United States Senate, *Conduct of the Ilse Koch War Crimes Trial: Interim Report of the Investigations Subcommittee of the Committee on Expenditures in the Executive Departments*, (Washington DC: United States Government Printing Office, 1948), 2.

[554] While the twenty-six page report was printed and published immediately, it took another few months to print and publish the transcripts of the hearings in full through the US government printing office.

correctly reported that once General Clay had approved the reduction, there was no further recourse. The reduction would stand, regardless of the Senate subcommittee's findings.

Colonel Young, who was chief of the litigation department in the War Crimes section of JAG, was asked to explain to the subcommittee how the reduction of Koch's sentence had came about. Col Young placed responsibility squarely on his superior Colonel Straight, as he was the first to recommend the reduction of the Koch sentence. Colonel Straight, in turn, testified that he based his recommendation on a short summation of evidence, focusing mainly on the 'credibility' of the witnesses, written by one Col James L Harbaugh— the last man to read the entire court record (over 9000 printed pages). After him, only a short summation of the evidence, followed by a recommendation, was presented up the chain of command. Nowhere in Young or Harbaugh's reviews did the men indicate their reasons for why they, as William Rogers, the law member of the subcommittee put it, 'so seriously disagreed with the original court.'[555] As Col. Straight explained to the subcommittee, '…I wish to state that there was no legal or administrative regulation prescribing what the contents of my reviews and recommendations were to be. They could have been summary in nature, consisting of essentially a conclusion only'.[556]

The following is just one example of how the subcommittee questioned Col Young as to how a reviewing officer could possibly reduce Koch's sentence by so many years:

> Senator Ferguson: Is it not fundamental, that courts generally in America rely upon: that if they hear and see the witnesses, they are the judges of the fact?...
>
> Mr Rogers: What occurs, I think, to the committee, and certainly occurs to me, is: If any of these things are true or substantially true, enough to justify the judgement, how you could possibly reduce the sentence to four years.
>
> Colonel Young: I would try to explain that. But I am not the reviewing officer…they tried thirty people under a common charge of joint atrocity or conspiracy…Now these people were all found guilty of having participated in

[555] United States Senate, *Conduct of the Ilse Koch War Crime Trial, Hearings before the Investigations subcommittee of the Committee on expenditures in the Executive Departments*, United States Senate, Eightieth Congress, 8-9 December 1948, (Washington DC: Government Printing Office, 1949), 1010

[556] Quoted in United States Senate*, Ilse Koch Interim Report,* 5.

> the "common design"; but as you can see, and this is not indicated in this review, that if they had a cook who merely participated by cooking meals for a week, if he was held guilty, he still might be a participant; but his degree of guilty was not great. So, you proportion sentences based on the degree of guilt, which, in turn, is based on the degree of participation. Now, they say in this review of the record that this woman did beat somebody. Well, you will have to go to the record to see whether that beating was a mere slapping, and I think probably, I don't know, I have not seen the record, it will show that this was not a serious beating…I'm just saying they have to apportion…
>
> Senator O'Conor: Except it is inherent in the sentence.[557]

The subcommittee believed that the Court's original sentence of life imprisonment for Koch must have reflected its belief that her crimes were serious.

The congressmen were perhaps most shocked by the lack of written records left by the court and review process. The reviewing authorities did not document the reasons for their reductions.

> Senator Rogers: Could the committee send us any records that you have available for us, or if you do not have them, could you send for them, any records which would show the justification for this [the reduction of Koch's sentence]?
>
> Col Young: …I will ask for them, but I'm almost convinced that you are not going to get any, that there was no other official record then the review mentioned…I don't think that there is any official record that was made at the time.
>
> Senator O'Conor: That is very surprising…All of us who ever had any part in trials know full well how undependable memory is, how treacherous it is, and where you have undertaken such a serious thing as this, and for your own protection you should have it in writing…[558]

The lack of written judgements was normal practice for both the original court and reviewing authorities of the Dachau trials. The IMT and NMT both issued written rulings from its judges. While no clear explanation was given regarding the decision to forgo explanations of court decisions, one can hypothesise that the emphasis on

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[557] United States Senate*, Ilse Koch Hearings,* 1011-1012.

[558] Ibid., 1013-1014.

speed as paramount to the Dachau trial programme to get through many hundreds of defendants had led to this practice. Still, it remained hard to understand, as written explanation of court judgements was traditional for all American courts, both civilian and military. Written explanations of why certain sentences were passed (or why they were reduced) would have allowed for more uniform judgements across the Dachau trials. They would have also allowed the court to explain why certain crimes deserved a specific punishment; this in turn could have served as precedent for awarding the same sentence to the same sorts of crimes.

Like the press, the committee focused (rather undue) energy on the question of whether or not Koch used the tattooed skins of inmates for gloves and lampshades. Considering the charge was disproved in the trial, the Senate Committee showed great interest in the skins. The congressmen peppered Denson with questions, seemingly fascinated, about Koch's alleged use of tattooed human skins: Did she use it? Did you have exhibits of the skins? Where did you find the skins? How large were the pieces? Did Densen have evidence of Koch's possession of skin from inmates she personally came into contact with? For example:

> Senator Ferguson: Did you have evidence that she did use human skin?
>
> Col Densen: I had evidence sir, to the effect that the persons who had entered her room, her bedroom, had seen articles of human skin in her bedroom.
>
> Senator Ferguson: Did you have any exhibits of the skin?
>
> Col Densen: That was in her bedroom? We had no exhibits of skin that was seen in her bedroom. We had exhibits of human skin, the same skin.
>
> Senator Ferguson: Where did you find these exhibits?
>
> Col Densen: Those exhibits, sir, had been found in various offices and homes throughout the camp when it was overrun by our troops. The American war crimes teams that moved in directly on the heels of the combat soldiers, collected this evidence, and they had a stack about 2 feet high.
>
> Senator Ferguson: How large were the pieces?
>
> Col Densen: The size of a man's chest, one of them was.
>
> Senator O'Coner: Did you have evidence of her possession of human skin which compared with individuals that had been known in the flesh and who she had contact with?
>
> Col Densen: Jean Collette, I think was the name of either a Belgian or a Frenchman who was in inmate there, this man. Jean Collette had a tattoo of, I

> think a schooner or galleon on his chest, and he was working on a detail and Ilse passed by. I am not sure whether someone saw her note his number or not, but anyway he disappeared. That was at the close of the day, He was never seen again. The tattoo was next seen in the pathological department where it was being tanned and it was later seen in her bedroom.
>
> Senator Ferguson: Who saw it in her bedroom?
>
> Col Densen: A man by the name of Froloess.
>
> Senator Ferguson: A prisoner?
>
> Col Densen: Yes, sir. A German prisoner.
>
> Senator O'Coner: Did you have several instances somewhat similar to that where the particular tattoo was used?
>
> Col Densen: That was the only one of that nature at all.[559]

Col Denson seemed wearied by the continued intense focus of the Senators (and, perhaps the press and public at large) finally spoke up:

> Let me say, in all sincerity, I did not feel that this skin business, because of the tenuousness of the proof, was of so much importance. It merely showed the background of what went on and what took place there. The gravamen of her action was in beating prisoners with her own hand, and causing them to be beaten so that they died. That was the matter that was really the basis for that sentence, I am sure.'[560]

Before the congressmen, Col Densen contended that he could have produced more witnesses against Koch, who could have testified further to her beatings and, perhaps even given more evidence about the tattooed skins, but he chose only the most reliable witnesses, and for expediency's sake, only witnesses who could testify against more than one defendant. He concluded his testimony before the subcommittee with a comment on Koch's guilty and her 'gratuitous' power:

> Mr Rogers: Mr Densen, based on your knowledge of this case, would you say that she [Koch] was less culpable than the other defendants?

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[559] Ibid., 1024-1025.

[560] Ibid., 1025.

> Col Densen: I think she was more culpable because this was gratuitous on her part. There was no reason in the world for her exercising authority that she exercised. So to my mind, she was more culpable.[561]

After Densen, several witnesses from the original Buchenwald trial (Dr Kurt Sitte, now a professor of physics at Syracuse University, Dr Paul Heller, and Dr Petr Zenkl, the former Deputy Prime Minister of Czechoslovakia) were called to give their testimony again – describing conditions and crimes at Buchenwald, especially pertaining to Ilse Koch – to the Senate subcommittee. This part of the subcommittee hearings was a bit like a trial *de novo* for Koch. Certainly, the senators were asking questions that they could have read about in the original trial transcript. They questioned the three men about their time at Buchenwald, asking them to give evidence about Ilse Koch's activities. The subcommittee also questioned Brigadier-General Emil Charles Kiel, of United States Air Force, who had led the Buchenwald Court. The General gave surprisingly vague answers about his time on the court, claiming that he had trouble remembering many details of the trial or debate in deciding the original verdicts. He mostly answered questions with 'yes, sir' and 'no, sir' and provided disappointingly little insight into the court's decision-making process.

Having heard the witnesses from the Buchenwald trial, the subcommittee turned with renewed criticism to the next witness, Col J. I. Harbaugh, the judge advocate on General Clay's staff, who agreed with recommendations from Col Straights office, and advocated to the General that Ilse Koch's sentence be reduced:

> Mr Rogers: In this case, Colonel, nobody states any reasons [for Koch's sentence reduction]. That is what the committee can't figure out…
>
> Col Harbaugh: The reasons were in our minds. Unfortunately, they weren't put down. But under Colonel Straight's review I believe that would he called the sufficiency of the evidence represented what he believed to be supported by credible evidence.
>
> Senator Ferguson: Then he passed on the credibility?
>
> Col Harbaugh: Yes, sir.

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[561] Ibid., 1027.

> Senator Ferguson: Now, you show us the rule that allows a reviewing court to pass on the credibility of the evidence.
>
> Col Harbaugh: We did it uniformly.
>
> Senator Ferguson: Show us the rule.
>
> Col Harbaugh: It was a rule of procedure for our courts.
>
> Senator Ferguson: Show us the rule of procedure that allows that to be done….Are you a lawyer?
>
> Col Harbaugh: Yes, sir.
>
> Senator Ferguson: Have you ever known appellate courts to do that?
>
> Col Harbaugh: No, sir. But there were different kinds of trials.
>
> Senator Ferguson: That is what I want. If they are difference, why are they not in writing? Why would not that thing be in writing? It is not a common law procedure. It is not that a lawyer ever learned anything like that in a law school. Now, how would he ever get the idea that he had a right to pass on the credibility?[562]

Already perturbed by these revelations, when Col Harbaugh revealed that the post-trial reviews took into account post trial petitions (i.e. evidence that the original court would not have seen), Senator Ferguson exploded:

> Senator Ferguson: So they [the review board] had different evidence than the court had?
>
> Col Harbaugh: They had more evidence then the court had.
>
> Senator Ferguson: Different?
>
> Col Harbaugh: Yes, sir.
>
> Senator Ferguson: Then they considered that and on that evidence they decided that some of the witnesses were not telling the truth?
>
> Col Harbaugh: Yes, sir.
>
> Senator Ferguson: And for that reason they disregarded certain testimony and that caused them to reduce the sentence?
>
> Col Harbaugh: Yes sir.
>
> Senator Ferguson: And you followed that procedure as a lawyer?
>
> Col Harbaugh: Yes, sir.

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[562] Ibid., 1098.

> Senator Ferguson: Do you know of any procedure in America in our administration of justice that allows the appellate court to consider evidence that was not before the trial court in the reduction of a sentence?
>
> Col Harbaugh: No, sir.
>
> Senator Ferguson: Is that in conformity of our ideas of justice?...Were we not trying over there to do justice in accordance with American principles of justice?[563]

Essentially, the review process allowed a few men to substitute their judgements for that of the court. At its inception, the American war crimes trial programme at NMT and Dachau (and the IMT, for that matter) had no appellate plan. After an America tribunal sentenced defendants, there was no higher court to rehear arguments or petitions. The only recourse the defendants and their lawyers had was to appeal to individual men in the War Crimes Department and the Military Government. These men, Col Straight and General Clay, took the place of an appellate court. Administrative decision-making, much more susceptible to political pressure, filled in for a hierarchical justice system of appellate courts.

The subcommittee saw no justification for Ilse Koch's reduction of sentence. The senators 'particularly faulted the relationship between the charges of the indictment against Koch and the review practices'.[564] The subcommittee believed the review practice gave accused and defence lawyers an unfair advantage. Furthermore, the review process looked at individual crimes and seemed to overlook the original charge of participation in the 'common design' of the camp, which was proved in court. The subcommittee felt 'the prosecutor would undoubtedly have put greater emphasis on specific crimes committed by Koch, had he known that this would be crucial during the review stage'.[565] The subcommittee called for better cooperation between the prosecutor and the review authorities. *The Washington Post* published this summary of the Senate hearings and subcommittee report:

> Many people who were both amazed and shocked at the reduction of the war crimes sentence imposed on the notorious Ilse Koch will be heartened by the Senate investigating committee report taking sharp issue with the Army. The

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[563] Ibid., 1104.

[564] Buscher, *The US War Crimes Trial Programme,* 55.

[565] Ibid., 55; United States Senate, *Ilse Koch Hearings,* 1104.

> Ferguson committee has concluded after a painstaking analysis of the evidence that Army reviewing authorities were completely unjustified in commuting her imprisonment from life to four years. The committee confirms the picture of Frau Koch as a degraded, sadistic specimen of humanity whose whim caused the death of many concentration camp inmates and who took a fancy to objects d'art made of human skin….
>
> Perhaps the most damning factor brought to light by the Ferguson committee was the shoddy fashion in which the verdict was followed up. Ilse Koch was tried, not for specific crimes, but for the larger offense of participating in the Nazi extermination scheme. But the tack taken by reviewing authorities was that each specific act should have been analysed. This was completely at variance with the scope of the trial. The chief prosecutor in the case, William D. Denson, confirmed in a letter published in the newspaper last September that plenty of evidence was available to connect her with individual crimes. And the committee notes that many of these would have justified a sentence of life imprisonment.[566]

In the end, the subcommittee could only offer a strong rebuke and recommendations for 'next time'. The Americans could not retry Ilse Koch for the same crimes without risking 'double jeopardy'.[567] Instead General Clay urged the German authorities to try Ilse Koch for crimes against German victims at Buchenwald, promising American cooperation. Clay 'urged the minister president of Bavaria to send a representative to work out charges against Koch with JAG's war crime branch personnel, centring on crimes against German citizens'.[568] Upon her release from American custody in 1949, Ilse Koch was rearrested by West German authorities, tried and convicted for crimes against German and Austrian citizens at Buchenwald from 27 November 1950 until 15 January 1951, and sentenced to life imprisonment. Ilse Koch committed suicide in her prison cell in September 1967.[569]

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[566] *The Washington Post,* 'Beast of Buchenwald,' 28 December 1948, 10.

[567] Trying a defendant for the same crime again after a legitimate conviction.

[568] Buscher, *The US War Crimes Trials in Germany,* 56.

[569] Die Zeit, 'Die "Kommandeuse von Buchenwald" erhängte sich in ihrer Zuchthauszelle' 8 September 1967.

2. The Malmédy Review (April-June and September 1949)

Four months after the Koch Senate committee closed, the Senate review of the Malmédy trial opened. It had been called in response to the Simpson Committee report and the Administration report.[570] The subcommittee investigation hearings opened in March 1949, chaired by Senator Raymond E Baldwin, and included members Senator Estes Kefauver and Senator Lester C Hunt. To placate the more radical critics of the army, the subcommittee invited Senator Joseph McCarthy, an extreme decrier of the army, to join the committee as a visiting member. Senator McCarthy dominated the first two months of the hearings with his trademark inquisitorial style.[571] After Senator McCarthy dramatically withdrew from the committee in May, accusing it of 'whitewashing the Army's…Gestapo and OGPU [the Soviet Union secret police] tactics',[572] the hearings continued in a more orderly fashion. By its own tally, the Malmédy subcommittee heard 108 witnesses, including defence attorneys, investigating officers, members of the court, reviewing officers, and even religious leaders, over a period of several months before issuing its final report.[573]

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[570] Jardim, *The Mauthausen Trial,* 207.

[571] Buscher, *The US War Crimes Trial Programme in Germany,* 40. From 1950-1954, Senator Joseph McCarthy (WI) would become a household name as he hunted for communist subversives and Soviet spies in the federal government and army through brutal, reckless, unfair, and highly-publicized hearings in Congress, as Chairman of the Permanent Subcommittee of Investigations. His bullying and blackmailing would lead to Senator Lester C Hunt, his fellow committee member in the Malmédy Investigation, committing suicide in 1954. After the televised Army-McCarthy hearings of April-June 1954, which revealed his unethical, inflammatory methods to the American public at large, McCarthy was censured by the Senate and faded from political importance. He left the political legacy of 'McCarthyism', a term used now in United States politics to describe unsubstantiated accusations and demagogic attacks on the character or patriotism of a political opponent. A huge amount of literature exists about Joseph McCarthy and McCarthyism; for three useful overviews see David Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (Oxford: Oxford University Press, 2005); Robert Griffith, *The Politics of Fear: Joseph R. McCarthy and the Senate* (Lexington: University of Kentucky Press, 1970); and Arthur Herman, *Joseph McCarthy: Reexamining the Life and Legacy of America's Most Hated Senator* (Free Press, 1999).

[572] Buscher, *The US War Crimes Trial Programme in Germany,* 42. For an example of Germany press reaction (largely positive) to McCarthy's methods see *Die Zeit*, 'Senator McCarthey [sic] Klagt an', 2 June 1949; for positive reaction to the investigation, as in agreeing that the Dachau trials needed to be investigated for wring-doing, see *Die Ziet*, 'Tod in Raten', 4 November 1948.

[573] United States Senate, *Malmédy Massacre Investigation: Report of the Subcommittee of the Committee on Armed Services* (Washington DC: United States Printing Office, 1949), 1.

The Malmédy subcommittee's final report was published on 13 October 1949. The report was largely a positive assessment of the trial programme and the conduct of the army. It serves as excellent overview of some of the controversial issues that arose in the American trial programme at Dachau; namely the charges of mistreatment during the pre-trial investigations as well as aspects of the trial and review procedures. The practices of the pretrial investigations were compared to standard American practices of investigation and prisoner treatment.

As discussed above, the main impetus for the investigation by the subcommittee was the accusations of mistreatment and duress of the accused by the investigating officers and the prosecution team, made by Colonel Everett and documented in the Administration Review. The alleged abuse took place while the men were concentration for pre-trial investigation and interrogation at Schwäbisch Hall (The men were transferred to Dachau in May 1946 and held at Dachau during their trial). The twelve man investigation team had separate cells available to them to hold the prisoners they were interrogating – the committee found no difference between these cells and other cells in the prison, except they had two doors so were more secure. Prisoners alleged that they were kept in special cells for weeks on end without food. The investigation team said they were kept for 2 or 3 days at a time and with full rations. The committee sided with the investigation team – pointing out; that there are only five such cells and several hundred suspects were screened during a period of 4 months'[574] –it was not possible in that time frame, with that number of prisoners for the men to be confided for very long. The subcommittee reported that 'there is no doubt that many of the suspects in the Malmédy case were kept in separate cells for extended periods of time, but [the subcommittee] has no criticism or complaint of this normal practice'.[575] Furthermore, the suspects were given water and, with 'the exception of one occasion' (when the men were punished for communicating with each other and put on bread and water ration for a few days), the defendants were fed 'three adequate meals a day'.[576]

The Malmédy defendants and their lawyers claimed that 'tricks' had been used to coerce confessions. These 'tricks' were relatively standard in American criminal

[574] Ibid., 7.

[575] Ibid., 8.

[576] Ibid., 9.

law investigations, such as the 'pretence of having information from other accused implicating the suspect being interrogated'.[577] The subcommittee wrote in their final report that they felt 'they cannot condemn them since they represent the usual and accepted methods of criminal investigations'.[578] The committee addressed some of the specific tricks such as the use of mock trials, in which a table covered in black cloth with a crucifix and two candles in a dark room was the faux court, to elicit confessions. They found that in twelve cases out of several hundred, mock trials were used, although the defendants were never told specifically that they were on trial – they were just led to believe so for a short while. When 'these mock trials had reached a certain point they would be disbanded and the prisoner taken back to his cell, after which the person who had posed as his friend would attempt to persuade the suspect to give a statement'.[579] There was not any evidence of 'any physical brutality in connection with the mock trials themselves'.[580] The subcommittee condemned the practice, but did 'understand' that this practice was based on the practice of pre-trial examination by a judge in Germany.

The committee also investigated other accusations of the use of 'tricks' including hoods, fake priests, and fake hangings. While it is 'an undisputed fact that hoods were placed over the heads of the suspects when they were moved from their various cells and back and forth around the prisoners, 'in view of the previous difficulties incurred in this case when no security was used….the subcommittee does not condemn the use of hoods'.[581] The subcommittee rejected the charge of the use of fake priests outright, reporting: 'It is considered most unfortunate that many prominent religious people have been misled by the use of uncorroborated statements…and apparently accepted the allegation as being true.' [582] The subcommittee also rejected the alleged use of fake hangings; 'the subcommittee feels in the absence of competent evidence to support allegations concerning hanging that, in fact, they never happened'. [583] The army investigators had used spies and

[577] Ibid., 8.

[578] Ibid,, 8.

[579] Ibid., 8.

[580] Ibid., 7-8.

[581] Ibid., 10.

[582] Ibid., 16.

[583] Ibid., 20.

informants to secure evidence, which the subcommittee approved of, as 'traditionally, the use of stool pigeons has been practiced by our American prosecuting authorities and is a recognized practice in criminal investigations'.[584]

The second half of the subcommittee report concerns the trial and the review procedures. The subcommittee, by its own admission, 'was keenly interested in the various reviews and investigations that were made by the Army of the Malmédy case',[585] and the apparent effort that was made to make certain that no accused suffered because of procedural or pre-trial errors. As in all war-crimes cases, the findings and sentences of the court had to be reviewed by the staff judge advocate. Because the Malmédy trial followed the same procedure and same review process as all the courts at Dachau, particularly the concentration camp trials, the subcommittee report served a Senate review of the entire trial process.

Unlike the Koch subcommittee, the Malmédy committee accepted outright that the Dachau trials followed their own unique set of rules:

> The rules of procedure under which this case was tried were not those that are used by Anglo-Saxon nations in regularly constituted military or civilian courts. In attempt to evaluate the manner in which the court was conducted, the subcommittee soon found that it was impossible to do so until this point was clearly understood.[586]

The Malmédy subcommittee offered no rebuke of these unique rules of procedure in general. However, the defence team had made a series of accusations that the trial procedure at Dachau was inherently unfair. For example the defence complained that they were not given adequate defence time as they had 74 accused men to defend and these defendants were only made available to the defence team on 17 and 18 April, and the trial began on 16 May. The subcommittee wrote that 'due to the limited time available, the defence was considerably handicapped in preparing its case for trial. The subcommittee does not believe that this seriously affected the outcome of the trial'. [587] While dismissing this complaint with, the Malmédy subcommittee investigated in detail the following two charges: that the mass trial was a

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[584] Ibid., 18. A 'stool pigeon' is a police informant.

[585] Ibid., 26.

[586] Ibid., 20.

[587] Ibid., 23.

problematic/illegal format and that the defence team had not adequately representing its clients by not allowing them to testify in court in their own defence.

One of the more controversial aspects of the Dachau tribunal programme was the use of mass trials. The major positive aspect of mass trial, indeed its *raison d'être*, was speed. In the first day of the Malmédy trial, the defence counsellors asked the court for a motion of severance because a mass trial would make it difficult to defend each defendant fully. The court denied this motion. Furthermore, the War Crimes Review Board upon examination stated that, 'it did not appear that the denial of the motion resulted in an injustice to any of the accused to such a degree as would warrant a new trial'.[588] The Malmédy subcommittee commented that it did 'not feel that it has the authority to serve as an appellate court to judge the ruling in this particular case'.[589] But the committee did go on in its report to make suggestions for 'future trials of this kind':[590]

> When so many accused, of varying ranks, are being tried together on a single charge, there must be some conflict of interest between the superiors and the subordinates. On the other hand, it is recognized that the scarcity of officers and the time elements that are involved in matters of this kind, made it extremely difficult to conduct large numbers of trials for separate defendants.[591]

The subcommittee went on to make a garbled suggestion for a 'basic rule [to] govern cases of this kind' suggesting that 'where there is more than one defendant and it appears that their joint indictment and trial will result in a conflict of interest to the extent that an individual defendant or group of defendants will be so seriously prejudiced as to prevent a fair and just trial, they should be indicted and tied separately or appropriate severances granted.'[592] This hardly clarified matters, but it is the final word the report had on the subject.

The committee spent considerable time commenting on 'one point which was developed during the course of the subcommittee's investigation, which is believed to

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[588] Quoted in Ibid., 23.

[589] Ibid., 23.

[590] Ibid., 23.

[591] Ibid., 23.

[592] Ibid., 23-24.

be of great importance in this case'— the failure of the accused to take the stand on their own behalf.

> …it appears that it took considerable persuasion and argument on the part of certain of the American defence counsel to persuade the accused not to take the stand. On the surface, that appears to be most unusual. It is the opinion of the subcommittee that it is an inherent right of an accused to take he stand in his own defence…[593]

Because the defendants claimed they had been mistreated, the committee pointed out that the defendants should have taken the stand and testified to their ill treatment in court.

> It would seem entirely likely that, had these statements been proven at the time of the trial to the satisfaction of the court and reviewing authorities, they might have served as the basis for a different decision in this case. Therefore, the subcommittee is of the opinion that the defence counsel in this case either did not believe the stories of the defendants, of which they apparently had knowledge, concerning physical mistreatment, or that they erred grievously in not introducing such testimony into the record.
>
> It is difficult for the subcommittee to reconcile the fact that this was not done. And the apparent acceptance and support of the various members of the defence counsel now give to the affidavits submitted some 16 months later by the defendants in this case.[594]

The committee found the defendants', and their lawyers', claims of maltreatment questionable because the men did not testify in court at the time to this mistreatment. Whether their lawyers, who encouraged them not to take the stand, misrepresented the Malmédy defendants, or if the Malmédy men were opportunistic after the trial with their complaints of mistreatment, the committee did not directly comment upon. But it can be assumed that the subcommittee members did not believe the defendants' accusations of torture because their report offered no strong condemnation of misrepresentation by army lawyers.

It is worth noting that throughout the subcommittee's report there a number of assumptions made about all SS men, which resulted in a restrained bias against them

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[593] Ibid., 25.

[594] Ibid., 25-26.

throughout the report. In particular, some of the accusations made by the Malmédy men were dismissed because the accused were 'hardened, experienced, members of the SS who had been through many campaigns and were used to worse procedure'.[595] An example is found in the subcommittee's response to the Malmédy defendant's allegations of (1) beatings, (2) threatening their family members, and (3) lack of access to medical treatment. The most serious charge made by the Malmédy defendants was that 'they were beaten severely and sadistically, not only by guards moving them around the prisons, but by the staff of the war crimes investigating team, for the purpose of securing confessions'.[596] This was the accusation most often reported by defendants, their advocates, and in the press. The subcommittee investigated this charge with great interest and found that only four men had been beaten and those beatings were by guards when transporting the prisoners, not by investigators to secure confessions. The most complete evidence supporting the beatings was given in an affidavit by a prisoner named Dietrich Schnell, whom the subcommittee questioned. The court believed that Schnell was lying in his originally affidavit because he 'changed his story in substantial detail'[597] when questioned by the court. The subcommittee report, the court took the time to described Schnell as 'an extremely intelligent former Nazi paratrooper…a *Kreisleiter* in the Nazi Party…one of the bulwarks of the Nazi party…[who] literally had life-and-death authority over the people'.[598] Perhaps part of the reason the subcommittee did not believe Schnell's evidence of beatings stemmed from fact that he was a former Nazi party functionary. Because of his 'extreme intelligence' the senators more easily believed, as the subcommittee reported, 'his entire story indicated that it had been carefully prepared and rehearsed'.[599] In their report the subcommittee wrote it was 'convinced that Schnell, because of his Nazi affiliations, was a most interested witness. …the subcommittee feels it should give little credence to the testimony of Schnell'.[600] In the end, the subcommittee was 'convinced that the confessions made by the prisoners,

[595] Ibid., 19.

[596] Ibid., 10.

[597] Ibid., 12.

[598] Ibid., 12.

[599] Ibid., 13.

[600] Ibid., 13-14.

and the evidence submitted at the trial were not secured through physical mistreatment of the accused'.[601]

The subcommittee heard accusations that investigators had made threats against the accused's family members and that the men had been denied proper medical treatment. While the subcommittee believed that threats had been made against the men's families if they refused to confess, the subcommittee simply noted that this was regrettable. Moreover the subcommittee did not believe these threats invalidated the men's confessions: 'It is questionable as to the effect such statements would have on the type of individual under interrogation, but it is hard to believe that this by itself would make a man perjure himself to the point of making a false confession and bearing false witness against his comrades'.[602] In their affidavits many men alleged they were denied adequate medical facilities and treatment. However, there was an American doctor and staff at Schwabisch Hall and these army members gave 'clear, professional, and convincing'[603] testimony to the subcommittee that medical treatment was received by all Malmédy subjects. The committee noted that it believed these American medical staff over the German civilian dentists who claimed he had treated men with their teeth knocked out from beatings.

In general the subcommittee found little to fault in the investigation methods and army trial. The subcommittee members were defensive of the army and, noticeably, were keenly aware that the attacks on the army using the Malmédy claims were harm to its reputation. The subcommittee report concluded its report with a warning that there was more at stake then the Army's conduct of the Malmédy trial:

> "Attacks on the war-crimes trials in general and the Malmédy massacre case in particular" were meant to revive German nationalism and to cast doubt upon the US occupation of Germany as a whole…the report cited evidence of the existence of groups in Germany seeking to have the United States withdraw its troops from Germany for two reasons: to pass a general amnesty for former Nazis convicted of war crimes and to establish close relations with the Soviet Union. The protests against the Malmédy trial were part of this conspiracy, the

[601] Ibid., 16.

[602] Ibid., 17.

[603] Ibid., 17.

> report claimed, and were intended to exploit the controversy's potential to damage the image and reputation of the United States.[604]

In this way, current political concerns about the Soviet Union entered into the review of the Malmédy process. The subcommittee was clearly concerned about the effects of criticism of the army.

D. Conclusion

Because clemency and sentence modification effectively substituted for appellate procedure,[605] a handful of men controlled the fate of the men (and woman) sentenced at Dachau. Some mistakes were made, with Koch's reduction and the Malmédy accusations garnering press attention, and the US Senate felt it was its duty to investigate the trial programme and its review process. The results were mixed with a generally positive (anti-German) report on the Malmédy trial, contrasted with a negative judgement in the Koch report on the review process after the trials. In his autobiography, General Clay wrote about the impact of Koch and Malmédy controversies on perceptions of the trial programme at Dachau:

> I have been asked if the Ilse Koch and Malmédy charges discredited our war trials in Germany. It is true that they were prime subjects for Communist propaganda. On the other hand, the full discussions in our press and radio and the obvious interest of the American people in justice and fair play rather impressed the German population. At least they learned that an official representing the United States must exercise his responsibilities in the bright light of public discussion. This was another and valuable lesson in democracy.[606]

One newspaper, at the time, agreed and opined:

> What comes of it is that Ilse Koch is, as Gen Clay said, "a strange, disgraced character" who was happy in the atmosphere of sadism and murder and who therefore may have been a murderess many times over, but that Mr Denson made no such case. He did show that she had beaten a prisoner. This being the fact, had reviewing authorities allowed the sentence to stand, they would have

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[604] Buscher, *The US War Crimes Trial Programme,* 42.

[605] Ibid., 160.

[606] Clay, *Decision in Germany*, 254-255.

> been accomplices in conviction by hearsay, which would have been borrowing the morals of the very kind of people we are trying. By all signs, American justice did not fail in this matter; it prevailed over a strong temptation to take a more popular course.[607]

Despite these 'valuable lessons', increasingly 'the war crimes trial programme was perceived as a hindrance to the reestablishment of a stable and democratic German state and to securing of German goodwill in the wake of the growing tensions between the US and the Soviet Union'.[608] After 1949, the US clemency programme picked up pace as General Clay was replaced as military governor by the first American High Commissioner for Occupied Germany, John J McCloy (served 21 September 1949 – 1 August 1952). The Army's clemency programme became the War Crimes Modification Board. The War Crimes Modification Board considered more then just the trial record when reviewing defendant's sentencing; a defendant's membership and rank, the nature of the defendant's crimes, mitigating circumstances, the original sentence and the severity of the sentence compared to other accused of the same offense, and finally, character references and the defendant's conduct in prison all became possible reasons for sentence reduction. The United States Army implemented 'good conduct time' (sentence reduction given to prisoners who maintain good behaviour while imprisoned) as 'the British had recently increased the "good conduct time" allowance for war criminals imprisoned at Werl to ten days a month'.[609] In January 1951, McCloy announced sweeping clemency decisions; as one scholar argued, 'the purely political desire to dispose of the war crimes programme in order to set the stage for German sovereignty and rearmament replaced the legal concerns [of early sentence modifications]'.[610] McCloy reduced the sentences of 78 of the 87 Nuremberg defendants held in Landsberg. 'The German industrialists, who had faced the Nuremberg tribunals in the Flick, I.G. Farben and Krupp trials, benefited the most'.[611] General McCloy did let stand 5 of the remaining 15 death sentences; 'The

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[607] *Los Angeles Times,* 'Opinions of Other Newspapers: Ilse Koch and the Realities', 3 November 1948, A4.

[608] Jardim, *The Mauthausen Trials,* 204

[609] Buscher, *The United States War Crimes Trial Programme,* 59.

[610] Ibid., 50.

[611] Ibid., 63.

five were Oswald Pohl, head of the SS Economic and Administrative Head Office, and four leaders of the *Einsatzgruppen*'.[612]

These sweeping amnesties and the refocusing of American foreign policy on containing (and combating) the Soviet Union's increasing power, undermined historical memory of the Dachau trials. The trials were, and are, largely forgotten.

[612] Ibid., 63

Conclusion: The Dachau Trials in History

The study of Dachau presents an alternative path to the history of the wider postwar reckoning of Nazi crimes. At the end of the Second World War, the American army, along with the other occupying Allied powers, faced, among other things, the monumental task of dealing with the perpetrators of crimes in the concentration camps. Increasingly at the end of the war, President Roosevelt's wartime rhetoric was directed at a legal means of delivering justice for the crimes committed. However what form this justice should take was contentious. Prior attempts at postwar justice, namely the Leipzig trials after the First World War, had failed.

As the American government debated how to enact justice, two opposing views emerged within the executive branch - the Morgenthau plan and Stimson plan. After much debate, three paths of American justice emerged: the International Military Tribunal (in cooperation with their Allies), the Nuremberg Military Tribunals, and the Dachau tribunal programme. Finding their genesis in the Bernays plan, the Dachau trials were based on the internationally recognized and signed Hague (1907) and Geneva (1929) conventions, although the trials grew increasingly complicated in their approach to law as prosecutors confronted larger Nazi crimes . Centered on military tribunals, first tested in the Saboteurs Trials (1942), the trials set out to be large scale, efficient, and fair. The trials were to serve as an appropriate reaction to the discovery of particularly gross war crimes, including the treatment of inmates at the concentration camps. It was hoped that thorough and fair trials would educate the German population about the criminality of the Nazi regime, while functioning as an example of the fairness of democracy. Furthermore, the trials would serve to discourage future war criminals by setting a legal precedent of American reaction.

Along with the 'Fliers trials' (202 trials of 582 German citizens who killed or injured downed Allied airmen[613]) and the 'Rüsselsheim Case' (a trial of staff members from the Hadamar euthanasia facility), were the concentration camp trials, which tried

[613] The most common sentence in the Fliers' cases was a death sentence, which was given for 187 defendants out of 582 in total (32%). In general there was suggestion of a bimodal distribution focused on the extremes of sentencing as 269/582 (46%) were given sentences of death or life imprisonment while 246/582 (43%) were either given sentences of less than 10 years or were acquitted.

personnel from the Dachau, Mauthausen, Buchenwald, Flossenbürg, and Dora-Mittelbau concentration camps. These Dachau military courts were legally based predominantly on the 'customary' laws of war. However, the concentration camp trials also incorporated the innovative legal concept of prosecuting defendants for participating in the 'common design' of the concentration camp, which was labelled criminal organisation. Thus by 'aiding, abeting, or participating' all individuals were culpable. In order to facilitate the trials efficiency, the court first sat in session on a 'parent trial', in which the prosecution established jurisdiction over the crimes committed by the defendants and presented a large amount of evidence to prove that the concentration camp in question and its subcamps were criminal organizations. Once established, subsequent courts took 'judicial notice' of the criminality of the camp – no further evidence needed to be presented. This left the prosecution in subsequent cases with the relatively simple task of establishing that the defendant was present at the camp. In turn, the defendants' only line of defence was to prove that they were not present at the camp. The strength of this structure was that it ensured a huge number of defendants were tried in a short two years.

American lawmakers and occupation authorities had spent a good deal of time focused on the problem of how to begin the trials (What charges? What courts? Which defendants?) and very little time planning for the aftermath of the trials. Thus, the winding-up of the trials in 1947 and 1948, in the face of growing tensions between the United States and the Soviet Union, revealed the major problem with the Dachau trials; namely the lack of long-term plans for the appeal process for those convicted. In this absence, administrative clemency programmes, initiated first by American occupation authorities, and eventually by the newly formed West German government, saw all those imprisoned by the Dachau tribunals released by the mid-1950s.

The blockade of Berlin by the USSR (24 June 1948 – 12 May 1949) marked the beginning of a new conflict. The Soviets blocked land and water access to West Berlin in response to the issuing of a new Deutschmark, hoping to drive the western Allies (Great Britain, France, and the United States) out of the city. In response, Great Britain and the United States rushed supplies to western Berlin in round-the-clock flights. The Berlin blockade solidified the division of Germany, heightened tensions between the Americans and their Allies in the west and the Soviets and their bloc in the east. By the time the Soviet blockade of Berlin was lifted, the Americans and their

Allies had signed up to the creation of a new military alliance, NATO (The North Atlantic Treaty Organization, 4 April 1949).[614]

With the formation of the Federal Republic of Germany in May 1949, control of judicial proceedings against war criminals was handed over to the newly-formed Bonn government. Lt Col Denson, for one, was hopeful, especially because the German government could punish crimes committed against Germans, something the Americans had not been able to under international law. He initially believed that the German courts would be vigilant as 'those acts [war crimes] were acts against the peace and dignity of the sovereignty of Germany'.[615] However, as seen in the previous chapter, FRG officials had little interest in continuing the unpopular denazification courts, as, the 'Germans increasingly saw lesser perpetrators brought before American courts as victims of unfair proceedings rather than as war criminals'.[616] As one scholar argued, the record of genocide perpetrated by the Germans was a 'wild card in the process of identity- (re)formation and reestablishment of stability and sovereignty'[617] and was thus generally ignored or forgotten.

The new FRG constitution contained Article 131, which governed the rights of civil servants. In essence it allowed for the reinstatement of Nazi era public servants and for the restoration of pensions for those entitled to pensions of their work under the Nazi regime. In practice the law 'soon showed that essentially no one who applied

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[614] See Andrei Cherny, *The Candy Bombers: The Untold Story of the Berlin Airlift and America's Finest Hour* (New York: G.P. Putnam's Sons, 2008); Daniel F. Harrington, *Berlin on the Brink: The Blockade, the Airlift, and the Early Cold War* (Lexington, KY: University of Kentucky Press, 2012); Diane Canwell, *The Berlin Airlift* (New York: Pelican Publishing, 2008); Roger Gene Miller, *To Save a City: The Berlin Airlift, 1948–1949* (Texas A&M University Press, 2000); N. Lewkowicz, *The German Question and the Origins of the Cold War* (Milan: IPOC, 2008); Henry Ashby Turner, *The Two Germanies Since 1945: East and West* (New Haven CT: Yale University Press, 1987); and D.M. Giangreco and Robert E Griffin, *Airbridge to Berlin: The Berlin Crisis of 1948, Its Origins and Aftermath* (New York: Presidio Press, 1988).

[615] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

[616] Jardim, *The Mauthausen Trial,* 204-5.

[617] Donald Bloxham, 'Prosecuting the Past in the Postwar Decade: Political Strategy and National Myth-Making' in Bankier, David and Dan Michman eds, *Holocaust and Justice: Representations and Historiography of the Holocaust on Postwar Trials*, Jerusalem: Yad Vashem, 2010 in association with Berghahn Books.

[for a federal job] was refused reemployment'[618] based on his or her activities during the war. The law stated in full read:

> The legal relations of persons, including refugees and expellees, who on 8 May 1945 were employed in the public service, have left the service for reasons other than those recognised by civil service regulations or collective bargaining agreements, and have not yet been reinstated or are employed in positions that do not correspond to those they previously held, shall be regulated by a federal law. The same shall apply *mutatis mutandis*[619] to persons, including refugees and expellees, who on 8 May 1945 were entitled to pensions and related benefits and who for reasons other than those recognised by civil service regulations or collective bargaining agreements no longer receive any such pension or related benefits. Until the pertinent federal law takes effect, no legal claims may be made, unless Land law otherwise provides.

In December 1949, the FRG parliament passed a blanket amnesty for all crimes whose minimum punishment was less than six months. These crimes included 'wrongful deprivation of personal liberty,' 'grievous bodily harm,' (common crimes during the 1938 pogrom) use of false identity (common at the end of the war), denunciation, and the public use of firearms'. The latter two crimes, denunciation and the public use of firearms, were 'a common crime in the final phase of the war when uptight Nazis tried to force their faltering neighbours to fight to the bitter end…these latter crimes were fresh in the memories of many Germans, and amnesty was intended to help restore social peace'.[620] Or, as historian Ian Kershaw summed up:

> The understandable thirst for the punishment of those responsible had to be quenched, not left to poison the long-term efforts for social as well as political reconstruction. High passions had to be contained. Natural justice had to be subordinated to politics. Looking to the future had to take precedence over a more thorough cleansing of the past. Collective amnesia was the way forward.[621]

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[618] Marcuse, *Legacies of Dachau,* 113.

[619] *Mutatis mutandis* – 'with necessary changes having been made' (to make the law apply).

[620] Marcuse, *Legacies of Dachau,* 112.

[621] Ian Kershaw, *To Hell and Back: Europe 1914-1949* (New York: Viking, 2015), 486.

A. Were the Dachau Trials a Success?

It is hard to sidestep the question of whether the Dachau concentration camp trials were successful or not. The Dachau trials were never well publicized and are largely forgotten today, except in a very small circle of scholars, in favour of their more famous cousins, the International Nuremberg Tribunal and the Nuremberg Trials. This is unfortunate because the Dachau tribunals represent the largest attempt by the United States to punish Nazi crimes committed at the concentration camps liberated by the Americans and thus add a significant untold story to the study of postwar Germany and the transitional justice programmes happening there. As laid out in this thesis, because they differed significantly from the International Military Tribunal at Nuremberg and the Nuremberg Military Tribunals, they add another layer, an alternative path, to the history of the wider postwar reckoning.

The IMT and NMT had their drawbacks. The International Military Tribunal at Nuremberg was slow (the men were indicted on 6 October 1945 and the verdict was delivered almost a year later on 1 October 1946) and tried only twenty-two defendants. The participation of the Soviet Union was problematic as was the inclusion of Soviet judges in light of their own crimes, particularly in occupied Poland (i.e the Katyn massacre of Polish officers in April and May 1940). Even in 1945 among the Allies, Soviet participation in the IMT was controversial in the light of Russian aggressions and atrocities. John Troutbeck of the British Foreign Office wrote a scathing memo in response to the proposal of the IMT: 'Surely to have a Russian sitting in a case of this kind will be regarded as almost a high point of international hypocrisy…There have been two criminal enterprises this century—by Germans and Russians'.[622] Moreover, the IMT was further problematized by the Allied killing of 500,000 German civilians in the Strategic Bombing Offensive. Furthermore, it remains difficult to defend the IMT against the criticism that the trial used *ex post facto* law to convict its defendants. 'Crimes against humanity', for example, did not exist in law when they were committed by the Nazi regime. However, the clear criminality of participating in the murder of millions makes this legal argument conceptual. As one scholar noted, '…the final outcome was less

[622] Quoted in Ann and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), 72; Peter Maguire, *Law and War: Revised Edition* (New York: Columbia University, 2010), 79.

prejudiced and more self-evidently just than…objections might imply. The trial did not fabricate the reality of the Third Reich and the death of as many as seven million men, women and children murdered…'[623] The IMT was widely publicized and generally considered fair. Today it is seen as the direct predecessor to the current International Criminal Court. The twelve Nuremberg Military Tribunals arraigned more defendants than the IMT, by using the same new laws that the IMT used, but even they are forgotten today as they have 'struggled to find their identity and their place in historical discourse'.[624]

The criteria for success most used by the major scholars working on aspects of the American trial programme are as follows: (1) how many perpetrators were punished and were they adequately punished and (2) did the trials 'teach the Germans' to reorient towards democracy by revealing the extent of Nazi crimes. Based on these criteria most previous scholars, including most German language scholars,[625] argued that Dachau was not a success. Rudolf Schlaffer, in his study of the Flossenberg 'parent trial', and Martin Gruner, highlighting the subsequent Dachau trial of Alex Piorkowski, went so far as to challenge the very legality of the trials and dismissed their ability to create justice.[626]

Buscher concluded that the American war crimes programme failed to achieve the two major goals of the American occupation authorities – it did not adequately punish the convicted and did not convince Germans of the need for reform.[627] To be sure, Jardim concluded that 'as an exercise in expeditious justice, the Mauthausen trial

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[623] Richard Overy, 'The Nuremberg Trials: International Law in the Making', Philippe Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003), 29.

[624] Michael R Marrus, 'Foreword' to Kim C Priemel and Alexa Stiller (eds) *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives and Historiography*, (Oxford: Berghahn Books, 2012), xi.

[625] For example, John Cramer, *Belsen Trial 1945: Der Lüneburger Prozess gegen Wachpersonal der Konzentrationslager Auschwitz und Bergen-Belsen* (Göttingen: Wallstein Verlag, 2011); Gerd R. Ueberschär (ed.), *Der Nationalsozialismus vor Gericht. Die allierten Proozesse gegen Kriegsverbrecher und Soldaten 1943-1952* (Frankfurt/Main 1999); Robert Sigel, *Im Interesse der Gerechtigkeit. Die Dachauer Kriegsverbrecherprozesse 1945-1948* (Frankfurt/Main 1992)

[626] Rudolf Schlaffer, *GeRechte Shüne? Das Konzentrationslager Flossenbürg: Möglichkeiten und Grenzen der nationalen und internationalen Strafverfolgung von NS-Verbrechen* (Verlag Dr. Kovac; Auflage: 1. Aufl, 2001); Martin Gruner, *Verurteilt in Dachau. Derprozess gegen den KZ-Kommandanten Alex Piorkowski vor einem US-Militärgericht* (Wißner-Verlag; Auflage: 1., Aufl., 2008).

[627] Buscher, 159.

[the subject of his study] was a great success for its American organizers', and 'as a vehicle for punishment, the Mauthausen trial was staggeringly effective'.[628] He also argued that Mauthausen was a success in spite of the prosecutor using 'the pre-existing mechanism of military law'.[629] However, he went on to say that the goal of the trials at Dachau was to 'reorient Germans toward democracy and reveal to the German public and the world the true extent of Nazi criminality.' Although the evidence given in the courtroom was excellent, 'few outside the courtroom heard [the testimony]'.[630] Thus, in this regard, 'the Mauthausen trials were 'a resounding failure'.[631] In her dissertation Yavnai disagreed with this measure of success and argued that even the evidence that was presented was partial. She concluded that while the concentration camp trials did provide some 'timely measure of retribution for the victims' they were important because of 'their timing, rather then their completeness of evidence'.[632] Marcuse concluded that because the Germans did not 'learn the lessons' of the trials the American trial programme was largely a failure. He wrote of the trials at Dachau, as well as the NMT and IMT:

> In the years that followed [the conclusion of the Dachau 'parent trial'], however, the Western Allies became markedly more lenient because they want to win the West Germans as allies in the emerging Cold War. And most Germans proved resistant to leaning the 'lessons' these trials were supposed to impart.[633]

Former chief prosecutor William Denson had different criteria for success at the Dachau concentration camp trials. He was concerned that the trials should be fair to the defendants. He believed that in this regard the Dachau trials were a success. He explained:

> …I call your attention to the fact there are certain elements, that are considered by lawyers versed in common law as essential to constitute a fair trial and one such element is the obligation of due process. I do believe that

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[628] Jardim, *The Mauthausen Trial,* 212-213.

[629] Ibid*,* 212.

[630] Ibid*,* 213.

[631] Ibid*,* 213.

[632] Yavnai, 243 and 253.

[633] Marcuse, *Legacies of Dachau,* 71.

> the way these courts handled the rules that circumscribed their activities and their powers were such as to comply and comport very favourably with our concepts of due process. That is each man has a right to a hearing, has a right to confrontation, has a right to be represented by counsel and know on his arraignment he had the perfect right to enter a plea of not guilty and if he didn't plea, the plea of not guilty was entered for him which thereupon automatically cast upon the government the obligation of proving the offence charged beyond all reasonable doubt and to a moral certainty. So that I think the safeguards that we are accustomed to in the State and Federal practice in this country were followed in those cases in Germany.[634]

Centred on military tribunals, the Dachau trials set out to be large scale, efficient, and fair. The result was, I would argue, that the Dachau trials, in general, accomplished what they set out to accomplish. In this way the Dachau trials were a success. When an individual parent trial is studied, as has been the case in the limited prior research, it is easier to focus on the limitations and shortcomings of the trial, but when seen through the lens of the entire programme and through the monumental task that was undertaken by the American army – it's accomplishments can be better seen. The Dachau trial programme was efficient. It tried a huge number of defendants from multiple concentration camps and subcamps. The trials were based on contemporary legal precedent as it stood in 1945. Despite lax rules of evidence and the introduction of the occasional controversial 'common design' charge, defendants were accorded fair and vigorous legal representation, a certainly imperfect but available appeals process (something not present at either of the Nuremberg trial programmes), and an opportunity for clemency. Any trial, tribunal, or judicial programme would have its compromises and shortcomings – and these limitations were at the forefront of the staff who planned and undertook the trial programme.

The Dachau trials were largely resistant to outside influences including the limited press coverage the trials received and domestic policy changes, at least until the ending trials in 1947. While prior authors have claimed that the Dachau trials were influenced by the Cold War, the analysis of sentencing completed in this thesis showed that sentencing actually increased when comparing 1947 to 1946. This is the

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[634] William D. Denson interview by Horace R. Hansen, Esq., William Dowdell Denson Papers: Series I, Box 2, Yale University Library Manuscript Collections, New Haven, Connecticut, USA.

opposite of what would be expected if, as other scholars have claimed, the Cold War was forcing leniency in the courtroom. Futhermore, despite the obvious issues with the administrative appeals process, the impression that initial reviews of the sentences handed out at Dachau frequently overturned initial sentencing is not supported by analysis of the 'parent trials' at Dachau. The percentage of cases where sentences were reduced upon initial review was limited in all the trials. Instead leniency was seen at a later date through mass clemency for convicted perpetrators during the 1950s. The Dachau trials did generate controversies, such as the Ilse Koch sentence reduction and Malmedy defendants' claims of being tortured to produce their confessions. This led the United States Senate to conduct a thorough review process of the whole Dachau tribunal progamme, in which the congressional review board concluded that the Dachau trials, although not without problems, were lawful. This congressional review process further justifies the claim that the Dachau trial programme was, generally, legitimate and fair.

Because of their design and emphasis on military law and legal precedence, the trials were more respectful for national sovereignty, especially seen in the decision, as problematic as it may seem today, to only persecute individuals who had committed crimes against the United States or its allies. Furthermore, it cannot be overlooked that the Dachau trials, as seen within the larger process of postwar reckoning and denazification, were, in the end, successful in ensuring that Nazism was not revived in post war Germany.[635]

B. Final Thoughts

More scholarship on lesser-known postwar trials is necessary. We know little about trials other than the International Military Tribunal at Nuremberg, particularly the various National trials, which made up a majority of the judicial efforts to administer justice in the wake of Nazi crimes. Whether a study of the other occupation powers in Germany (France, Britain, USSR) or the subjugated countries coming to terms with the crimes committed during German occupation (The Netherlands, Czechoslovakia, Belgium, Norway, and Poland to name a few), more

[635] Konrad H. Jarausch, *After Hitler: Recivilizing Germans, 1945-1995* (Oxford: Oxford University Press, reprint 2008).

work could be done to study these individual national responses. The American Dachau trials are an important and neglected part of this huge project of reckonings.

Thus the Dachau trials make a correction in the prevailing historiographical literature on the postwar reckoning with Nazi criminality, and indeed on the development of human rights. The Dachau trials provide a more politically cautious and legally conservative model for postwar justice by using the long-standing Hague and Geneva Conventions as their primary standard. This was more in tune with the contemporary temperament of world politics, in an era before the Universal Declaration of Human Rights (1948) and all that followed became part of customary international law. Accordingly, the Dachau trials were more respectful of state sovereignty and less attuned to the emerging ideologies about genocide and crimes against humanity. They were run along narrower, traditional lines of military justice, and more conducive to clemency during review. When compared to the well known, and well studied, International Military Tribunal and, to a lesser extent, Nuremberg Military Tribunals, the Dachau trials, the largest of the three trial programmes, followed an alternative view, a traditional view, to the new developments in international law in mid-1945. This is what makes the Dachau trials, arguably the most important of the three.

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