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# MILITARY LAW REVIEW

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**THE INTERNATIONAL MILITARY TRIBUNAL AT  
NUREMBERG: EXAMINING ITS LEGACY SEVENTY-  
FIVE YEARS LATER**

# *Military Law Review*

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## THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG: EXAMINING ITS LEGACY SEVENTY-FIVE YEARS LATER

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## FOREWORD

In November 1945, an international military court—the likes of which had never previously existed—began criminal proceedings against high ranking Nazis in Nuremberg, Germany. When this International Military Tribunal (IMT), completed its work in August 1946, the American military government in occupied Germany held twelve more war crimes trials in Nuremberg. These follow-on “subsequent proceedings” indicted—and convicted—commanders, doctors, lawyers, judges, industrialists, bankers, and other Germans who had willingly participated in war crimes, crimes against peace, and crimes against humanity.

Taken together, the IMT and the twelve subsequent proceedings changed international law forever. For the first time in history, criminal tribunals had determined that there was *individual* criminal responsibility for violations of international law and the law of armed conflict (LOAC), including responsibility for acts of state. Prior to this, individuals in the armed forces who committed criminal offenses under orders or sanction of their government or commander were not individually liable for misconduct. But the horrendous crimes committed by the Nazis both before and during World War II resulted in a recognition that, since war crimes are committed by individuals, *only by punishing individuals* can the provisions of international law and LOAC be enforced. The IMT and subsequent proceedings also stand for the principle that an individual has duties under international law that *transcend the national obligations* of obedience to an individual state.

Recognizing the importance of the IMT and subsequent proceedings, a select group of scholars came together at The Judge Advocate General’s Legal Center and School on 19 November 2020 to commemorate the seventy-fifth anniversary of the commencement of the trials in Nuremberg. The contents of this issue of the *Military Law Review*—articles that resulted from the symposium—reflect the importance of the trials at Nuremberg in legal history.

After introductory remarks from Colonel Sean McGarry, Dean of The Judge Advocate General’s Legal Center and School, there were seven speakers: Mr. Fred Borch, the Regimental Historian and Archivist for The Judge Advocate General’s Corps; Dr. William Meinecke Jr., a historian at

the U.S. Holocaust Museum; Professor Geoffrey Corn of the South Texas College of Law; Professor Gary Solis of Georgetown Law School; Ms. Andrea Harrison of the International Committee of the Red Cross; Professor Tom Nachbar of the University of Virginia Law School; and Lieutenant General Charles Pede, The 40th Judge Advocate General of the U.S. Army. The speakers discussed the history of the IMT and the twelve subsequent proceedings. One speaker focused on how the rule of law was perverted by the Nazis, in that they transformed German jurisprudence into an organized system of injustice and persecution. Another speaker examined how the Nuremberg proceedings firmly established that there is individual criminal responsibility for violation of LOAC—a major development in the law. Still another talked about the impact that the Nuremberg proceedings will continue to have on the evolution of international law and LOAC.

As we move into the third decade of the twenty-first century, there is every reason to believe that the importance of the IMT and the twelve subsequent proceedings will continue and that this special issue of the *Military Law Review* will be a ready source for those interested the evolution of international law and LOAC.

Fred L. Borch  
Regimental Historian & Archivist  
Professor of Legal History and Leadership  
The Judge Advocate General's Legal Center and School

**OPENING REMARKS FOR THE SEVENTY-FIFTH  
ANNIVERSARY OF THE INTERNATIONAL MILITARY  
TRIBUNAL AT NUREMBERG\***

COLONEL SEAN T. MCGARRY<sup>†</sup>

Good morning to our distinguished guests and speakers; members of the 69th Graduate Course and the 212th Officer Basic Course, who are here with us today in the auditorium; our neighbors from the University of Virginia; and our guests who may be participating remotely. I am very excited to welcome you to this historic event as we commemorate the seventy-fifth anniversary of the International Military Tribunal at Nuremberg. Seventy-five years ago, a justice from the highest court in our land took a leave of absence from the United States Supreme Court to prepare the world's case in an international tribunal created by charter to judge twenty-two high-ranking Nazi officials for crimes against peace, waging aggressive war, crimes against humanity, and war crimes. In November 1945, the seminal International Tribunal at Nuremberg commenced in Courtroom 600 of the Nuremberg Palace of Justice, and history was made.

Our commemoration of this event is organized into three distinct phases. We are going to start with the history and background of the

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\* This is an edited transcript of remarks delivered on 19 November 2020 at “The International Military Tribunal at Nuremberg: Examining Its Legacy 75 Years Later,” a symposium hosted by the National Security Law Department of The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia. See The Judge Advoc. Gen.’s Legal Ctr. & Sch., *Nuremberg@75 Part 1 History of Trials*, YOUTUBE (Nov. 20, 2020), <https://youtu.be/pmegWos1oOA?t=195>, for a video recording of these remarks.

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tribunals, and that will start after I yield the stage to Mr. Fred Borch,<sup>1</sup> who will be followed by Dr. William Meinecke<sup>2</sup> of the U.S. Holocaust Memorial Museum. We are then going to move to an examination of the impact that the Nuremberg tribunals had on the law of armed conflict in the post-World War II world. To do that, we are going to hear from Professor Geoff Corn<sup>3</sup> from the South Texas College of Law and Gary Solis,<sup>4</sup> most recently of Georgetown University and George Washington University. We are going to conclude our program today with a forward look at what the legacy of Nuremberg means for all of us as individuals, as a military, and as a Nation, with comments from Andrea Harrison,<sup>5</sup> Chair of the American Society of International Law, Professor Tom Nachbar of the University of Virginia,<sup>6</sup> and, of course, our very own Lieutenant General Chuck Pede,<sup>7</sup> the fortieth Judge Advocate General of the United States Army.

As we work through our program today and we go from contemplative reflection to a forward-looking, eyes-ahead focus on a future of violent extremist organizations and a continuing great power competition that demands not only our attention and focus on an adversary, but also continued and deliberate efforts to retain and train the best and brightest—those individuals educated for operational adaptability and an ability to excel at expanding the competitive space in increasingly complex multi-domain operations in a principled way—I want you to think about the context that Nuremberg has provided for us. Not just where we were then but where you are now—and when I say “you,” I am talking specifically to the 69th Graduate Course and the 212th Officer Basic Course—and what that means for all of us as we go forward into the world.

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<sup>1</sup> Fred L. Borch III, *The Nuremberg Military Tribunals: A Short History*, 229 MIL. L. REV. 159 (2021).

<sup>2</sup> William F. Meinecke Jr., *German Justice on Trial: The Justice Case*, 229 MIL. L. REV. 173 (2021).

<sup>3</sup> Geoffrey S. Corn, *Individual Criminal Responsibility for War Crimes*, 229 MIL. L. REV. 191 (2021).

<sup>4</sup> Gary D. Solis, “Smoothing Out” the IMT Judgment: *The Legal Legacy of the Twelve Subsequent Military Tribunals*, 229 MIL. L. REV. 205 (2021).

<sup>5</sup> Andrea Joy Harrison, *Guidelines on Investigating Violations of International Humanitarian Law and Practical Mechanisms for Accountability—Today and Beyond*, 229 MIL. L. REV. 221 (2021).

<sup>6</sup> Thomas B. Nachbar, *Nuremberg and the Role(s) of Accountability in the Law of Armed Conflict*, 229 MIL. L. REV. 237 (2021).

<sup>7</sup> Lieutenant General Charles N. Pede, *The Significance of the Nuremberg International Military Tribunals on the Practice of Military Law*, 229 MIL. L. REV. 253 (2021).



First, I want you to consider the criminal history, or lack thereof, for the individuals who were on trial at that tribunal. Most of those people would have appeared to be lawful, upstanding citizens who happen to manipulate state process and a system of justice to their own ends. But once they were seated in power, they went largely unchallenged, even by those who were educated, trained, and chartered to be protectors of the law (e.g., attorneys). The apparent ease with which that happened is truly a scary thing, and it is something we have to be mindful of in our own practice. We have to remember that we are charged with protecting the process<sup>8</sup> and we are charged to be practitioners of principled counsel.<sup>9</sup> The designers of the Nuremberg tribunal did just that. It would have been very easy for them to look at the horrors of any individual charge sheet and let that drive a summary process, but they did not succumb to those baser instincts and yield to the temptation of victors' justice. They provided due process, rules of evidence, and the presumption of innocence,<sup>10</sup> as opposed to a presumption of guilt and a summary execution, which was an option that was debated at that time.<sup>11</sup> They did not do that because they were principled counsel.

Second, I would like you to think about the value of public record. This tribunal was not a secret backroom star chamber. It was an open, public, and transparent proceeding. It was held in symbolic location for the Nazi party, and it was recorded with the most cutting-edge technology available at the time to produce a record of the proceeding that was held out to the world.<sup>12</sup> And that record was used to ensure maximum exposure of not just the event and the people being tried, but just as importantly—and maybe more so—it was held out to show that the process that was applied was fair.

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<sup>8</sup> 5 U.S.C. § 3331 (requiring that officers in the Armed Forces of the United States take an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic” and to “bear true faith and allegiance to the same”).

<sup>9</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS para. 1-1 (8 June 2020) (“The JAGC provides principled counsel and premier legal services, as committed members and leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army.”).

<sup>10</sup> Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

<sup>11</sup> *E.g.*, Tripartite Dinner Meeting, November 29, 1943, 8:30 P.M., Soviet Embassy, *in* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: CONFERENCES AT CAIRO AND TEHRAN: 1943, at 552, 553–54 (1961).

<sup>12</sup> See *Collections Search*, U.S. HOLOCAUST MEM'L MUSEUM, [https://collections.ushmm.org/search/?f%5Bf\\_key\\_event%5D%5B%5D=imt\\_nuremberg](https://collections.ushmm.org/search/?f%5Bf_key_event%5D%5B%5D=imt_nuremberg) (last visited May 23, 2021), for a collection of video and audio recordings of the International Military Tribunal's proceedings.

It is fairness and the rule of law that continues even today, especially today, as the hallmarks of legitimacy. That is something that we all need to keep in mind as we work through our own practices, whether they are conducting investigations, criminal proceedings, or those targeting decisions of battlefield next.

Third, I would like you to consider that the impact of the historical record. Public accountability for war crimes does not end with judgment and announcement of verdicts and sentences. There is a component of war crimes, distinguished from other types of criminal activity, that deserves preservation of a historical record for historians to scrutinize and the rest of the world and subsequent generations to understand if we are going to have any kind of success at preventing future occurrences.<sup>13</sup> As judge advocates, we continue to work tirelessly on behalf of our clients, whether they are victims of crimes or we are champions of the institutions we represent.

Today's program is specifically designed to help us recognize the significance of an event that happened seventy-five years ago in Germany, and how it still continues to be relevant today and into the foreseeable future. With that in mind, I now have the privilege of introducing today's first speaker, Mr. Fred Borch. He is the U.S. Army Judge Advocate General Corps's Professor of Legal History and Leadership. He is our second Regimental Historian and Archivist. Mr. Borch has distinguished himself as the first Chief Prosecutor for the Department of Defense Office of Military Commissions for the U.S. Military Commissions at Guantanamo Bay. He is a Fulbright Scholar. He has three times distinguished himself as a Professor at the Naval War College, the Center for Terrorism and Counter-terrorism at the University of Leiden and here at The Judge Advocate General's Legal Center and School. He is a prolific writer and an always-entertaining speaker. He is an accomplished author; he has written extensively on the lore of the U.S. Army Judge Advocate General's Corps and judge advocates in combat. He is the author of *Military Trials of War Criminals in the Netherlands East Indies*, and he has even consulted on a major motion picture, *The Conspirator*.

Without further ado, let me welcome Mr. Borch. Sir, the floor is yours.

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<sup>13</sup> Rome Statute of the International Criminal Court pmb., July 17, 1998, 2187 U.N.T.S. 90 (stating that the states party to the Rome Statute are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes").

**THE NUREMBERG MILITARY TRIBUNALS:  
A SHORT HISTORY\***FRED L. BORCH III<sup>†</sup>

## I. Introduction

Good morning, one and all. Thank you very much, sir, for those kind remarks. Today, I am going to give you some context for understanding what happened seventy-five years ago. The International Military Tribunal (IMT) and the twelve subsequent proceedings are the foundation for modern international law. You really cannot overstate that and as we go through my talk, I think you will see why.

Before I start, I want to share a couple of things with you. First of all, why are we having this symposium? Well, because it is a good idea, of course. But credit really goes to Major Travis Covey, as it was originally his idea. Thanks also to Lieutenant Colonel Justin Marchese and to Major Keoni Medici. I am really grateful to them for putting this together, and I think you will find it enjoyable, even if we are only spending a couple of hours to talk about something that went on from 1945 to 1949.

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\* This is an edited transcript of remarks delivered on 19 November 2020 at “The International Military Tribunal at Nuremberg: Examining Its Legacy 75 Years Later,” a symposium hosted by the National Security Law Department of The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia. See The Judge Advoc. Gen.’s Legal Ctr. & Sch., *Nuremberg@75 Part 1 History of Trials*, YouTube (Nov. 20, 2020), <https://youtu.be/pmegWos1oOA?t=715>, for a video recording of these remarks.

<sup>†</sup> Regimental Historian and Archivist, The Judge Advocate General’s Corps, U.S. Army; Professor of Legal History and Leadership, The Judge Advocate General’s Legal Center and School. M.A., 2020, Norwich University, Northfield, Vermont; M.A., 2017, University of Virginia; M.A., 2001, Naval War College; LL.M., 1988, The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia; LL.M., 1980, University of Brussels, Belgium; J.D., 1979, University of North Carolina, Chapel Hill, North Carolina; A.B., 1976, Davidson College, Davidson, North Carolina. Author, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (2001); *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia* (2004); *Kimmel Short and Pearl Harbor: The Final Report Revealed* (2004); *For Military Merit: A History of Recipients of the Purple Heart* (2010); *Military Trials of War Criminals in the Netherlands East Indies* (2017); *Lore of the Corps* (2018); *Judge Advocates in the Great War 1917-1922* (2021). Member of the Alabama and North Carolina Bars. Fred Borch served as an active duty judge advocate from 1980 to 2005. He has been in his current position since 2006.

We will start with the background of the IMT (i.e., why it convened, where it was, what the charges were), then I am going to talk about the IMT itself, which was held from 20 November 1945 to 31 August 1946,<sup>1</sup> and then the twelve subsequent proceedings. One thing you should take away immediately from my remarks is that there was not just one trial at Nuremberg but, in fact, thirteen trials. The first one, the IMT, is the one that is most familiar to you—the one you learned about in law school or the one you have seen on television documentaries, but there also were twelve subsequent proceedings.

One of the first questions that came up as it became apparent that the Allies were going to win the war was, “What should we do with these Nazis?” There were many senior Government officials who said that the guilt of these men was so black that a trial was not necessary and that they should be executed.<sup>2</sup> This was actually seriously considered, but it was decided that a trial was a better course of action. I am going to explain why that came about.

Before I do that, let me talk about Nazi war crimes in terms of a pyramid, which will give you context for the rest of my talk. At the very top of the pyramid is the IMT that happened at Nuremberg from November 1945 through 1946; that trial is only the trial of the major war criminals.

The second level of the pyramid—right below the IMT—is the twelve subsequent proceedings. The twelve subsequent proceedings that we are going to talk about are the ones that were tried by the U.S. Government in the American sector under Control Council Law No. 10.<sup>3</sup> The French, the British, and the Russians also tried subsequent proceedings in their occupation zones. There was actually more out there than we are going to talk about; we are only going to talk about the American subsequent proceedings. Who is tried at these? The major war criminals were tried at

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<sup>1</sup> United States v. Göring, 1 Trial of the Major War Criminals Before the International Military Tribunal, Judgment, at 172 (Oct. 1, 1946).

<sup>2</sup> TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 29 (1992); ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 61–62 (2010).

<sup>3</sup> Control Council Law No. 10, art. III, *reprinted in* 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306 (1945).

the IMT, so I like to say the not-so-major war criminals were tried at the twelve subsequent proceedings.

The third level of the pyramid—below the IMT and the twelve subsequent proceedings—is the military commissions tried at Dachau, mostly by Army Judge Advocate General Department attorneys and their assistants.<sup>4</sup> Those prosecuted at these tribunals were the trigger-pullers, the guards at concentration camps, and the SS men who murdered American Soldiers and others at Malmedy.<sup>5</sup>

The fourth level of the pyramid is the trials held by other nations for crimes committed during the occupation of their countries. In Belgium, the Netherlands, Yugoslavia, even Russia, where they had Nazi war criminals in custody, they tried cases.<sup>6</sup>

Last of all, at the base of the pyramid were trials conducted by German authorities in German civilian courts.<sup>7</sup> Every so often, you pick up a newspaper or hear on television, radio, or your source of news that the Germans are trying someone for war crimes in German court.<sup>8</sup> Usually, it is someone who served as a concentration camp guard or committed some other war crime; they are now in their 80s or 90s, but they are being prosecuted.

The IMT is important because it was the first time in history that an international court decided that there was individual criminal liability.<sup>9</sup> I cannot overstate how important it is that this is the first time that we have individual criminal liability. In the past, international law had always accepted that if someone is acting on behalf of the state or under obedience

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<sup>4</sup> *E.g.*, United States v. Skorzeny, Case No. 6-100 (U.S. Mil. Gov't Ct. Sept. 9, 1947).

<sup>5</sup> *E.g.*, United States v. Bersin, Case No. 6-24 (U.S. Mil. Gov't Ct. July 16, 1946).

<sup>6</sup> Devin O. Pendas, *Seeking Justice, Finding Law: Nazi Trials in Postwar Europe*, 81 J. MOD. HIST. 347, 354 (2009) (stating that more than 95,000 Germans and Austrians were convicted of Nazi war crimes in Eastern and Western European courts).

<sup>7</sup> *Id.* (“The Germans themselves convicted nearly 20,000 people of Nazi crimes—6,495 in the courts of the Western Occupation Zones/Federal Republic and at least 12,776 in the Soviet Occupation Zone/German Democratic Republic.” (citations omitted)).

<sup>8</sup> *E.g.*, Melissa Eddy, *Ex-Nazi Guard Convicted in One of Germany's Last Holocaust Trials*, N.Y. TIMES, July 24, 2020, at A12.

<sup>9</sup> *Birth of International Criminal Law*, NUREMBERG MUN. MUSEUMS, <https://museums.nuernberg.de/memorium-nuremberg-trials/the-legacy-of-nuremberg/birth-of-international-criminal-law> (last visited May 27, 2021).

to orders, then there is no individual responsibility.<sup>10</sup> Nuremberg changed all of that. There is no more hiding behind an act of state to escape responsibility for your war crimes.

The second thing that is really important is that the IMT established firmly that crimes against humanity are a part of the law of armed conflict (LOAC).<sup>11</sup> What are crimes against humanity? Inhumane acts against civilian populations (e.g., the murder of millions of Jews, Gypsies, and other people who the Nazis thought were not deserving of due process or life).<sup>12</sup> Prior to this time, there was no such understanding that a crime against humanity—having committed horrific acts against civilian populations—was part of the LOAC. But Nuremberg established forever that it is, and this is really important for us as lawyers.

The third and last piece that is important about Nuremberg is that the IMT was the death knell for this idea that if I am acting pursuant to superior orders, I get a “get out of jail free” card. It is no longer an absolute defense, though it was prior to the trials.<sup>13</sup>

## II. Creation of the International Military Tribunal

Why have an international criminal court? Why not just take these Nazis out and execute them? Believe it or not, the idea of an international forum did not come from the Americans, the British, or the French. It came from the Soviets. Joseph Stalin decided that a trial would be a great idea because he thought he would get something like the Moscow Trials of 1936 to

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<sup>10</sup> Indeed, this was a common view among nations at the time. *See, e.g.*, U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 347 (1 Oct. 1940) (“Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders.”).

<sup>11</sup> *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law> (last visited May 27, 2021).

<sup>12</sup> *See infra* note 30.

<sup>13</sup> *E.g.*, U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 509a (18 July 1956) (C1, 15 July 1976) (“The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.”).

1938.<sup>14</sup> When Stalin purged the Communist Party of those he thought were disloyal to him, he had “show trials” in Moscow—scripted trials where it was not really in doubt that the people are going to be found guilty and later taken out and shot.<sup>15</sup> In this case, Stalin thought, “If I do this in Berlin,” and that is where Stalin wanted to have the IMT, “the Soviet Union will be revealed as the victim of World War II and the Germans will be revealed as the evil menace to the world that they really are.”<sup>16</sup> It was Stalin’s idea to have some sort of a public trial, and that was the genesis for the IMT.

The irony was that the trial did not quite turn out the way Stalin thought it would. Once the French, British, and Americans got involved and started putting together the charter to create the IMT, they insisted on due process for the defendants. For those of you who have done reading on the topic, you know that although there are some complaints about victors’ justice, no one has ever argued—at least no one who is a responsible scholar—that the IMT was not fair. In fact, the proceedings were full and fair.

As Colonel McGarry said, the trials were created by executive agreements<sup>17</sup> and the charter.<sup>18</sup> These were signed by the four major powers, the Soviets, the British, the French, and the United States, on 8 August 1945.<sup>19</sup> That date should certainly be significant to you because of what was happening on the Pacific on 8 August.<sup>20</sup> In any case, this is the charter that creates the court. The Allies proclaimed that they were acting on behalf of the United Nations, and this is the birth of the idea that after World War

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<sup>14</sup> Francine Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order*, 113 AM. HIST. REV. 701, 703 (2008).

<sup>15</sup> See generally GEORGE H. HODOS, *SHOW TRIALS: STALINIST PURGES IN EASTERN EUROPE, 1948–1954* (1987).

<sup>16</sup> See Hirsch, *supra* note 14.

<sup>17</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

<sup>18</sup> Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

<sup>19</sup> *Id.*

<sup>20</sup> On 8 August 1945, two days after the United States dropped its first atomic bomb on Hiroshima, Japan, a B-29 bomber dropped a second bomb on Nagasaki, Japan. The Soviet Union declared war on Japan that same day. PROCLAMATION CALLING FOR THE SURRENDER OF JAPAN, APPROVED BY THE HEADS OF GOVERNMENT OF THE UNITED STATES, CHINA, AND THE UNITED KINGDOM, reprinted in 2 HIST. OFF., U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: CONFERENCE OF BERLIN (POTSDAM) 1945, at 1474, 1474 n.1 (1960).

II, the world was going to adhere to the rule of law and have a robust international legal structure.

The question was where the IMT should be held. The Soviets wanted to have the trials in Berlin, and the reason they wanted Berlin was its historical significance as the capital of Germany, which makes sense. Who was in control in Berlin? The Soviets. But what was the problem with going to Berlin for the trial? There was not much left. Even if you wanted to have a trial in Berlin, you could not because the city was in ruins in August 1945.

However, Nuremberg, which also has historical and symbolic significance—remember that many Nazi party rallies are held there—was in pretty good shape. The Court of Justice was actually standing. And who was in control of Nuremberg? What zone was that in? Yes, you would be right. We were there. That was the chief reason that Nuremberg was chosen: it actually had an intact courtroom, where everything can be put together and because the Americans were in control of that geographic area.<sup>21</sup>

### III. Selection of Defendants

Who was going to be tried? There literally were thousands and thousands of Germans who could be tried for war crimes,<sup>22</sup> but the idea was to try the major war criminals.<sup>23</sup> None of the twenty-two defendants tried there were ever trigger-pullers actually carrying out nefarious acts on behalf of the Nazis, but they were all important members of the Nazi state.<sup>24</sup> Hermann Göring, for example, the Reichsmarschall, was the number two guy who was supposed to actually follow Hitler, if Hitler were to be killed.<sup>25</sup>

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<sup>21</sup> *Choice of Nuremberg as the Venue for the Trials*, NUREMBERG MUN. MUSEUMS, <https://museums.nuernberg.de/memorium-nuremberg-trials/permanent-exhibition/courtroom-600/choice-of-nuremberg> (last visited May 27, 2021).

<sup>22</sup> See, e.g., Elmer Plischke, *Denazification Law and Procedure*, 41 AM. J. INT'L L. 807, 825–26 (1947) (estimating over three million chargeable cases in Germany, which “would mean a hearing for every five inhabitants in our Occupation Zone”).

<sup>23</sup> Donald Bloxham, *From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited*, 98 HIST. 567, 572 (2013) (“The defendants comprised most of the surviving highest leaders of the Third Reich, but were also selected as representative of the broad spectrum of interests and political, military and economic institutions held to have contributed to and benefited from the conspiracy.”).

<sup>24</sup> *Id.*

<sup>25</sup> IAN KERSHAW, *HITLER: A BIOGRAPHY* 624 (2008).



Joachim von Ribbentrop was the foreign minister who sat down with Stalin, signed the non-aggression pact between Germany and the Soviet Union and, really, I think, made World War II possible.<sup>26</sup> Albert Speer, of course, was the industrialist, the planner, the architect. I am not going to go through all of them, but there are twenty-two defendants, and they were the major war criminals.

#### IV. What Law Would Apply?

A really interesting point in the IMT for those of us who are attorneys or interested in the law is that the Allies had to decide what law would apply at the tribunal. Some planners said, “Well, let’s just say that we will use international law.” But if you think back to 1945, what was there in the way of international law other than custom? You had the Hague Conventions and you had the Geneva Conventions, but other than that, there was not a whole lot out there. Ultimately, the Allies decided that it would be too dangerous just to leave it up to the judges to decide what the law was, so the Allies decided what the law was. Consequently, all that the four judges had to do was apply the facts to the law enunciated in the charter that created the IMT, and if the facts met the requirements of the law, then the Nazi defendants were guilty.<sup>27</sup>

With this in mind, Article 6 of the IMT charter declared the crimes that existed in international law.<sup>28</sup> “Crimes against peace” was the idea that the Nazis had waged aggressive war. It is not really all that clear, even today, what that means but, in general, if you violated a treaty by attacking a friendly country, violated neutrality, or otherwise waged an aggressive war, that was a crime against peace.<sup>29</sup> “Crimes against humanity” were defined as inhumane acts against civilian populations (e.g., murdering civilians, murdering Jews, running special squads in Ukraine and Russia to round

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<sup>26</sup> *German-Soviet Pact*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/german-soviet-pact> (last visited May 27, 2021).

<sup>27</sup> Charter of the International Military Tribunal, *supra* note 18, 59 Stat. at 1547, 82 U.N.T.S. at 286–88.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (defining crimes against peace as “namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”).

up and simply kill people).<sup>30</sup> Finally, Article 6 identified “war crimes” as violations of international law (e.g., killing prisoners of war, needless destruction of private or public property).<sup>31</sup> These are the three crimes declared in Article 6.

#### V. Trial Participants and Procedures

There were four judges at the IMT: Iona Nikitchenko of the Soviet Union; Francis Biddle of the United States; Geoffrey Lawrence of the United Kingdom; and Henri Donnedieu de Vabres of France.<sup>32</sup> Francis Biddle had been the U.S. Attorney General under Franklin Roosevelt and, in fact, he and the U.S. Army Judge Advocate General in 1942 prosecuted the U-boat saboteurs.<sup>33</sup> The Soviet judge was a major general and the only judge of the four who was in the military.<sup>34</sup>

There were four prosecutors, although we really only hear about Robert Jackson, the lead prosecutor. Each country had a prosecutor.<sup>35</sup> And how about defense counsel? Everybody got a defense counsel, almost all of whom were German lawyers.<sup>36</sup>

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<sup>30</sup> *Id.* (defining crimes against humanity as “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”).

<sup>31</sup> *Id.* (defining war crimes as “namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”).

<sup>32</sup> *United States v. Göring*, 1 Trial of the Major War Criminals Before the International Military Tribunal, Members and Alternate Members of the Tribunal, at 1 (Oct. 1, 1946).

<sup>33</sup> *Ex parte Quirin*, 317 U.S. 1, 11 (1942).

<sup>34</sup> *Göring*, 1 Trial of the Major War Criminals Before the International Military Tribunal, at 1.

<sup>35</sup> *Id.* at 3–5.

<sup>36</sup> *Id.* at 6–7.

How about procedure? All evidence with probative value could be considered by the court;<sup>37</sup> the basic standard was relevance.<sup>38</sup> Does hearsay come in? Sure. Can an accused testify? Yes; under Article 24(g) of the IMT charter, the accused could testify<sup>39</sup> and present evidence.<sup>40</sup> This was something that Stalin and the Soviets were really upset about: “Wait a minute. We are not interested in hearing the Nazi side here or seeing a defense. That is not why we are here.” But you can see that the Allies said, “If we are going to have a trial, we have to have some due process.” As a result, by the last day of the trials, 31 August 1946, the IMT judges heard 360 witnesses, and there is now a 42-volume record of the trial.<sup>41</sup>

We do not have time to go into all the results, but to summarize: eight defendants were found guilty of crimes against peace; twelve were found guilty of waging aggressive war. Some actually were found not guilty.<sup>42</sup> Twelve of the accused were sentenced to death and the remainder to prison terms.<sup>43</sup>

## VI. Subsequent Proceedings

Originally, the idea was that there would be more than one IMT. In fact, at the beginning, every one of the Allies contemplated that there would be several follow-on IMTs.<sup>44</sup> Why did that not happen? Why did we only have one and then go to these “subsequent proceedings”? There are a couple of reasons, but the chief one was that Mr. Justice Jackson advised President

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<sup>37</sup> Charter of the International Military Tribunal, *supra* note 18, 59 Stat. at 1551, 82 U.N.T.S. at 296 (“The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.”).

<sup>38</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2019) (“Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

<sup>39</sup> Charter of the International Military Tribunal, *supra* note 18, 59 Stat. at 1551–52, 82 U.N.T.S. at 298.

<sup>40</sup> *Id.*

<sup>41</sup> See *Trial of the Major War Criminals Before the International Military Tribunal*, LIBR. OF CONGR., [https://www.loc.gov/rr/frd/Military\\_Law/NT\\_major-war-criminals.html](https://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html) (May 4, 2016), for access to the forty-two volumes.

<sup>42</sup> *United States v. Göring*, 1 *Trial of the Major War Criminals Before the International Military Tribunal*, Judgment, at 279–341 (Oct. 1, 1946).

<sup>43</sup> *Id.* at 365–66.

<sup>44</sup> Donald Bloxham, ‘*The Trial That Never Was: Why There Was No Second International Trial of Major War Criminals*, 82 *HIST.* 41, 45–49 (2002).

Truman that the United States should not participate in any future IMTs.<sup>45</sup> Jackson argued that the IMT process was too complicated: four judges of four different nationalities meant that an IMT had to conduct all proceedings in four languages, plus German.<sup>46</sup> Additionally, the mix of common law and civil law at the IMT was confusing. It would be a lot more efficient, said Jackson, if we could simply try future cases in the American zone and just call them “subsequent proceedings.”

President Truman also was afraid that another IMT would end up turning into a propaganda vehicle for the Soviets.<sup>47</sup> The Cold War was already beginning, and the fear was that if we have another IMT, it would just be an opportunity for Stalin to do mischief.

Who was tried at these twelve subsequent proceedings? The “less” major war criminals. Not a whole lot of trigger-pullers, though there are some. These were military trials in the sense that the prosecutor was Brigadier General Telford Taylor, who was not a judge advocate but had been an assistant to Mr. Justice Jackson at the IMT,<sup>48</sup> so he knew his way around the proceedings and the courtroom. Taylor was the prosecutor, but the judges were civilians. Each one of the twelve subsequent proceedings had three civilian judges who sat in judgment.<sup>49</sup> Very similar to a tribunal that you would see in a civil law country, with three judges deciding guilt or innocence and any punishment. Regarding the rules of evidence: again, all evidence probative to a reasonable person may be considered by the tribunal.<sup>50</sup>

I am going to go quickly through each of the twelve cases.

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<sup>45</sup> *Id.* at 50.

<sup>46</sup> Letter from Robert H. Jackson, U.S. Chief of Couns., to Harry S. Truman, U.S. President (Oct. 7, 1946), in U.S. DEP’T OF STATE, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432, 433 (1949).

<sup>47</sup> Hirsch, *supra* note 14.

<sup>48</sup> Drexel A. Sprecher, *Central Role of Telford Taylor as U.S. Chief of Counsel in the Subsequent Proceedings*, 37 COLUM. J. TRANSNAT’L L. 673, 673 (1999).

<sup>49</sup> BRIGADIER GENERAL TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 35 (1949).

<sup>50</sup> *Id.* at 288 (setting forth in Article VII the rules of evidence under Ordinance No. 7).

In the Medical Case,<sup>51</sup> twenty-three doctors and officials were tried and convicted for conducting horrific experiments on concentration camp inmates and prisoners of war, including experiments with malaria, freezing, and sterilization. Most of them were found guilty; some of them were executed.

In the Milch Case,<sup>52</sup> Luftwaffe Field Marshal Erhard Milch was in charge of the Nazi slave labor program. As you might imagine, if millions of German men are fighting in the Wehrmacht, you have shortage of labor. The way you fix this is that you simply deport Dutch, Belgian, and French citizens to Germany to do the work. Five million workers were deported to Germany. Milch was in charge of the program. He was prosecuted and found guilty.

We have a speaker this morning who is going to talk about the third subsequent proceeding,<sup>53</sup> the Justice Case.<sup>54</sup> Here, fifteen defendants were charged with having transformed German courts into a system of cruelty and injustice. There was a rule of law, but it had been perverted. The Nazis ran special courts and People's Courts, all of which were used to eliminate, kill, and murder Germans who opposed them.

The Pohl Case<sup>55</sup> was the fourth of the twelve subsequent proceedings. Schutzstaffel General Oswald Pohl and seventeen defendants oversaw the operation of the concentration camps at Buchenwald, Dachau, Auschwitz, and Treblinka. They were obviously up to no good, tried, and many of them were hanged.

One of the things that the Allies were really upset about was that German industrialists, men like Friedrich Flick, had really made the rise to Nazi power possible, and it fed the German war machine. We had subsequent proceedings against industrialists, of whom Flick was one. In

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<sup>51</sup> United States v. Brandt (Medical Case), Case No. 1, 1 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Aug. 20, 1947).

<sup>52</sup> United States v. Milch (Milch Case), Case No. 2, 2 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Apr. 16, 1947).

<sup>53</sup> William F. Meinecke Jr., *German Justice on Trial: The Justice Case*, 229 MIL. L. REV. 173 (2021).

<sup>54</sup> United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Dec. 3, 1947).

<sup>55</sup> United States v. Pohl (Pohl Case), Case No. 4, 5 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Nov. 3, 1947).

the Flick Case,<sup>56</sup> which was the fifth case to be tried, the offenses charged were crimes against humanity, inhumane acts against civilians, and what was called the “Aryanization of private property.” Even today, you still hear about this. If you read the *New York Times* or the *Washington Post* or listen to Fox News, you frequently learn about a painting that has been returned to the heirs of a person or persons who had it seized by the Nazis during World War II.<sup>57</sup> This Aryanization of private property was a big problem, and Flick and his co-defendants were prosecuted for this. Not only for taking paintings and other works of art, but also for seizing companies.

The sixth proceeding was the so-called I.G. Farben Case.<sup>58</sup> This was a big pharmaceutical company financing the Nazi regime, manufacturing far in excess of the needs of the peacetime economy.

The seventh proceeding, called the Hostage Case,<sup>59</sup> is a very interesting case for those of us who are military lawyers or interested in the LOAC. In this particular case, the Germans decreed, and it was an arbitrary rule, that if one German were wounded, say, in an attack by the French or Dutch resistance, the Germans would execute twenty-five to fifty Frenchmen or Dutchmen. The Germans would kill 50 to 100 for each German killed. The Germans argued that the principle of military necessity required this, which, of course, is ridiculous. The Hostage Case stands, then, for the proposition that you cannot conduct reprisals, at least of this magnitude, and insist that military necessity requires it. The law on reprisals has changed since World War II,<sup>60</sup> but the Hostage Case is very important: no arbitrary executions. “Arbitrary,” here, is used in the sense that the Germans never conducted an investigation or trial. They simply took out civilians and killed them.

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<sup>56</sup> United States v. Flick (Flick Case), Case No. 5, 6 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Dec. 22, 1947).

<sup>57</sup> E.g., Colin Moynihan, *Heirs Sue Over Ownership of a Picasso, Saying It Was Seized by Nazis*, N.Y. TIMES (May 13, 2021), <https://www.nytimes.com/2021/05/13/arts/design/picasso-painting-lawsuit-nazis.html>.

<sup>58</sup> United States v. Krauch (I.G. Farben Case), Case No. 6, 7 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (July 29, 1948).

<sup>59</sup> United States v. List (Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Feb. 19, 1948).

<sup>60</sup> See generally A. R. Albrecht, *War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949*, 47 AM. J. INT’L L. 590 (1953).

In the RuSHA Case,<sup>61</sup> the eighth proceeding, there were fourteen defendants in an SS organization that was in charge of racial purity in Germany and carried out a systematic program of genocide.

The ninth subsequent proceeding was the Einsatzgruppen Case.<sup>62</sup> The Einsatz Special Task Force consisted of mobile death squads that would go around in the east, particularly in the part of the Soviet Union that had been under German rule, and executed Jews and other “undesirables.” Twenty individuals were sentenced to death and hanged for their crimes against humanity.

The tenth trial, the Krupp Case,<sup>63</sup> is like the I.G. Farben Case. It involved another industrialist who was tried for waging, or allowing the Nazis to wage, aggressive war and financing the Nazi rise to power.

In the eleventh subsequent proceeding, known as the Ministries Case,<sup>64</sup> defendants who were part of German ministerial organizations were prosecuted for carrying out the policy of murdering Jews and killing Allied aircrews instead of taking them prisoner.

Finally, there was the High Command Case,<sup>65</sup> the twelfth and final subsequent proceeding, in which senior German officers were prosecuted for waging wars of aggression and invasion and the murder of Soviet prisoners of war.

## VII. Conclusion

If you are interested in further reading on the history of the Nuremberg military tribunals, Telford Taylor’s book<sup>66</sup> is the book to read. If you are

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<sup>61</sup> United States v. Greifelt (RuSHA Case), Case No. 8, 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Mar. 10, 1948).

<sup>62</sup> United States v. Ohlendorf (Einsatzgruppen Case), Case No. 9, 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Apr. 8, 1948).

<sup>63</sup> United States v. Krupp (Krupp Case), Case No. 10, 9 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (July 31, 1948).

<sup>64</sup> United States v. Weizsaecker (Ministries Case), Case No. 11, 12 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Apr. 11, 1949).

<sup>65</sup> United States v. Leeb (High Command Case), Case No. 12, 10 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Oct. 27, 1948).

<sup>66</sup> TAYLOR, *supra* note 2.

interested in the twelve subsequent proceedings, the best book is by Jon Heller.<sup>67</sup> And if you are interested in Soviet participation in Nuremberg, a brand new book by Francine Hirsch,<sup>68</sup> who is a professor at the University of Wisconsin, provides a perspective that, until now, we have not had.

In getting to the bottom line of IMT, I think it is that, for the first time in history, a court has decided, and the world is accepting, that an individual has obligations that transcend obedience to the state. You can no longer say, “I did what I did because that was required of me as a citizen of a nation.” Nuremberg stands for the proposition that there is something more important than obedience to domestic law, and that is that our acts as individuals also must conform to international law and the LOAC.

Thank you.

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<sup>67</sup> KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (2011).

<sup>68</sup> FRANCINE HIRSCH, *SOVIET JUDGMENT AT NUREMBERG: A NEW HISTORY OF THE INTERNATIONAL MILITARY TRIBUNAL AFTER WORLD WAR II* (2020).



**GERMAN JUSTICE ON TRIAL: THE JUSTICE CASE\***WILLIAM F. MEINECKE JR.<sup>†</sup>

## I. Introduction

Good morning. It is my privilege to talk to you this morning about the *United States v. Altstoetter* (the Justice Case).<sup>1</sup> As you know, I work at the United States Holocaust Memorial Museum. I have been there for about thirty years, since 1992, and my academic area of expertise is actually German law in Weimar and Nazi Germany. I did a dissertation that was a collective biography of the German supreme court in Weimar and Nazi Germany and a master's thesis that was on continuity and change in the German Administration of Justice from its establishment in 1879 to 1979, when it underwent fundamental reform. For the museum, I am a German specialist. My area of expertise there is Nazi state policy formation and implementation.

Today, we are going to talk about the German Justice Case. It is one of the subsequent Nuremberg proceedings targeting officials in the Administration of Justice for Nazi crimes. If we look at it, we see that it is just one of a series of trials held before an American military tribunal under the auspices of the International Military Tribunal (IMT). That meant that

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<sup>1</sup> *United States v. Altstoetter* (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Dec. 4, 1947).

they followed the same rules of evidence and criminal procedure as agreed to at Nuremberg for the major war crimes trials.<sup>2</sup>

Each of these twelve cases targets a particular aspect of German society, whether it be German industry (e.g., the Flick Case, the I.G. Farben Case) or concentration camps (e.g., the Pohl Case).<sup>3</sup> Like in the IMT (i.e., the trial for major war criminals), the Justice Case relied on adversarial justice to establish the facts. This was authorized by Control Council Law No. 10, which authorized the military commanders in each of the occupation zones of Germany (i.e., the United States, Great Britain, France, and the Soviet Union) to hold trials for lesser war criminals.<sup>4</sup> Those tried at Nuremberg were the major war criminals; this is the second tier of war criminals.

The way the American military approached the case was to look at various sectors of German society, especially German professionals, industrialists, and civil servants, and to try them for secondary offenses. It is important to note here that they were bound by the agreement that set up the IMT<sup>5</sup> and, like the IMT, it relied on adversarial justice to establish the facts in this case. This means that there were German lawyers acting as defense attorneys for those accused of a crime. The American prosecutors represented the international interest. Here, we had Brigadier General Telford Taylor as chief of the prosecution in the Justice Case, and the judges were civil judges from American courts.<sup>6</sup> In this case, these were mostly from the State Supreme Court in Ohio, as well as a former Attorney General

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<sup>2</sup> See INT'L MIL. TRIBUNAL: NUREMBERG, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 19–23 (1947) (establishing rules of procedure and evidence).

<sup>3</sup> See *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, LIBR. OF CONG., [https://www.loc.gov/tr/frd/Military\\_Law/NTs\\_war-criminals.html](https://www.loc.gov/tr/frd/Military_Law/NTs_war-criminals.html) (July 16, 2010), for the records and allied documents of the twelve subsequent proceedings.

<sup>4</sup> Control Council Law No. 10, art. III, reprinted in 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 308–10 (1945).

<sup>5</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

<sup>6</sup> BRIGADIER GENERAL TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 34–35 (1949).

of the State of Ohio.<sup>7</sup> In addition to that, there was a judge from the court of appeals in Texas.<sup>8</sup> They were to try this case and establish the facts in the case.

The problem is who would face trial.<sup>9</sup> You can see there are almost 150,000 potential people who could be tried in the Justice Case.<sup>10</sup> The German justice system was actually very large and extensive. The National Socialists' League of Law Guardians was a Nazi organization of jurists with about 100,000 members, any one of whom could have been charged.<sup>11</sup> I think that, like at the IMT, they decided that responsibility should be greatest where authority is the greatest.<sup>12</sup> Looking at the leaders of the justice system was problematic because most of them were not available for trial.

The first Justice Minister under Hitler, Franz Gürtner, was Justice Minister from 1933 to 1941,<sup>13</sup> when he died of natural causes. The last Minister of Justice, Otto Thierack, was Minister of Justice from 1942 to 1945.<sup>14</sup> He was captured by the British and committed suicide in British captivity. The Chief Justice of Germany (i.e., the presiding judge of the German supreme court), Erwin Bumke, committed suicide in Leipzig in April 1945 as American forces entered the city.<sup>15</sup> The head of the chief Nazi court, the People's Court in Berlin, was Roland Freisler, who was killed in an American bombing raid. When an American bomb struck the court building, it knocked down a balcony, under which Freisler was crushed.<sup>16</sup> And Hans Frank, who was the Reich law leader of the Nazi Party, was

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<sup>7</sup> United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Members of the Tribunal, at 13 (Dec. 4, 1947).

<sup>8</sup> *Id.*

<sup>9</sup> TAYLOR, *supra* note 6, at 50.

<sup>10</sup> This figure includes members of the National Socialists' League of Law Guardians, as well as all judges, lawyers, and prosecutors active in Germany and Austria under the Nazi regime.

<sup>11</sup> MICHAEL SUNNUS, DER NS-RECHTSWAHRERBUND (1928–1945) (1991).

<sup>12</sup> See generally TAYLOR, *supra* note 6, at 73–85 (discussing the process used to select defendants).

<sup>13</sup> EKKEHARD RITTER, FRANZ GÜRTNER: POLITISCHE BIOGRAPHIE EINES DEUTSCHEN JURISTEN 1881–1941, at 217–19 (1976).

<sup>14</sup> DER VOLKSGERICHTSHOF: HITLERS POLITISCHES TRIBUNAL 22–25 (2004).

<sup>15</sup> INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 39–41 (Deborah Schneider trans., 1991).

<sup>16</sup> DER VOLKSGERICHTSHOF: HITLERS POLITISCHES TRIBUNAL, *supra* note 14, at 26–28.

convicted in the trial of major war criminals at Nuremberg and executed<sup>17</sup> not for his duties or his actions as Reich law leader, but because of his actions as Governor General of occupied Poland.<sup>18</sup>

Who were the American jurists going to try? They were left with those to whom they had access that were in the American zone of occupation, which governed who they were going to try on one hand. On the other hand, the level of responsibility of the jurists to whom they actually had access. Of the defendants that were charged in the Justice Case,<sup>19</sup> you see there were members of the Ministry of Justice. The highest ranked official there was Frank Schlegelberger, who was the number two man in the Ministry of Justice from 1931, well before the Nazi rise to power, to his retirement in 1942.<sup>20</sup> He was State Secretary in the Ministry of Justice and then, after Gürtner's death in 1941, he was acting Minister of Justice until his retirement in 1942.<sup>21</sup> He was the highest-ranked official in the Ministry of Justice.

The other defendants were judges on the People's Court in Berlin and the special courts. Both are regarded as political courts, as Nazi courts—especially the People's Court in Berlin, which was dominated by lay judges who were political appointees appointed by the Ministry of Justice.<sup>22</sup> So, it was only a minority of professional judges that staffed the court. The special courts, again, like the People's Court in Berlin, had expedited procedures

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<sup>17</sup> United States v. Göring, 1 Trial of the Major War Criminals Before the International Military Tribunal, Sentences, at 365 (Oct. 1, 1946).

<sup>18</sup> *Id.* at 296–98.

<sup>19</sup> The following individuals were indicted: Josef Altstoetter, Wilhelm von Ammon, Paul Barnickel, Hermann Cuhorst, Karl Engert, Guenther Joel, Herbert Klemm, Ernst Lautz, Wolfgang Mettgenberg, Guenther Nebelung, Rudolf Oeschey, Hans Petersen, Oswald Rothaug, Curt Rothenberger, Franz Schlegelberger, and Carl Westphal. United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Indictment, at 15–26 (Dec. 4, 1947).

<sup>20</sup> Eli Nathans, *Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice*, 18 L. & HIST. REV. 281, 285 (2000).

<sup>21</sup> *Id.* at 293–95.

<sup>22</sup> Gesetz zur Änderung von Vorschriften des Strafrechts und des Strafverfahrens [Law Amending the Provisions of Criminal Law and Criminal Procedure], Apr. 24, 1934, RGBL at 341 (Ger.); see IM NAMEN DES DEUTSCHEN VOLKES: TODESURTEILE DES VOLKSGERICHTSHOFES 34, 41 (Heinz Hillermeier ed., 1980).

and rules of evidence, and there was limited appeal from those courts.<sup>23</sup> It was meant to be really quick justice, “*Schlagartig*” as the Germans say, to try political opponents, especially of the Nazi regime.<sup>24</sup>

What I find fascinating here is that all of the judges on the People’s Court and Hermann Cuhorst, who was the presiding judge of the Special Court in Stuttgart, were all found not guilty in the Justice Case for lack of evidence.<sup>25</sup> The only judges who were found guilty were the presiding judge of the Nuremberg Special Court, Oswald Rothaug, and his co-justice, Rudolf Oeschey.<sup>26</sup> I think, in part, that was because those other judges followed the normal rules of criminal procedure under the Nazi regime and applied the law as it was so-called normal under the Nazi regime, whereas Rothaug and Oeschey violated the norms, even under a Nazi German state, in their proceedings. We will talk more about that in a few minutes, but I think they could be viewed, especially Rothaug, as an example of German justice run wild.

I want to focus on just two of the defendants: the highest ranked defendant, Franz Schlegelberger, State Secretary of the Ministry of Justice, acting Minister of Justice in 1942; and Judge Oswald Rothaug, who was a state prosecutor who became the Special Court judge at Nuremberg in 1937 and was promoted in 1943, when he was sent to the People’s Court in Berlin. I think it was mainly his actions as a Special Court presiding judge that are at issue in the Justice Case.

Notice the age difference between the two men. There was a good twenty years between Schlegelberger and Rothaug.<sup>27</sup> Schlegelberger was by no means a Nazi. He was a very high rank in the Administration of

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<sup>23</sup> Verordnung über die Bildung von Sondergerichten [Ordinance on the Formation of Special Courts], Mar. 21, 1933, RGBL I at 136 (Ger.); NATIONALSOZIALISTISCHES HANDBUCH FÜR RECHT UND GESETZGEBUNG 1478 (Hans Frank ed., 1937).

<sup>24</sup> Verordnung über die Bildung von Sondergerichten [Ordinance on the Formation of Special Courts], Mar. 21, 1933, RGBL I at 136 (Ger.).

<sup>25</sup> United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 985 (Dec. 4, 1947).

<sup>26</sup> *Id.*

<sup>27</sup> The SD reports referred repeatedly to the dichotomy between younger jurists, who enthusiastically embraced Nazism, and older jurists with a pre-Nazi perspective on justice. See MELDUNGEN AUS DEM REICH: DIE GEHEIMEN LAGEBERICHTE DES SICHERHEITSDIENST DER SS 1938–1945 (Heinz Boberach ed., 1984).

Justice: the State Secretary. He was the number two man in the Ministry of Justice as early as 1931. He had the normal education and professional appointments that are required for an appointment to the Ministry of Justice,<sup>28</sup> as Rothaug had the normal education and experience for his appointment as a Special Court judge in 1937.<sup>29</sup> Neither were political appointees without qualification.

## II. Franz Schlegelberger

Schlegelberger was asked by Hitler to join the Nazi Party in 1938, so he reluctantly did.<sup>30</sup> He was a jurist of the old school. He agreed that the state should be based on law and the state's action should be governed by legislation. He was regarded by the tribunal as a rather tragic figure because he got involved in Nazi criminology almost against his will.<sup>31</sup>

Judge Rothaug, on the other hand, was much younger—and this was typical of people in the Ministry of Justice: the younger ones tended to be more enamored of Nazi ideology—and he was committed to Nazi ideology.<sup>32</sup> He reveled in the trial of Jews and Poles, both groups considered racial inferiors by the Nazi German state. He then faced trial. We can see that regardless of the two counterpoints, the experience was roughly the same in the trial.

The charges, like at the main proceedings at the IMT in Nuremberg, were conspiracy, war crimes, crimes against humanity, and membership in a criminal organization.<sup>33</sup> I think we can discount count four because none of the defendants were high-ranking members of the SS, the SD, or the SA. Maybe if the tribunal had said that the Academy for German Law was a criminal organization or the National Socialists' League of Law Guardians was a criminal organization that count would be more important, but it is not so important here.

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<sup>28</sup> *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 126–29.

<sup>29</sup> *Id.* at 154–58.

<sup>30</sup> Nathans, *supra* note 20, at 281–304.

<sup>31</sup> *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 1081–87.

<sup>32</sup> *Id.* at 1143–56.

<sup>33</sup> *Id.* at 15–26.

With respect to count one, the defense attorneys argued that the IMT did not authorize a charge of conspiracy in the commission of war crimes and crimes against humanity.<sup>34</sup> In the main proceedings, it was conspiracy in fighting an illegal war. The tribunal agreed with them and largely discounted count one by throwing it out.<sup>35</sup>

I do not want to speak about war crimes. I think that is the charge that most opens the proceedings to criticism, especially from the Germans, who argue that that is evidence of victors' justice (i.e., that only the defeated are charged with war crimes).<sup>36</sup> Instead, I want to focus on crimes against humanity because that has really withstood the test of time. Even today, most Germans regard the charge of crimes against humanity as legitimate and as a serious infraction committed by the Nazi German government.<sup>37</sup> They accept that as a fair charge.

Just to remind you, this is the definition of a crime against humanity used by the IMT at Nuremberg:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during 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.<sup>38</sup>

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<sup>34</sup> *Id.* at 955 (“It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.”).

<sup>35</sup> *Id.*

<sup>36</sup> Some German jurists regarded the IMT as victors' justice. *E.g.*, ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES, at xv (Patricia Heberer & Jürgen Matthäus eds., 2008).

<sup>37</sup> Even in December 1945, more than 80% of Germans believed the Nuremberg trials to be a fair and just trial of Nazi leaders. *See* PUBLIC OPINION, 1935–1946, at 1035–36 (Hadley Cantril ed., 1951).

<sup>38</sup> Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280, 287–88.

The Justice Case focused on the portion of the charge of crime against humanity that alleged “persecution on political, racial and religious grounds.”<sup>39</sup> That will be the focus when looking at the professional duties of Schlegelberger on one hand in the Ministry of Justice and Rothaug on the other, as chief presiding judge of the Special Court in Nuremberg.

I also want to point out this portion of the charge because it has serious implications for the Justice Case: “whether or not in violation of domestic law of the country where perpetrated.”<sup>40</sup> What this in effect did was prevent a defense by the judges that they were just following the law. That was not an excuse that led to exoneration. The tribunal, like the IMT, held representatives of the government responsible, especially where responsibility and power is highest and they must be held responsible. Similarly, they could not claim some superior orders, even though it was from the German state, because the IMT limited the superior orders defense in that the defendant had to show that the orders or laws that they were following were something with which they personally disagreed. The burden of proof was on the defendant,<sup>41</sup> and there was just no evidence of that.<sup>42</sup>

The Einsatzgruppen were members of the SS and the SD, as well as the German Security Police, assigned to kill Jews behind the front during the invasion of the Soviet Union.<sup>43</sup> It also included German nationals who were

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<sup>39</sup> *United States v. Altstoetter (Justice Case)*, Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Indictment, at 23 (Dec. 4, 1947).

<sup>40</sup> Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280, 287–88.

<sup>41</sup> American intelligence teams developed categories of individuals subject to automatic arrest, including all judges and prosecutors, as well as members of Nazi organizations above a certain rank. DIRECTIVE TO COMMANDER-IN-CHIEF OF UNITED STATES FORCES OF OCCUPATION REGARDING THE MILITARY GOVERNMENT OF GERMANY (May 10, 1945), *reprinted in* U.S. DEP’T OF STATE, DOCUMENTS ON GERMANY: 1945–1985 at 15, 20–21 (4th ed. 1985).

<sup>42</sup> There might have been some indication of this for Schlegelberger, but not at all in the case of Rothaug. Section 104 of the Weimar Constitution stated that judges were subject only to the law. The Nazi German state never revoked this clause of the constitution. Judges were expected to ignore directives about court decisions.

<sup>43</sup> *Einsatzgruppen: An Overview*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/einsatzgruppen> (last visited June 8, 2021).



deported from Germany to ghettos in the occupied eastern territories.<sup>44</sup> Many of them were killed, especially in Riga and Kaunas (Kovno), where they were killed along with native Jews.

Let us look at the charges against Franz Schlegelberger. The tribunal argued that he had infringed on judicial independence and that he constantly justified and legalized ex post facto the arbitrary actions of Hitler as the chief executive of the German state.<sup>45</sup> He put the law and justice at the service of the politics of the Nazi regime.<sup>46</sup> He drafted, enforced, and validated racial legislation that targeted the Jews and Poles as members of an inferior race.<sup>47</sup>

Significantly, he turned over those defendants who had been convicted in German courts but whose sentences Hitler regarded as insufficient.<sup>48</sup> He turned them over to the police for execution. There were dozens of defendants. The example cited at the tribunal was the experience of Markus Luftglass, a Jewish merchant who was charged with stealing and hoarding large numbers of eggs.<sup>49</sup> The Special Court in Katowice sentenced him to two-and-a-half years for theft.<sup>50</sup> Hitler read about that in the newspaper—this was typically how he found out about these things—and he was outraged. He informed Schlegelberger that the sentence was unacceptable and that he had to increase the criminal penalty.<sup>51</sup> Within a week, Schlegelberger arranged for Luftglass to be turned over to the secret state police, Geheime Staatspolizei (i.e., the Gestapo), for execution, and he was summarily shot.<sup>52</sup> No legal proceedings necessary, no legal order necessary—simply turned over to the police for execution.

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<sup>44</sup> *German Jews During the Holocaust*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/german-jews-during-the-holocaust> (last visited June 8, 2021).

<sup>45</sup> *United States v. Altstoetter (Justice Case)*, Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1081–87 (Dec. 4, 1947).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> MÜLLER, *supra* note 15, at 174–82.

<sup>49</sup> *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 429–31.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* See ADOLPH HITLER: MONOLOGE IM FÜHRERHAUPTQUARTIER: 1941–1944, at 140–42, 271–72, 347–52 (Werner Jochmann ed., 1980), for Hitler’s growing frustration with the Ministry of Justice.

<sup>52</sup> *Id.*

Luftglass was just one of dozens of people treated the same way. Hitler was outraged at the sentence and Schlegelberger fixed it by transferring the defendant to the police. Eventually, he decided that it would be best if the Ministry of Justice could deal with that on its own. Part of the innovation that Schlegelberger applied is something called the *Nichtigkeitsbeschwerde*, or invalidating appeal, where a prosecutor was empowered to take a case directly to the supreme court if a lower court's sentence was considered especially lenient.<sup>53</sup> The supreme court could either send the case back to the lower court with directions to have a harsher penalty or it could impose a death sentence itself. That became the standard legal means by which the courts overturned decisions that the Nazi German state deemed too lenient.<sup>54</sup>

Schlegelberger's defense was innovative. He said, "I was defending the normative state." It was the German Jewish émigré jurist Ernst Fraenkel who argued in exile that Germany, under the Nazis, had become what he called a "dual state," where the normative state (based in law) existed side by side with a police state (based on the executive whims of Adolph Hitler and the leaders of the Nazi Party).<sup>55</sup> Schlegelberger was caught in the middle because the police, as agents of the executive, were constantly threatening to usurp the jurisdiction and the functions of the judicial system, and Schlegelberger found himself fighting a rearguard action against the police so that he could maintain what could be saved in the rule of law.<sup>56</sup>

Schlegelberger made concessions to avoid a greater evil. He said that he could not resign because, if he did, Hitler would appoint a hardcore Nazi ideologue as Minister of Justice and the situation would be much worse, with many more thousands of people being killed.<sup>57</sup> He was in an impossible position where he was defending the normative state as best as he could and could not resign because that would be abdicating responsibility, probably to a hardcore Nazi. We now know that Schlegelberger was right. When he retired, Hitler appointed a hardcore Nazi ideologue as Minister of Justice,

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<sup>53</sup> Verordnung über die zuständigkeit der Strafgerichte, die Sondergerichte undsonstige strafverfahrenrechtliche Vorschriften [Ordinance on the Jurisdiction of Criminal Courts, Special Courts and Other Provisions of Criminal Procedure Law], Feb. 21, 1940, RGBL I at 405 (Ger.).

<sup>54</sup> MÜLLER, *supra* note 15, at 129–33.

<sup>55</sup> ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (Edith Lowenstein & Klaus Knorr eds., E.A. Shils trans., Oxford Univ. Press 2010) (1941).

<sup>56</sup> Nathans, *supra* note 20, at 281–304.

<sup>57</sup> *Id.*

Otto Thierack.<sup>58</sup> One of the first things he did was make a deal with the SS and the police (i.e., Heinrich Himmler) for the systematic transfer of prisoners from prisons run by the Ministry of Justice to concentration camps, where they were specifically going to be worked to death (i.e., extermination through work).<sup>59</sup> Clearly, Schlegelberger saw the writing on the wall.

The tribunal rejected this idea that Schlegelberger was fighting a rearguard. Actually, they said that by making a series of compromises, he involved the Ministry of Justice in Nazi criminology step by step.<sup>60</sup> In German, there is a proverb: “Once you begin to say yes, it is hard to say no.”<sup>61</sup> By agreeing to compromise on a whole series of principles, it became more and more difficult for Schlegelberger to make a stand. Even the concessions that he made to the Nazi regime ended up involving the Ministry of Justice deeply in Nazi criminality. The Ministry of Justice was indeed a means for exterminating the Jewish and Polish populations not just in Germany but also in the occupied territories of Germany and in Europe.

Schlegelberger was sentenced by the tribunal to life in prison for war crimes and crimes against humanity.<sup>62</sup> He was released because of ill health in 1950,<sup>63</sup> yet he managed to live until the 1970s, dying at the age of 94.<sup>64</sup> How ill could he really have been? There was some issue there. Also

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<sup>58</sup> Stephen J. Sfekas, *A Court Pure and Unsullied: Justice in the Justice Trial at Nuremberg*, 46 *UNIV. BALT. L. REV.* 457, 495–69 (2017). Hitler discussed his vision for a National Socialist administration of justice with his newly appointed Nazi minister of justice, Otto Thierack. ADOLPH HITLER: MONOLOGE IM FÜHRERHAUPTQUARTIER: 1941–1944, *supra* 51, at 299–304.

<sup>59</sup> OFF. OF U.S. CHIEF OF COUNS. FOR PROSECUTION OF AXIS CRIMINALITY, 3 NAZI CONSPIRACY AND AGGRESSION 467–70 (1946).

<sup>60</sup> *United States v. Altstoetter (Justice Case)*, Case No. 3, 3 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Judgment, at 1081–87 (Dec. 4, 1947); MÜLLER, *supra* note 15, at 270–73.

<sup>61</sup> One of the conclusions of the Seminars for Judicial Professionals at the Holocaust Museum in Washington, D.C., is that if a judge or prosecutor waits until his or her only choice is to submit or resign, they have waited too long to take a stand in defense of professional ethics. See *Judiciary*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/outreach-programs/judiciary> (last visited June 9, 2021), for a description of these seminars.

<sup>62</sup> *Altstoetter*, 3 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1200.

<sup>63</sup> Nathans, *supra* note 20, at 300.

<sup>64</sup> Mathias Reimann, *Franz Schlegelberger (Der Unrechtsstaat III)* by Eli Nathans, 39 *AM. J. COMPAR. L.* 459, 460 (1991) (book review).

disgusting is that the West German government recognized him as a legitimate civil servant, even under the Nazi regime, so that upon his release from American custody, he began to receive a state pension as a high civil servant of some 3,000 German marks per month.<sup>65</sup> The average pay in Germany, at the time, was about 500 German marks per month.<sup>66</sup> He also got a cash payment of 160,000 German marks that accumulated while he was in American custody.<sup>67</sup> Put that against the 100,000 Reichsmarks that Hitler paid him to retire quietly,<sup>68</sup> and I think it was pretty clear where Schlegelberger's loyalties lay.

### III. Oswald Rothaug

Taking a look at Rothaug, the charges of the tribunal are that he often appeared in court drunk, that his court proceedings were often like show trials, and that he gave long diatribes about the dangers of the Jewish and Polish races as subhuman types that threatened ordinary Germans.<sup>69</sup> In particular, the tribunal cited the Katzenberger case, in which he lacked all decorum. The Katzenberger "race defilement" case involved a violation of the second Nuremberg law, the Law for the Protection of German Blood and German Honor,<sup>70</sup> where an elderly Jewish man, Leo Katzenberger, head of the Jewish community in Nuremberg, was charged with committing racial defilement (i.e., having a sexual relationship) with a young woman named Irene Seiler.<sup>71</sup> This was in 1942 when he comes to trial.<sup>72</sup> It was first looked at by the state court, which was going to dismiss it for lack of evidence, and Rothaug intervened and said, "No, transfer it to the Special Court and I will see that he is prosecuted and found guilty."<sup>73</sup>

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<sup>65</sup> Harry Reicher, *The Jurists' Trial and Lessons for the Rule of Law*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 175, 178 (Herbert R. Reginbogen & Christoph J. M. Safferling eds., 2006).

<sup>66</sup> *Id.*

<sup>67</sup> MÜLLER, *supra* note 15, at 208.

<sup>68</sup> *Id.*

<sup>69</sup> *United States v. Altstoetter (Justice Case)*, Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1154–58 (Dec. 4, 1947).

<sup>70</sup> Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law for the Protection of German Blood and Honor], Sept. 15, 1935, RGBL I at 1145 (Ger.).

<sup>71</sup> *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 650–53.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1143–56.

Not only was he intervening in the normal procedure of the courts, but he was also working from the assumption that Katzenberger was guilty, and that was not proper decorum for a judge. He then worked very closely with the prosecutor. His *ex parte* discussions with the prosecution<sup>74</sup> about how the case should proceed and how they were going to find Katzenberger guilty—and not just find him guilty but have him executed, which is an uphill battle because the maximum penalty was just two-and-a-half years' confinement.<sup>75</sup>

How was he going to have Katzenberger found guilty of race defilement and executed? That was a novel idea that Rothaug hits upon. Basically, what he did was violate the normal rules of criminal procedure by insisting that Katzenberger and his so-called paramour be tried together rather than Seiler being tried for perjury first.<sup>76</sup> This was to prevent Seiler from testifying on behalf of Katzenberger that he never had a sexual relationship with her.<sup>77</sup> There was no evidence of a sexual relationship between the two; there was just rumor and innuendo. They were tried together so that Irene Seiler was muzzled.

Secondly, he paired a violation of the Law for the Protection of German Blood and German Honor, the second Nuremberg law, with a violation of the Ordinance Against Public Enemies.<sup>78</sup> This was a decree that was passed by the Reich Defense Council in September 1939, which authorized judges to increase criminal penalties, up to and including death, in cases where the judge determined that the defendant used the conditions of war to further their crime.<sup>79</sup> This was absolute novelty, and most of the judges and prosecutors in Germany would reject this out of hand because Rothaug said the conditions of war were that Seiler's husband had been drafted into

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<sup>74</sup> *Id.* at 86–87.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Article 4 stated, “Anyone who intentionally commits a criminal offense, taking advantage of the exceptional circumstances caused by the state of war, will be punished with penitentiary for up to 15 years, with lifelong penal servitude or with death, if this is required by Sound Popular Judgment (Gesundes Volksempfinden) because of the particular reprehensibility of the crime”. *Verordnung gegen Volksschädlinge* [Ordinance Against Public Enemies], Sept. 5, 1939, RGBl I at 1679 (Ger.).

the Army and was away fighting at the front.<sup>80</sup> The absence of her husband facilitated Katzenberger and Seiler's having a sexual liaison. That was rejected out of hand; that was ridiculous.

In any case, the trial was very unseemly. Again, he gave long diatribes about the dangers of the Jewish menace to German society. There were high-ranking Nazi officials present in the courtroom. I think there were serious charges here, especially since he was part and parcel of this whole idea that Jews should be subject to a harsher kind of justice and a harsher kind of proceeding.

His defense was quite novel. He said, "I was just a small cog in the vast machinery of justice. Yes, I was presiding judge of the Special Court in Nuremberg but, by 1942, there were more than seventy such courts. Why are you picking on me and not looking at all the justices of the special courts?" He said that he only ever applied valid law, which is technically true, and that he followed the case law established by the Reich Supreme Court, the *Reichsgericht*. He also said that he submitted several decisions where the Supreme Court summarily overturned a lower court decision with a too-lenient sentence and substituted a death sentence as evidence that he was part and parcel of the mainstream interpretation of the law and that he was not doing something exceptional.<sup>81</sup> He agreed that he was on the harsher side of things, but he insisted that it was still legal because you could have the swing between a more lenient judge and a harsher judge but both remained within the law. He said he was harsh not because he was prejudiced against Jews or Poles, but because he was a patriotic German who fervently supported Germany during the war.<sup>82</sup> He said that he was always careful and dispassionate and that all he ever did was apply the law.<sup>83</sup>

The Nuremberg proceedings rejected that out of hand and said that from the evidence, it was clear that the trial, as presided over by Rothaug, lacked all of the essentials of legality—that Rothaug, by the way he

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<sup>80</sup> WILLIAM F. MEINECKE JR. & ALEXANDRA ZAPRUDER, U.S. HOLOCAUST MEM'L MUSEUM, LAW, JUSTICE, AND THE HOLOCAUST 40–50 (2014), <https://www.ushmm.org/m/pdfs/20140711-ljh-booklet-2nd-Edition.pdf>.

<sup>81</sup> *Alstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 341–416.

<sup>82</sup> *Id.* at 750–51.

<sup>83</sup> *Id.* at 341–416.

conducted his court, was just a cog in the machinery of persecution that the justice system in Germany had become by 1942.

Leo Katzenberger was found guilty of race defilement without evidence, based solely on innuendo and rumor, and executed by beheading.<sup>84</sup> Rothaug was rewarded for his service at Nuremberg by being promoted to the People's Court in Berlin.<sup>85</sup> I think there was a lot of personal self-serving involved in Rothaug's actions. He wanted to draw attention from the Nazi Party. He wanted to show that he would take a tough stance against Jewish and Polish defendants and from that, he got a promotion. He was not just a small cog in the machinery of justice. In fact, the court ruled that he was part and parcel in the whole process of genocide.<sup>86</sup>

"Genocide" was a word not used by the IMT at Nuremberg with the major war criminals. It was a term coined by Raphael Lemkin to really explain the experience of his family members, who were Polish Jews. He coined the word "genocide" (i.e., the murder of an entire people) to describe that experience.<sup>87</sup> Here, the term was used extensively, as the tribunal points out that both Schlegelberger and Rothaug were, for different intentions and reasons, involved in the crime of genocide.<sup>88</sup>

Unfortunately, Rothaug was released in 1956, in part because of political considerations by the new High Commissioner of Germany, John McCloy.<sup>89</sup> He agreed with the other Western Allies that in order to have a viable defense against Soviet expansionism, you had to include the Germans.<sup>90</sup> The Germans were anxious to put the crimes of war behind them and they wanted to focus on the future. In fact, there was a movement in Germany called "*Stunde Null*" ("zero hour"), where they say the new Germany begins from this moment; we are going to forget the past and

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<sup>84</sup> *Id.* at 373.

<sup>85</sup> *Id.* at 1151–56.

<sup>86</sup> *Id.* at 1155.

<sup>87</sup> *Coining a Word and Championing a Cause: The Story of Raphael Lemkin*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/coining-a-word-and-championing-a-cause-the-story-of-raaphael-lemkin> (last visited May 21, 2021).

<sup>88</sup> *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 1085, 1155.

<sup>89</sup> Frank M. Buscher, *The U.S. High Commission and German Nationalism, 1949–52*, 23 CENT. EUR. HIST. 57, 57–75 (1990).

<sup>90</sup> *Id.*

just look to the future.<sup>91</sup> As part of that whole movement, in order to integrate Germany into the Western defense infrastructure, McCloy quietly pardoned or facilitated the release of most of their criminals tried by the American tribunal in the subsequent Nuremberg proceedings.<sup>92</sup>

It is interesting to note that Rothaug was able to avoid prosecution by German courts. Here, I am absolutely convinced that a German court, using German law, would have found Rothaug guilty of violation of paragraph 336 of the German Criminal Code, “judicial perversion of justice” (also called “judicial murder”),<sup>93</sup> just for his character or behavior in the proceedings against Leo Katzenberg. It was every bit of scandalous as that paragraph indicates: he skewed the law, he misused judicial discretion in order to increase criminal penalties, and he mischaracterized the evidence to find Leo Katzenberg guilty and execute him.

In any case, Rothaug was able to avoid trial by German courts and German law by citing double jeopardy, saying that he was already tried for these crimes by the American military tribunal and that to try him again would be a violation of this basic principle of the rule of law. Sadly, he avoided domestic prosecution.

#### IV. Conclusion

I would like to end by talking about efforts by the Allies—the Western Allies, especially—in restoring the rule of law in Germany.

All persons are equal before the law.

No person, whatever his race, nationality, or religion, shall be deprived of his legal rights.

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<sup>91</sup> See generally GERMAN HIST. INST., *STUNDE NULL: THE END AND THE BEGINNING FIFTY YEARS AGO* (Geoffrey J. Giles ed., 1997).

<sup>92</sup> Buscher, *supra* note 89.

<sup>93</sup> Paragraph 336 included crimes committed in office and paragraph 339 of the Reich Criminal Code included: “A judge who deliberately does not apply an applicable law, because he holds a different result for fair, politically opportune or more appropriate for other reasons has committed a perversion of justice.” *Strafgesetzbuch für das Deutsche Reich* [Criminal Code for the German Reich], May 15, 1871, RGBL I at 127 (Ger.).



Rights of the Accused: No person shall be deprived of life, liberty, or property without due process of law.

Criminal responsibility shall be determined only for offences provided by law.

In any criminal prosecution, the accused shall have the rights recognized by democratic law, namely, the right to a speedy . . . trial[,] to be informed of the nature and cause of the accusation[,] to be confronted with witnesses against him[,] to have process for obtaining witnesses in his favor[, and] to have the assistance of counsel for his defence. Excessive or inhuman punishments or any not provided by law will not be inflicted.<sup>94</sup>

This comes from a publication from the American Occupation Government of Germany, and it discusses their efforts to restore the rule of law in Germany. Partly, this comes from the Control Council Law No. 1, which named specific laws that were based on racial ideology or were political in nature and simply said that these Nazi laws were invalid and must be removed from the legal codes.<sup>95</sup>

In October 1945, Control Council Proclamation No. 3 reestablished the court system in Germany, as it existed under the Court Organization Act of 1924.<sup>96</sup> Since there was no united government of Germany, it would be without the supreme court. Basically, it reestablished the district court, the state court, and the state superior court, which would be the highest court in occupation zones.<sup>97</sup> It also reestablished the rules of criminal procedure and civil procedure, the criminal code, and the civil code, as they existed before the Nazi rise to power.<sup>98</sup>

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<sup>94</sup> OFF. OF MIL. GOV'T FOR GER. (U.S.), STATUS REPORT ON MILITARY GOVERNMENT OF GERMANY: U.S. ZONE 29 (1946).

<sup>95</sup> Control Council Law No. 1, *reprinted in* 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 101–130 (1945).

<sup>96</sup> Control Council Proclamation No. 3, *reprinted in* 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 138–139 (1945).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

The only legacy of the Nazi period was actually in the people staffing the courts, most of whom had been lawyers, judges, and prosecutors under the Nazi regime. Even the new Chief Justice of Germany in 1950, Hermann Weinkauff, had been a supreme court justice under the supreme court in Nazi Germany.<sup>99</sup> That legacy still existed.

If anything, the legacies of the Justice Case are the production of a record of Nazi criminality and the justice system, the idea that judges could no longer ignore the human consequences of the laws that they apply, and that they have to really struggle and think about the effect on humans that the application of the law has.

Thank you very much.

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<sup>99</sup> *The Presidents of the Federal Court of Justice*, BUNDESGERICHTSHOF, [https://www.bundesgerichtshof.de/EN/People/PremiersPresidents/premiersPresidents\\_node.html](https://www.bundesgerichtshof.de/EN/People/PremiersPresidents/premiersPresidents_node.html) (last visited June 9, 2021).

**INDIVIDUAL CRIMINAL RESPONSIBILITY  
FOR WAR CRIMES\***GEOFFREY S. CORN<sup>†</sup>

Thank you for the introduction and thank you for the opportunity to contribute to this event. It is nice to see all of you. I am used to doing Zoom classes, but it is a bit of a change to see so many people in uniform and so many people signed in right when they are supposed to be. When you are in academia, things work a little differently. I think this is a great event and I was excited to get the opportunity to participate. I wish I were there; I am not there because of some commitments I have here. It was no fault of the organizers who worked very hard to get me there. I want to thank them again and thank all of you for your attention.

What I want to talk about is an article<sup>1</sup> that I just finished with a friend, colleague, and alumna of the U.S. Army Judge Advocate General's Legal Center and School's Graduate Course, Lieutenant Colonel (Retired) Rachel VanLandingham, who was an Air Force officer and is now teaching law at Southwestern Law School in Los Angeles. About a year ago, we were together and I asked her a question: "Is it not odd that Congress has enumerated a war crimes code for our enemies, but it has not incorporated something similar into the punitive articles of the Uniform Code of Military Justice (UCMJ)?" That got us thinking about resurrecting an issue that has been periodically discussed: whether it is time for Congress to incorporate war crimes as enumerated offenses in the UCMJ to enable commanders to have a more feasible approach to holding our own Service members

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<sup>1</sup> Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309 (2020).

accountable for battlefield misconduct or wartime misconduct when it actually violates the laws and customs of war.

The general topic of your symposium is the impact of the Nuremberg legacy on accountability. When I think about that question, I think the real impact of Nuremberg is that we should not have needed Nuremberg. We should not have had Nuremberg for two reasons. First, leaders in all armed forces should be fully committed to ensuring that their subordinates comply with the laws and customs of war. That is certainly a principal obligation that you bear as legal advisors in operations and legal advisors in training in order to facilitate the commander's capacity to implement that responsibility of command. When I think of the term "command responsibility," I do not instinctively gravitate towards the mode of criminal liability that it is understood to represent for most international and military lawyers. I think of the responsibility of commanders to make sure that we never get to a point where we need to do war crimes prosecutions.

I think the other aspect of the legacy of Nuremberg (i.e., that we should not need a tribunal like Nuremberg or any international tribunal) is that when there is misconduct within the ranks of the armed forces, the military is committed to holding its members accountable. The U.S. military, as you all know, has a seemingly unwavering commitment and an absolute commitment to ensuring effective accountability for wartime misconduct.<sup>2</sup> This is widely misunderstood, I think. There are many observers who assume that any time there is a report of an incident of wartime misconduct, it should result in a criminal trial and a conviction, but all of you know that that is an unrealistic expectation.

There are two bodies of law operating here that are not completely in sync: the law of armed conflict (or international humanitarian law) and international criminal law. Translating international humanitarian law into criminal responsibility is a complicated and challenging task. You could have many situations where a commander would conclude that there were mistakes made by subordinates and that those mistakes were inconsistent with the law of armed conflict, but based on the advice of legal advisors, the commander would conclude that the ability to satisfy the burden of proof in a criminal prosecution is just not feasible. This is a challenge for

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<sup>2</sup> U.S. DEP'T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM (2 July 2020).

all international and domestic criminal tribunals that want to punish individuals for violating the rules of war, so to speak.

I was in a conference yesterday with the American Society for International Law, where we were talking about this, and we had some experts on international criminal law who made the point that, in some ways, when you try to translate a battlefield regulatory norm into a norm of criminal responsibility, it is like putting a square peg into a round hole—it is not easy because the standards are different,<sup>3</sup> and we need to understand that.

Part of the solution for that for the U.S. military, as you all know and I believe, has been a longstanding tradition that when we have Service members who engage in misconduct that would amount to a violation of the law of war, we charge it under the punitive articles of the UCMJ as a crime derived from the common law-type crimes in the code (e.g., murder, assault, mayhem, arson, larceny). I was in the Graduate Course in 1996 doing the seminars that you all are doing, and this is what we talked about: If I am a military prosecutor, why do I want to go through the headache of having to deal with jurisdictional questions and vagaries of international law to prosecute a Service member when it is so much easier to simply allege a violation of the punitive articles that currently exist?

As some of you may know, the option of charging a war crime has always been a part of the UCMJ.<sup>4</sup> As a matter of fact, it predates the UCMJ. It was incorporated into the Articles of War, I think in 1916 for both the Army and the Navy.<sup>5</sup> Article 18, UCMJ, vests a general court-martial with jurisdiction over two categories of offenses. First, offenses in violation of the punitive articles,<sup>6</sup> but only individuals subject to Article 2, UCMJ, are subject to that jurisdiction. The second clause of Article 18, UCMJ, also vests a general court-martial with jurisdiction over any person who violates

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<sup>3</sup> See generally Geoffrey S. Corn, *Ensuring Experience Remains the Life of the Law: Incorporating Military Realities into the Process of War Crimes Accountability*, in 2014 GLOB. CMTY.: Y.B. INT'L L. & JURIS. 189 (discussing the prosecution of international humanitarian law violations).

<sup>4</sup> UCMJ art. 18(a) (1950); see generally Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001).

<sup>5</sup> Aldykiewicz & Corn, *supra* note 4, at 94–95.

<sup>6</sup> UCMJ art. 18(a) (1950).

the law of war and is subject to trial by military tribunal.<sup>7</sup> Theoretically, prosecutors have always had the potential to allege a violation of the laws and customs of war but, to my knowledge, we have never done that for Service members who commit violations of the law of war in a situation where we could, in fact, allege and prove a war crime *per se*.

The question becomes, “Why tinker with that?” I think the answer turns on changes in the international perception of what right looks like when you are dealing with misconduct that would qualify as a war crime. It comes from the fact that there is increasing scrutiny by international tribunals (e.g., the International Criminal Court) over accountability for war crimes, and it comes from the basic change in the way our own military thinks about the role of legitimacy as an enabler to operational and strategic success.

I think that the situation has changed. I started my career as an intelligence officer, and my job was to do the intelligence preparation of the battlefield. If we were doing the intelligence preparation of the battlefield on how to prosecute a war crime in 1996, I think it made sense that these were rare events and we were not a military that was involved in a constant state of combat operations. When you had the odd incident of battlefield misconduct that would qualify as a war crime, it was okay to use the punitive articles. There was not going to be a lot of attention on it, and the internal accountability would be credible and effective. That is not the situation anymore. The intelligence preparation of the battlefield has changed, and one of the most significant changes, in my mind, is the role of legitimacy as recognized in our own joint operational doctrine. As most of you know, Joint Publication 3-0 lists legitimacy as a key principle of effective joint operations.<sup>8</sup> How is legitimacy defined? Legitimacy is defined as the actual and perceived commitment to law, morality, and ethics by the force.<sup>9</sup> It is more than just the actual commitment—it is the perception of commitment.

I do not know if any of you had the opportunity to watch BBC yesterday, but if you had watched it, the lead story was the report that was released by the Australian armed forces about the war crimes in which their special

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<sup>7</sup> *Id.*

<sup>8</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS I-2 (17 Jan. 2017) (C1, 22 Oct. 2018).

<sup>9</sup> *Id.* at A-4 (“Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences.”).

operators appear to have engaged in Afghanistan.<sup>10</sup> The Chief of the Australian Defence Force gave a presentation where he acknowledged that, based on an extensive inquiry and investigation, there is strong evidence that there were a number of unlawful killings and abuse of detainees committed by Australian forces.<sup>11</sup> This is worldwide news. The world is watching.

One of the questions he was asked was, “What is Australia going to do about it? Are there going to be criminal investigations and prosecutions?” There is this long, convoluted process of how you have to go through the military investigators, then it has to be referred to a special prosecutor, and then it moves into a civilian court. I am watching that saying, “If that happens in our forces, the process is much more efficient because it belongs to the commander, who plays the role as the convening authority.” Then I was wondering, and I think we all should wonder if we were confronted with something similar, “How is the perception of legitimacy going to be influenced by the inability or the practice of not charging an actual war crime?” Or, better yet, “If our convening authority-commander is concerned about legitimacy in response to misconduct, should the commander have a more feasible mechanism to allege an actual war crime in lieu of a common law offense?” Our view in this article is that the answer is yes.

There is another development here that I think did not exist when I was in your place in 1996. That is that Congress has done it—Congress has enumerated a war crimes code.<sup>12</sup> Ironically, they have done it for our enemies, but not our own forces. That really is what has us scratching our heads. The Military Commissions Act of 2006,<sup>13</sup> as amended in 2009<sup>14</sup> in response to the opinion of *Hamdan v. Rumsfeld*,<sup>15</sup> enumerated the crimes that were within the jurisdiction of this military commission, the American war crimes tribunal.<sup>16</sup> Why did Congress do that? Congress did that, to my

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<sup>10</sup> *Australian ‘War Crimes:’ Elite Troops Killed Afghan Civilians, Report Finds*, BBC NEWS (Nov. 19, 2020), <https://www.bbc.com/news/world-australia-54996581>.

<sup>11</sup> Alexandra Koch, Rohini Kurup & Tia Sewell, *Understanding the Australian Inquiry into ADF War Crimes in Afghanistan* (Nov. 25, 2020, 12:23 PM), <https://www.lawfareblog.com/understanding-australian-inquiry-adf-war-crimes-afghanistan>.

<sup>12</sup> 10 U.S.C. §§ 950p–950t.

<sup>13</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §§ 948a–950t).

<sup>14</sup> National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2574–614 (2009).

<sup>15</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>16</sup> 10 U.S.C. §§ 950p–950t.

knowledge, on the advice of the Judge Advocates General, who said the vagaries of the existing practice of charging war crimes under a general article, so to speak—under Article 21, UCMJ, that vests the President with the discretion to convene a military commission to punish captured personnel for violating the laws of customs and war—is going to create more litigation and uncertainty. What we need is for Congress to be very clear on what crimes it believes are applicable to our captured enemies because they violated international law, as the United States understands it, before they were captured.

The punitive articles to the Military Commissions Act are an enumeration of war crimes that, ostensibly, Congress and the executive believe are valid. My question is, “Why not simply adopt the same approach for the UCMJ?” If we did that, if we added to the punitive articles of the UCMJ the provisions of the Military Commissions Act’s punitive articles, it would create a much more logical alignment between battlefield misconduct—the type of crimes that were at the focal point of the Nuremberg tribunal—and the capacity or ability of a legal advisor to advise a commander acting as a convening authority that, in this case, we should charge the actual war crime.

The core of our article’s proposal is that Congress should enumerate war crimes for the punitive articles relatively analogous to the enumeration in the Military Commissions Act.<sup>17</sup> The thesis of the paper is that it is perplexing and counterproductive for the perception of legitimacy that the United States would not enumerate a war crimes code for its own forces when it has done so for its captured enemy forces.<sup>18</sup> One of the challenging aspects of developing this thesis in the article was whether we would do a whole cloth migration of the punitive articles in the Military Commissions Act into the UCMJ, and we do not think that that is the right approach for two reasons. First, there are some offenses in the Military Commissions Act that remain controversial in terms of their international law pedigree. If in your course you are studying war crimes, if you have read the *Al Bahlul* circuit court en banc opinion,<sup>19</sup> you see a relatively fractured opinion. The key opinion in that ultimate decision was then-Judge Kavanaugh, who referred to the validity of Congress including in the Military Commissions

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<sup>17</sup> Corn & VanLandingham, *supra* note 1, at 344–45.

<sup>18</sup> *Id.* at 311–17.

<sup>19</sup> *Al Bahlul v. United States*, 767 F.3d 1, 27 (D.C. Cir. 2014) (en banc), *aff’d per curiam on reh’g en banc*, 840 F.3d 757 (D.C. Cir. 2016).



Act jurisdiction war crimes that are consistent with what he called the American common law of war.

In other words, they do not have to be war crimes recognized by the international community. As long as there is a tradition in American practice of alleging these crimes, then it is valid for Congress to incorporate them into the Military Commissions Act's jurisdiction. The crimes that were most controversial were conspiracy to violate the laws and customs of war,<sup>20</sup> and the most controversial provision is "material support to terrorism."<sup>21</sup> Is material support to terrorism really a war crime? I think most international criminal law experts would say no, but Congress has said yes for the military commission. I do not think that it makes any sense to incorporate that into a war crimes code for our own forces, because if we were to determine that one of our Soldiers engaged in material support to terrorism, then the proper offense would be aiding the enemy under the existing punitive articles,<sup>22</sup> assuming the terrorist is an enemy group.

Even if the terrorist was not an enemy group, there was actually a court-martial tried at Fort Lewis when I was in my last assignment as a Regional Defense Counsel, *United States v. Specialist Ryan D. Anderson*.<sup>23</sup> Specialist Anderson was a National Guard Soldier who was caught up in a sting trying to give what he believed were undercover agents for al Qaeda information on how to disable and steal an M-1 Abrams tank after he deployed to Iraq.<sup>24</sup> He was tried for a violation of Article 134, UCMJ, in the crafted offense of aiding al Qaeda.<sup>25</sup> The reason that they did not charge him with aiding the enemy was because it was not clear that the evidence could establish conclusively that al Qaeda qualified as "the enemy" for purposes of the definition of the crime in the UCMJ because Congress had never actually used the term "al Qaeda" in the 2001 Authorization for the Use of Military Force.<sup>26</sup> Was al Qaeda technically an enemy within the meaning of the offense? There was debate over that, so they crafted a violation: aiding al

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<sup>20</sup> *Rumsfeld*, 548 U.S. 557; *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled by Al Bahlul*, 767 F.3d at 11.

<sup>21</sup> *Al Bahlul*, 767 F.3d at 38.

<sup>22</sup> UCMJ art. 103b (2016).

<sup>23</sup> *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010), *aff'g* No. Army 20040897, 2008 CCA LEXIS 671 (A. Ct. Crim. App. Jan. 31, 2008).

<sup>24</sup> *Id.* at 381.

<sup>25</sup> *Id.* at 384 & n.4.

<sup>26</sup> *See* Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

Qaeda, a terrorist organization engaged in hostilities against the United States.

We do not need to include material support to terrorism, or terrorism for that matter, in the punitive articles that we would incorporate into the UCMJ. Conspiracy, I think, is a different beast. I actually think that there is validity in treating conspiracy to violate the law of war as a war crime *per se*—that it is more than just a mode of liability. I think it opens up an important discussion on the validity of alleging inchoate versions of substantive war crimes. I think it is an area that is undertheorized and I think it is an important area, and here is why. When we think of war crimes, our instinct is to gravitate towards result crimes (e.g., you attacked civilians, you murdered a prisoner) that are defined by the pernicious result. But, in fact, effective accountability often requires accountability for conduct crimes. You can have a situation where a commander launches an indiscriminate attack but, thankfully, it does not have the harmful effect on the civilian population. Think of Hamas in a conflict with Israel, where they are firing rockets indiscriminately. Either Israel will let them fall in an empty field or the Patriot missile system will rapidly identify that they are heading for a population center and, thankfully, be able to take them down before they cause any harm. There is no unlawful result from that attack, but certainly as a conduct offense, it is worthy of condemnation.

I think another one where that is interesting is perfidy. If you have not studied perfidy, you will learn that to establish the offense of perfidy under international criminal law, you have to prove that the perfidious conduct resulted in death, injury, or capture to the enemy.<sup>27</sup> Is that really why we condemn perfidy? Do we condemn perfidy because of the result it produces, or do we condemn perfidy because the conduct dilutes our confidence in respect for the laws and customs of war and therefore endangers a civilian population? For example, take an enemy soldier who is fighting in a civilian uniform. What if he does not hurt anybody? Does that mean he should be immune from sanction? In my view, there should be more attention focused on the application of inchoate versions of law of war violations—conspiracy and attempt, specifically—so that we have a better mechanism or a better ability to sanction conduct offenses as opposed to just result offenses. I

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<sup>27</sup> INT'L CRIM. CT., ELEMENTS OF CRIMES 24 (2011) (enumerating in article 8(2)(b)(xi) the war crime of treacherously killing or wounding).

think conspiracy and the attempt provision as it exists in the Military Commissions Act should be incorporated into the punitive articles.

There are some other aspects that I think the migration of most of the war crimes in the punitive articles of the Military Commissions Act into the UCMJ would provide an opportunity to consider. One is closing the command responsibility gap. This is long overdue. This is not a new idea. Again, another one of my Judge Advocate General's Legal Center and School faculty colleagues, who is now a law professor, Vic Hansen of the New England School of Law, wrote about this some time ago.<sup>28</sup>

Under the punitive articles, if we are not charging a war crime and we have a commander who should have known that his subordinates were going to commit war crimes, we do not charge a *Yamashita* "should have known" theory of command responsibility.<sup>29</sup> The best we are going to do is dereliction of duty.<sup>30</sup> Why? Because if we are charging a punitive article violation, the modes of liability are established by the aiding and abetting provisions, and the aiding and abetting provisions require proof of a shared criminal intent.<sup>31</sup> A commander's reckless failure to properly deal with a situation of a brewing war crimes incident would not satisfy that aiding and abetting mode of liability.<sup>32</sup>

This was what happened after My Lai, when Captain Ernest Medina, the company commander of the unit that committed the atrocity, was

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<sup>28</sup> Victor Hansen, *What's Good for the Goose is Good for the Gander—Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L.R. 335 (2006).

<sup>29</sup> *In re Yamashita*, 327 U.S. 1, 15–16 (1946).

<sup>30</sup> See, e.g., OFF. OF THE JUDGE ADVOC. GEN., U.S. DEP'T OF ARMY, TARGETING AND THE LAW OF WAR: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT tbl.1 (2017) (citing dereliction of duty in articulating the "elements of proof" to establish a law of war violation, including in the context of command responsibility); see also Lieutenant Colonel James T. Hill, *Command Prosecutorial Authority and the Uniform Code of Military Justice—A Redoubt Against Impunity and a National Security Imperative*, 228 MIL. L. REV. 473, 482–89 (2020) (discussing the theory of command responsibility through dereliction of duty).

<sup>31</sup> UCMJ art. 77(1) (1950).

<sup>32</sup> Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 175–76 (2000).

acquitted by his general court-martial.<sup>33</sup> Why was he acquitted? Because he was charged as an aider and abettor, and the evidence was insufficient to establish that he shared the criminal intent.<sup>34</sup> He was really responsible under the doctrine of command responsibility.

Could we charge a commander with the substantive crimes of a subordinate based on the international law doctrine of command responsibility? I think we could do that through the mechanism of the second clause of Article 18, UCMJ, but I believe that needs to be incorporated into the punitive articles of the UCMJ. And if you look at the responsibility provision of the Military Commissions Act, it is, in fact, incorporated there.<sup>35</sup> If you look at modes of liability in the Military Commissions Act, Congress incorporated the *Yamashita* theory of command responsibility.<sup>36</sup> We think that this is an opportunity to address that shortfall.

Another thing we address in the article is our belief that it would be credible for Congress to codify a mistake of law defense for battlefield misconduct.<sup>37</sup> You all know that mistake of law is rarely a viable defense. I was involved in the court-martial of a U.S. Army captain named Rogelio Maynulet, who killed a wounded detainee in Iraq and was charged with assault with intent to commit murder.<sup>38</sup> I am not sure why they charged the assault, but probably the convening authority was trying to limit his liability. He was a good officer who got in a firefight; there was a mortally wounded enemy and the medic said there was nothing he could do for him and that he was going to die.<sup>39</sup> It was all being recorded by an unmanned aerial vehicle, and Captain Maynulet said, “Step away” or something like that, and he shot him in the head and killed him. When Maynulet explained

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<sup>33</sup> Because Captain Medina was acquitted, no record of trial exists. But see Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7 (1972), for the perspective and insight of the military judge who presided over Captain Medina’s general court-martial.

<sup>34</sup> Smidt, *supra* note 32.

<sup>35</sup> 10 U.S.C. § 950q (“[A] superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal.”).

<sup>36</sup> *Id.*

<sup>37</sup> Corn & VanLandingham, *supra* note 1.

<sup>38</sup> United States v. Maynulet, 68 M.J. 374, 375 (C.A.A.F. 2010).

<sup>39</sup> *Id.*

why he did it, he talked about a briefing he received from a judge advocate before they went to Iraq.<sup>40</sup>

I was helping the civilian defense counsel. We got the PowerPoint briefing and there was one slide that said, “unnecessary suffering” and then under it, all it said was, “do the right thing.” That was his understanding of what “unnecessary suffering” meant.<sup>41</sup> The judge denied him a mistake of law instruction because the judge said that the crime that he was charged with does not require knowledge that the killing is unlawful,<sup>42</sup> which is true. That is normally why you deny a mistake of law instruction.<sup>43</sup>

We do not think that mistake of law should be a purely subjective defense. What we are suggesting is that in the complexity of battlefield operations, a defendant should have the opportunity to at least plead an honest and objectively reasonable misunderstanding of his or her legal obligation as it related to that alleged act of misconduct. I think it would rarely be successful and, in fact, I think if Captain Maynulet had received that instruction, the court-martial may have still convicted him. But it seems odd to me that a Soldier, Marine, or Airman could receive a legal briefing, and that legal briefing for whatever reason may have been misleading or even erroneous, yet that fact could not factor into the assessment of a criminal, culpable state of mind if the Service member is then subjected to a criminal prosecution. I think it is worth thinking about if Congress were to do this.

The last piece of this that is really interesting is getting rid of the amended Article 2(13), UCMJ. I do not know if any of you have looked at that. It kind of popped into the UCMJ, and I have been unable to figure out where it came from. I was with Lieutenant General Charles Pede a couple of years ago at a conference, and I asked if he knew about this. My recollection is that he said, “I do not think we had anything to do with adding that provision.” Remember what Article 2, UCMJ, does, which is subject individuals to the punitive articles of the UCMJ—all of them, to include

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<sup>40</sup> *Id.* at 375.

<sup>41</sup> *Id.* at 375–76.

<sup>42</sup> *Id.* at 376.

<sup>43</sup> See generally U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK (29 Feb. 2020).

dereliction of duty, absence without leave, disobedience to an officer, et cetera.

Included now in the list of individuals subject to Article 2, UCMJ, jurisdiction are “[i]ndividuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War . . . who violate the law of war.”<sup>44</sup> That makes absolutely no sense. What has Congress done? In Article 2(13), UCMJ, Congress has subjected our enemy to our military code before the enemy is ever captured. Once the enemy is captured, there is an existing provision of Article 2, UCMJ, that subjects a prisoner of war to court-martial jurisdiction<sup>45</sup> for good reason. Article 2(13), UCMJ, captures violations of the law of war,<sup>46</sup> but the law of war is not encompassed in Article 2, UCMJ, jurisdiction. It is completely confusing.

I think what happened was that somebody in Congress, or some staffer, wanted to foreclose the opportunity of using a general court-martial as a criminal tribunal for unprivileged belligerents to ensure that unprivileged belligerent trials would remain in Guantanamo. What does it purport to do? It purports to say that the only individuals we capture who we could court-martial have to qualify for status under Article 4 of the Third Geneva Convention,<sup>47</sup> but it is incoherent. It makes no sense. If Congress wants to limit the forum that is available for unprivileged belligerents alleged to have committed war crimes to the military commission, they should do that in Article 18, UCMJ. They should say in Article 18, UCMJ, that a general court-martial has jurisdiction to prosecute any person who violates the law of war except individuals who do not qualify as prisoners of war under Article 4 of the Third Geneva Convention.

I think that one of the benefits of including war crimes in the punitive articles is that it would actually make it more likely that if we did capture an enemy who we believe violated the law of war before capture that we would use a general court-martial to prosecute that individual instead of creating a new tribunal to do it, which we have done so far. Why? Because it would be so much easier. You would just look at the UCMJ. You would have the war crimes incorporated in the UCMJ, the general court-martial would

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<sup>44</sup> UCMJ art. 2(13) (2009).

<sup>45</sup> *Id.* art. 2(9) (1950).

<sup>46</sup> *Id.* art. 2(13) (2009).

<sup>47</sup> *Id.*

have jurisdiction under Article 18, UCMJ, and it would be a more feasible and, in my view, a more credible approach. It would subject the enemy to the same process that we use for our own personnel. Ultimately, I think, to advance our collective interest in enhancing the perception of legitimacy when we are dealing with misconduct in war, both by our own forces and by our captured opponents, it would be logical to give commanders the ability to look to the punitive articles of the UCMJ and charge those offenses for trial by general court-martial.

I will finish with a quote from President Eisenhower during his first inaugural address. He said, “Whatever America hopes to bring to pass in the world must first come to pass in the heart of America.”<sup>48</sup> If we want legitimacy and accountability to be fully embraced, I think that it is time for our Congress and our Armed Forces to fully embrace it by adopting a war crimes code in the punitive articles.

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<sup>48</sup> *Quotes*, DWIGHT D. EISENHOWER PRESIDENTIAL LIBR., <https://www.eisenhowerlibrary.gov/eisenhowers/quotes> (Apr. 19, 2021).





**“SMOOTHING OUT” THE IMT JUDGMENT:  
THE LEGAL LEGACY OF THE TWELVE  
SUBSEQUENT MILITARY TRIBUNALS\***

GARY D. SOLIS<sup>†</sup>

### I. Introduction

There are not many institutions recognizing that this year marks the seventy-fifth anniversary of the Nuremberg International Military Tribunal (IMT). On 21 November 1945, Supreme Court Justice Robert Jackson faced the tribunal’s four judges and said that the tribunal was “one of the most significant tributes that Power ever has paid to Reason.”<sup>1</sup>

World War II had ended; the Nazis surrendered on 8 May 1945 and the Japanese three months later.<sup>2</sup> American, British, French, and Russian military units were in Berlin as occupation forces. General Dwight Eisenhower, in cooperation with the same three U.S. allies, had established the Allied Control Council.<sup>3</sup> Remember that this was right after the conclusion of the war. There was no operative law in Germany, so the Allies decided that they would be the operative law until law could be resurrected.<sup>4</sup>

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<sup>1</sup> INT’L MIL. TRIBUNAL: NUREMBERG, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1947).

<sup>2</sup> 1945: *Key Dates*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/1945-key-dates> (Jan. 1, 2008).

<sup>3</sup> *Allied Control Councils and Commissions*, 1 INT’L ORG. 162, 167 (1947).

<sup>4</sup> See generally 1 LEGAL DIV., OFF. OF MIL. GOV’T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE (1945) (repealing Nazi laws, dismantling Nazi organizations, reorganizing the German judicial system, and taking other measures to restructure the German state).

The Allied Control Council was effectively the law in Germany at the time, and its goal was to bring back the German society.

Soon, Army Lieutenant General (LTG) Lucius Clay arrived. He had been appointed the Military Governor of Germany and commander of Berlin's U.S. zone.<sup>5</sup> His mission, like that of the Allied Control Council, was to bring back a functioning German government.<sup>6</sup> General Eisenhower and LTG Clay were trying to figure out what to do with thousands of Nazi war criminals that they knew were in Germany that they were probably holding in camps.

The United States' war crimes policy, as Mr. Borch mentioned this morning, was guided by the 1945 London Agreement that had published the charter of the IMT.<sup>7</sup> After the IMT concluded, Allied war crimes policy would be executed under the authority of Control Council Law No. 10.<sup>8</sup> Each of the occupying powers was given authority by Control Council Law No. 10 to try Germans charged with war crimes, crimes against peace, and crimes against humanity.<sup>9</sup> As was mentioned this morning, initially there was a fourth charge to try those who were in organizations that had been declared unlawful by the IMT.<sup>10</sup>

There would be new trials subsequent to the IMT. Control Council Law No. 10 directed that they were to be composed of tribunals, before judges selected by the convening power.<sup>11</sup> The United States had determined that merely trying a couple dozen Nazi war criminals was not sufficient to fully serve justice. The German people must see that their fate was the fault of the Nazi government and of the Nazi military caste and understand that German citizens had allowed the Nazis to flourish, change their lives, and

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<sup>5</sup> 1 EUROPE SINCE 1945: AN ENCYCLOPEDIA 205 (Bernard A. Cook ed., 2001).

<sup>6</sup> Major Matthew A. George, *The Operational Art of Political Transformation: General Lucius D. Clay, Post World War II Germany, and Beyond 1–2* (May 24, 2018) (unpublished manuscript) (on file with author).

<sup>7</sup> Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

<sup>8</sup> Control Council Law No. 10, *reprinted in* 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306–11 (1945).

<sup>9</sup> *Id.* at 306–07.

<sup>10</sup> *Id.* at 307.

<sup>11</sup> *Id.* 308–10.

destroy their nation. Public trials that would remove all doubt that the crimes charged by the Allies were established by proof, through fair trials, so that no German citizen could doubt that the crimes charged by the Allies were fact; that those crimes had been committed not just by military and political chiefs, but by Germany's senior lawyers,<sup>12</sup> doctors,<sup>13</sup> industrialists,<sup>14</sup> civil servants—the enablers of Hitler's National Socialist Party.

## II. Tri-Level War Crime Trials

After World War II, U.S. war crimes trials were conducted on three levels. We know that twenty-two of the most senior criminals were tried at the IMT; Justice Jackson was appointed by President Truman and, at the IMT, he had tried twenty-two Nazis.<sup>15</sup> Nineteen of them were convicted, twelve were sentenced to be hanged, and three were acquitted.<sup>16</sup> Among the IMT's most notable rulings, it held that there was individual criminal responsibility for war crimes,<sup>17</sup> which had not been the case prior to the IMT. In addition, head of state immunity would no longer be recognized.

The IMT would be followed by several trials. Like the IMT, these trials were to be held in the Nuremberg Palace of Justice. Today, they are referred to as the “subsequent proceedings.” Subsequent proceeding defendants were to be subordinate German leaders—as Fred put it nicely, the not-so-important criminals. The subsequent proceedings would try senior administrators, leading industrialists, professional leaders, and political foils who had enabled the Nazi machinery that murdered, stole, and perverted Germany to Nazi beliefs and ideals. They would be guided by Control

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<sup>12</sup> *United States v. Altstoetter (Justice Case)*, Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Dec. 3, 1947).

<sup>13</sup> *United States v. Brandt (Medical Case)*, Case No. 1, 1 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Aug. 20, 1947).

<sup>14</sup> *United States v. Flick (Flick Case)*, Case No. 5, 6 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Dec. 22, 1947); *United States v. Krupp (Krupp Case)*, Case No. 10, 9 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (July 31, 1948).

<sup>15</sup> Letter from Robert H. Jackson, U.S. Chief of Couns., to Harry S. Truman, U.S. President (Oct. 7, 1946), in U.S. DEP'T OF STATE, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432, 432 (1949).

<sup>16</sup> *Id.*; *United States v. Göring*, 1 Trial of the Major War Criminals Before the International Military Tribunal, Sentences, at 365–67 (Oct. 1, 1946).

<sup>17</sup> Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

Council Law No. 10. The significant difference between the IMT and the subsequent proceedings was that the latter would be judged by long-experienced legal professionals who would implement the IMT's judgment, and the IMT's 149-page judgement would be the subsequent proceedings' stare decisis.

Mr. Borch and I were discussing after the first lecture this morning why they were civilian judges rather than military judges. We cannot know for sure. As far as I know, Brigadier General (BG) Telford Taylor or Justice Jackson have not commented on that. It is my opinion that we did that because we wanted the German populace to see that this was not just another military trial of the defeated enemy. This was a trial of civilian jurists who would implement the laws that we had enacted in the Control Council.

There was a third level of American war crime trials conducted by the U.S. Army at Dachau, a former Nazi death camp. The Dachau trials of "lesser Nazis" (e.g., concentration camp guards, policemen, minor officers, soldiers, including SS Colonel Joachim Peiper) would be conducted under the rules and procedures of the 1940 Field Manual (FM) 27-10<sup>18</sup> and the 1928 *Manual for Courts-Martial*.<sup>19</sup> These would be ordinary courts-martial at Dachau conducted in extraordinary times with military judges and officer panels. The Dachau trials eventually convicted 1,416 accused.<sup>20</sup> Unfortunately, their interrogation techniques, particularly in the early trials, were conducted using torture and beatings, which put serious doubt into the voluntariness of confessions and the validity of the trials' outcomes.<sup>21</sup>

After the IMT, the subsequent proceedings, and the Dachau courts-martial, remaining suspects in the Nazi regime (e.g., political functionaries, Nazi officers, soldiers) were to be tried by what were known as "denazification courts."<sup>22</sup> This covered thousands of potential accused who were originally going to be tried by the subsequent proceedings. Fortunately, they were taken over by the German judicial system, which was

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<sup>18</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE (1 Oct. 1940) [hereinafter FM 27-10].

<sup>19</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (1928).

<sup>20</sup> RICHARD HARWOOD, NUREMBERG AND OTHER WAR CRIMES TRIALS 50 (1978).

<sup>21</sup> *Id.* at 48.

<sup>22</sup> See, e.g., Dana Adams Schmidt, *Von Papen Sentenced to 8 Years by German Court as Major Nazi*, N.Y. TIMES, Feb. 24, 1947, at A1 (describing Franz von Papen's conviction and sentence).

newly raised, under German national law. This unexpected involvement of German courts was a major relief for U.S. prosecutors.

Our focus is on the subsequent proceedings. They are not the *forgotten* trials, but they are the *unappreciated* trials. Their role was important in restoring Germany as a democratic nation and a vital post-war U.S. ally. They provided the basis for much of post-war international criminal law and for a degree of modern military law, as well.

Each subsequent proceeding was made up of three judges. Three was not a magic number; we did not have to have three but we decided that three was the best number. These civilians were designated by the Military Governor, LTG Clay.<sup>23</sup> These thirty-two civilian judges, recruited by the War Department in the United States and initially appointed by President Truman in his role as Commander-in-Chief, were independent and responsible only to themselves for their judicial actions and decisions.<sup>24</sup> There was no appellate court at the time, though later, LTG Clay reviewed every finding and every judgment of each court and he reduced some sentences.<sup>25</sup> The civilian judges were on their own; that is, there was nobody looking over their appellate shoulder. Twenty-five of the thirty-two judges were, or had been, state court judges; one was a law school dean; the other six were “prominent practicing attorneys.”<sup>26</sup> The qualification for tribunal judgeship was five years of legal practice.<sup>27</sup> Judicial experience was not required, although no tribunal could consist solely of practicing attorneys; the presiding judge on each panel had to be an experienced, practicing judge.

### III. Selection of the Accused

The first problem for the subsequent proceedings was identifying who they should try. The “bad guys,” sure, but determining who the Nazi bad guys were, and which of them should be tried, was a tremendous task.<sup>28</sup>

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<sup>23</sup> MILITARY GOVERNMENT—GERMANY, UNITED STATES ZONE: ORDINANCE NO. 7, at 286 (1946), *reprinted in* BRIGADIER GENERAL TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949).

<sup>24</sup> TAYLOR, *supra* note 23, at 34–35.

<sup>25</sup> *Id.* at 177.

<sup>26</sup> *Id.* at 35.

<sup>27</sup> *Id.* at 29.

<sup>28</sup> *Id.* at 50.

These twelve subsequent proceedings (which was decided later—they did not know initially how many there would be) could not come anywhere near trying all of the Nazis suspected of war crimes, even if they were identified and could be located somewhere within post-war Europe.<sup>29</sup>

A modest source of help was located. “For many months the United Nations War Crimes Commission had been compiling lists of suspects on the basis of information furnished by the countries occupied by Germany, and by the end of the war these lists were very lengthy.”<sup>30</sup> Also, the basic directive regarding the U.S. military government of Germany, Joint Chiefs of Staff Directive 1067/6, was titled, “Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses.”<sup>31</sup> Joint Chiefs of Staff Directive 1067/6 required General Eisenhower, the Commander-in-Chief of U.S. Occupation Forces in all of Europe, to detain all persons suspected of committing any war crime—conspirators, principals, and aiders-and-abettors.<sup>32</sup> Soon after the war ended, the U.S. Army was holding nearly 100,000 German suspects.<sup>33</sup> We could try only a very small number of those, of course. Those held, by the way, were not considered prisoners of war, but rather suspected war criminals.

The charges to be brought by the subsequent proceedings were an easier matter. They were identified in Control Council Law No. 10 itself: war crimes, occupation offenses, crimes against peace, and crimes against humanity<sup>34</sup>—the same charges we had seen at the Nuremberg IMT.

First, BG Taylor, Justice Jackson’s successor, grouped the several varieties of war criminal enterprises into cases “according to the sphere of activity in which [the defendants] were primarily engaged.”<sup>35</sup> That was a difficult process itself and sometimes had subtle differentiations, but BG

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<sup>29</sup> See, e.g., Elmer Plischke, *Denazification Law and Procedure*, 41 AM. J. INT’L L. 807, 825–26 (1947) (estimating over three million chargeable cases in Germany, which “would mean a hearing for every five inhabitants in our Occupation Zone”).

<sup>30</sup> TAYLOR, *supra* note 23, at 50.

<sup>31</sup> JOINT CHIEFS OF STAFF, DIR. 1067/6, DIRECTIVE ON THE IDENTIFICATION AND APPREHENSION OF PERSONS SUSPECTED OF WAR CRIMES OR OTHER OFFENSES (26 Apr. 1945).

<sup>32</sup> *Id.* para. 8*b.*

<sup>33</sup> *The Army and the Occupation of Germany*, NAT’L ARMY MUSEUM, <https://www.nam.ac.uk/explore/occupation-and-reconstruction-germany-1945-48> (last visited June 16, 2021).

<sup>34</sup> TAYLOR, *supra* note 23, at 64–65.

<sup>35</sup> *Id.* at 76.

Taylor eventually came up with twelve subject-matter trial categories that were the result,<sup>36</sup> and you have seen those already: “The Medical Case,” “The Justice Case,” “The Hostage Case,” “The Ministries Case,” “The High Command Case,” and so on. Identification of the crimes to be prosecuted and the sub-grouping of potential defendants into the various criminal enterprise “boxes” narrowed the number of potential defendants significantly. Finally, an individual’s selection as a trial defendant was based on their level of responsibility and involvement in their criminal enterprise category.<sup>37</sup> Actually, these are the kinds of judgments that prosecutors make every day in courts (e.g., “Who among this batch are we going to charge?”). This was not a scientific assessment; it was what the Office of the Chief of Counsel decided on its own. They were doing the best they could in a terrible time—the war had not been over for a year, yet they were having to make these decisions. They may not have been scientific, but it was a good start.

#### IV. The Cases

The unique difference between the Nuremberg IMT and the subsequent proceedings was the extremely large number of potential defendants and the enormity of their crimes. But the subsequent proceedings’ legacy is not found in their creation or in the number of defendants that were tried. The subsequent proceedings do stand in the legal shadow of the IMT, and reasonably so. Not only was the IMT the world’s first legal accounting for those who would make aggressive war, historic in itself, but it was the IMT that historically held that act of state doctrine was dead; that crimes against international law are committed by men, not abstract entities (e.g., states); and that international law is enforced only by punishing the men and women who violate that law—a holding that reinvigorated international criminal law for decades.<sup>38</sup>

Beyond those very significant holdings, “there is remarkably little criminal law in the IMT judgment: nothing on evidence and procedure; almost nothing on modes of participation, defenses, or sentencing. Even the [judgment’s] discussion of the crimes themselves is relatively cursory . . . .

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<sup>36</sup> *Id.* at 76–77.

<sup>37</sup> *Id.* at 73–85.

<sup>38</sup> *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law> (last visited June 16, 2021).

The [subsequent proceedings], by contrast, addressed those areas in detail.”<sup>39</sup> Those subsequent proceedings were conducted by ninety-four military prosecutors, eleven of whom were women. Those 94 prosecutors tried 12 cases, involving 185 accused, before 36 civilian jurists.<sup>40</sup>

It is the subsequent proceedings’ contributions to the law of war and international criminal law that have had lasting impact. The proceedings’ influence is seen in the International Criminal Court’s Rome Statute<sup>41</sup> and, particularly, in the outstanding judgments of the International Criminal Tribunal for the former Yugoslavia.<sup>42</sup>

Examples of the subsequent proceedings’ legal legacy are numerous. Take the *New York Times* headline of Thursday, 17 September 2020: *Saudi Strikes in Yemen Put U.S. in Danger of War Crime Charges*.<sup>43</sup>

The civilian death toll from Saudi Arabia’s disastrous air war over Yemen was steadily rising in 2016 when the State Department’s legal office . . . reached a startling conclusion: Top American officials could be charged with war crimes for approving bomb sales to the Saudis . . . .

U.S. officials say the legal risks have only grown as President Trump has made selling weapons to Saudi Arabia, the United Arab Emirates and other Middle East nations a cornerstone of his foreign policy. . . .

. . . .

. . . [I]t was clear that State and Defense Department officials had “potential legal liability for aiding and abetting war crimes.” . . .

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<sup>39</sup> KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 3 (2011).

<sup>40</sup> TAYLOR, *supra* note 23, at 118–19, 241.

<sup>41</sup> *Some Questions and Answers*, INT’L CRIM. CT., <https://legal.un.org/icc/statute/iccq&a.htm> (last visited June 16, 2021).

<sup>42</sup> INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, *FACTS AND FIGURES* (2017), [https://www.icty.org/sites/icty.org/files/images/content/Infographic\\_facts\\_figures\\_en.pdf](https://www.icty.org/sites/icty.org/files/images/content/Infographic_facts_figures_en.pdf).

<sup>43</sup> Michael LaForgia & Edward Wong, *Saudi Strikes in Yemen Put U.S. in Danger of War Crime Charges*, N.Y. TIMES, Sept. 17, 2020, at A1.



. . . .

U.S. officials have had full knowledge of the pattern of indiscriminate killing, which makes them legally vulnerable. . . . [S]ome State Department officials who shepherd arms sales overseas . . . have discussed the possibility of being arrested while vacationing abroad.<sup>44</sup>

Can the U.S. Secretary of Defense on a state visit to Germany, Spain, or Sweden (i.e., states that assert mandatory universal jurisdiction for war crimes)<sup>45</sup> be arrested and tried for providing weapons to Saudi Arabia, while knowing these weapons will be used against Yemini civilians (i.e., a grave breach of Article 85(4) of 1977 Additional Protocol I)?<sup>46</sup> The answer turns on the court’s definition of “knowledge,” whatever court that might be. “Knowledge” is not addressed in the Geneva Conventions, the Additional Protocols, the *Manual for Courts-Martial*, or the Uniform Code of Military Justice. But the subsequent proceedings did address it in *United States v. Pohl*, referred to as the “Concentration Camps Case” because all eighteen defendants had some involvement with the death camps.<sup>47</sup>

One of the accused in *Pohl* was Rudolf Scheide, a former SS colonel. He was acquitted of war crimes and crimes against humanity.<sup>48</sup> The tribunal wrote in its judgment that “the prosecution has offered no evidence that the defendant had knowledge of the criminal activities of the SS, or that he remained in said organization . . . with such knowledge.”<sup>49</sup> The tribunal’s phrase, “with such knowledge,” comes to the rescue of the Secretary of Defense. The subsequent proceedings required *actual knowledge* of the unlawful usage—in the Secretary of Defense’s case, that *he had actual*

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<sup>44</sup> *Id.*

<sup>45</sup> E.g., Darren Hawkins, *Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality*, 9 GLOB. GOVERNANCE 347, 359–360, 366–67 (2003).

<sup>46</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85(4), June 8, 1977, 1125 U.N.T.S. 3 (defining as a “grave breach” the “transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.”).

<sup>47</sup> *United States v. Pohl* (Pohl Case), Case No. 4, 5 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 195 (Nov. 3, 1947).

<sup>48</sup> *Id.* at 1017–18.

<sup>49</sup> *Id.* at 1018 (emphasis added).

*knowledge* that the U.S. weapons being sold to the Saudis would be unlawfully used to target civilians. “Actual knowledge” is a hard case to prove, particularly if the accused is a civilian, a political appointee, and with no physical connection to the weapon involved or the state wherein it is used.

The Department of Defense’s *Law of War Manual* addresses “knowledge” in relation to command responsibility, and it casts a much wider net than “actual knowledge.” Did the commander know, or *should she have known*, of the illegality involved in the weapons sale?<sup>50</sup> Each subsequent proceeding required *actual knowledge* rather than the broader negligence standard of “should have known.”<sup>51</sup>

The subsequent proceedings have relevance in Army courts-martial. Some years ago, the issue of a commander’s knowledge of a subordinate’s war crimes was crucial in the Army general court-martial of *United States v. Captain Ernest Medina*. Medina was the commanding officer of Charlie Company, 1st Battalion, 20th Infantry, part of Task Force Barker, in the 1968 assault on My Lai.<sup>52</sup> Captain (CPT) Medina’s 1st Platoon was led by Second Lieutenant (2LT) William Calley.<sup>53</sup>

I presume you know the basics of the My Lai massacre of 350 to 400 Vietnamese civilians and that 2LT Calley’s general court-martial, before CPT Medina’s trial, resulted in 2LT Calley’s sentence to confinement for life.<sup>54</sup> Shortly after 2LT Calley’s 1971 conviction, his company commander, CPT Medina, was tried, charged with being an aider and abettor to the premeditated murder of not fewer than 100 Vietnamese civilians.<sup>55</sup> The trial counsel requested an instruction to the members that, to convict, they

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<sup>50</sup> OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1140 n.338 (2016) [hereinafter LAW OF WAR MANUAL].

<sup>51</sup> HELLER, *supra* note 39, at 293.

<sup>52</sup> 1 LIEUTENANT GENERAL W. R. PEERS, U.S. DEP’T OF ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT 4-6 to 4-8 (1970).

<sup>53</sup> Brenda J. Taylor, *Calley, William Laws, Jr.*, in VIETNAM WAR: A TOPICAL EXPLORATION AND PRIMARY SOURCE COLLECTION 250–51 (James H. Willbanks ed., 2018).

<sup>54</sup> *United States v. Calley*, 48 C.M.R. 19 (C.M.A. 1973), *aff’g* 46 C.M.R. 1131 (A.C.M.R. 1973).

<sup>55</sup> Because Captain Medina was acquitted, no record of trial exists. But see Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7 (1972), for the perspective and insight of the military judge who presided over Captain Medina’s general court-martial.

had to be convinced beyond a reasonable doubt that CPT Medina had *actual knowledge* of 2LT Calley's crimes in My Lai.<sup>56</sup>

Actual knowledge was not then, and is not today, an element of aiding and abetting required by the *Manual for Courts-Martial*,<sup>57</sup> the Uniform Code of Military Justice,<sup>58</sup> or the *Military Judges' Benchbook*.<sup>59</sup> It was clear that the standard was not actual knowledge. Rather, it is the more inclusive negligence standard: that the commander knew or should have known, which is in FM 27-10<sup>60</sup> and today's *Law of War Manual*.<sup>61</sup> Several subsequent proceedings considered command responsibility and that was their conclusion. In CPT Medina's case, on the basis of the trial counsel's lack of familiarity with Nuremberg and with FM 27-10, the military judge gave the requested incorrect instruction with its erroneous standard.<sup>62</sup> Geoff Corn suggested that he may have been acquitted anyway, which is true because the same trial had mischarged CPT Medina. Instead of charging him with command responsibility, negligence, or some other offense (of which there were many), he charged the most difficult one he could pull from the *Manual for Courts-Martial*: aiding and abetting, which requires that they share the mental intent.<sup>63</sup> The members acquitted on all charges as a result.<sup>64</sup>

Another instance of forward-looking law applied by the subsequent proceedings: In the 1940 edition of FM 27-10, it is stated that obedience to the orders of a superior is a complete defense. "Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders."<sup>65</sup> After the 1944 change to the FM—a one-page insert in most of the older

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<sup>56</sup> *Id.* at 10–11.

<sup>57</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVIII, ¶ 156 (1968); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 1.b (2019).

<sup>58</sup> UCMJ art. 77(1) (1950).

<sup>59</sup> U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-1-1 (29 Feb. 2020) (enumerating the elements of aiding and abetting).

<sup>60</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 501 (18 July 1956) (C1, 15 July 1976).

<sup>61</sup> LAW OF WAR MANUAL, *supra* note 50.

<sup>62</sup> *See supra* note 55.

<sup>63</sup> U.S. DEP'T OF ARMY, *supra* note 59 ("[T]he accused must consciously share in the actual perpetrator's criminal intent to be an aider or abettor . . .").

<sup>64</sup> *See supra* note 55.

<sup>65</sup> FM 27-10, *supra* note 18, para. 347.

manuals—obedience to orders no longer was a complete defense.<sup>66</sup> It was no longer a defense. It could be considered in extenuation and mitigation, but the law had changed. The law changed because, as Fred mentioned this morning, we were about to try the Germans for obedience to orders, which they would raise as a defense. In order to preclude that, we changed the FM. The British made a similar adjustment to their law of war regulations.<sup>67</sup> Article 8 of the IMT's charter was blunt on this issue: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation . . . ."<sup>68</sup>

The defense of superior orders was effectively eliminated by the IMT. But the IMT was apparently uncomfortable with so confining a decision, despite its clearly being required by the charter. The IMT injected an unanticipated ameliorating factor that was not in keeping with its own charter. "The true test," the Tribunal noted, "which is found in . . . the criminal law of most nations, is not the existence of the [illegal] order, but whether a moral choice was in fact possible."<sup>69</sup>

The charters of the IMT and the subsequent proceedings, regarding obedience to orders, are essentially identical. The subsequent proceedings, however, had many more opportunities to visit the courtroom viability of "moral choice," the test informally modified by the IMT. The "subsequent tribunals . . . sought to resolve the matter by treating it as an issue of intent."<sup>70</sup>

Despite the two charters, subsequent proceedings cases uniformly required a showing of a lack of "moral choice" (i.e., duress) as a necessary part of a successful defense of superior orders. Consideration of the better-reasoned, more reasonable, and soon widely accepted "moral choice" test is

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<sup>66</sup> U.S. DEP'T OF ARMY, *supra* note 60, para. 509.

<sup>67</sup> 1 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMES 18 (1947).

<sup>68</sup> Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 8, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280.

<sup>69</sup> United States v. Göring, 1 Trial of the Major War Criminals Before the International Military Tribunal, Judgment, at 224 (Oct. 1, 1946).

<sup>70</sup> Charles Garraway, *Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?*, 836 INT'L REV. RED CROSS 785, 788 (1999).

apparent in the Flick<sup>71</sup> and Farben<sup>72</sup> subsequent proceedings judgments. The subsequent proceedings, in going their own way and implementing what the IMT had given discussion rather than implementation, demonstrated courage and independence that lends legal and moral authority to their judgements. Today's *Law of War Manual* follows the lead of the subsequent proceedings, holding "that a person acted pursuant to orders of his or her Government or of a superior does not relieve that person from responsibility under international law, provided it was possible in fact for that person to make a moral choice."<sup>73</sup>

There are other instances of the subsequent proceedings' forward-looking exercise of legal judgment. Although the judges were responsible only to the law and themselves, the Army's Office of Chief Counsel had oversight of the subsequent proceedings.<sup>74</sup> In relation to defendants charged with being members of Nazi groups found to be criminal by the IMT, the Office of Chief Counsel pressed the civilian judges to find that membership equaled guilt, even if the accused was able to document efforts to resign and escape the illegal group.<sup>75</sup> The subsequent proceedings in the Justice, Farben, and Ministries trials rejected the Office of Chief Counsel's advice and, instead, applied a functional test that considered the accused's actual relationship to the outlawed group.<sup>76</sup> There were some of the outlawed group that were punished with other charges in the subsequent proceedings.

## V. Conclusion

The twelve subsequent proceedings were tried from December 1946 to October 1949.<sup>77</sup> They were initiated on 21 November, but the first trial did not come until thirteen months later. Of the 185 individuals indicted,

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<sup>71</sup> United States v. Flick (Flick Case), Case No. 5, 6 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1197–98 (Dec. 22, 1947).

<sup>72</sup> United States v. Krauch (I.G. Farben Case), Case No. 6, 7 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1175–76 (July 29, 1948).

<sup>73</sup> LAW OF WAR MANUAL, *supra* note 50, § 18.22.4.

<sup>74</sup> TAYLOR, *supra* note 23, at 13.

<sup>75</sup> See *id.* at 15–17, 69–70 (describing the International Military Tribunal's handling of "membership" cases).

<sup>76</sup> *Id.* at 69–70.

<sup>77</sup> *Id.* at 118–19.

177 went to verdict.<sup>78</sup> Four defendants committed suicide, and four more were severed due to their illnesses. Of the 177, 142 were convicted of 1 or more counts, 35 were acquitted, 20 were sentenced to confinement for life, and 24 death sentences were adjudged and confirmed.<sup>79</sup>

How, then, to explain the lack of public awareness of the laudable work of the subsequent proceedings? How to explain what was the apogee of military trials, in which the defeated enemy received the closest thing to “justice” that America has seen in post-war trials?

Some of you may have seen the 1961 movie *Judgement at Nuremberg*,<sup>80</sup> which is a portrayal of the subsequent proceedings’ Justice Case, in which sixteen senior German jurists were tried.<sup>81</sup> Much of the movie’s courtroom dialogue was taken from the proceedings’ record of trial. Seeing Maximilian Schell play a German defense lawyer and Burt Lancaster an accused Nazi judge is what first interested me in the subsequent proceedings. The tribunal’s chief judge, Spencer Tracy in the movie, had much to say, fictional or not, about the subsequent proceedings’ efforts to stay as close as humanly possible to justice in the face of horrific Nazi injustice.

No movie can explain how only ten of the twenty-four sentences to death were carried out. The initial ten were executed with some rapidity. Eight-and-a-half years after the last tribunal had closed, and despite twenty sentences of confinement for life, every accused but the ten who were executed were free men, beneficiaries of the West’s fear of the rise of the Soviet Union and the United States’ desire for a strong European ally who might stop or slow Soviet military adventurism.

There were also other political factors in play. There was tremendous pressure from German Catholic and Protestant clergy to reduce or set aside war criminal sentences.<sup>82</sup> The Federal Republic of Germany achieved

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<sup>78</sup> *Id.* at 91, 241.

<sup>79</sup> *Id.*

<sup>80</sup> JUDGMENT AT NUREMBURG (Roxlom Films 1961).

<sup>81</sup> United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Indictment, at 15–26 (Dec. 3, 1947).

<sup>82</sup> Thomas Alan Schwartz, *John J. McCloy and the Landsberg Cases*, in AMERICAN POLICY AND THE RECONSTRUCTION OF WEST GERMANY, 1945–1955, at 438 (Jeffrey M. Diefendorf, Axel Frohn & Hermann-Josef Rupieper eds., 1993).

statehood in 1955, and Chancellor Konrad Adenauer pressed for war crimes clemency or outright release of those who were imprisoned.<sup>83</sup> He was facing an election, and the United States helped him.

Starting in 1951, the focus of the U.S. effort was no longer on punishing war criminals and reeducating the German public but rather on preventing the war criminals problem from causing further criticism . . . of the American occupation [of Germany]. During this period American officials instituted clemency and sentence modification procedures which eventually allowed the complete dismantling of the war crimes operation . . . . This latter phase was closely connected to the 1950 decision to rearm the Federal Republic [of Germany] and negotiations to establish the European Defense Community.<sup>84</sup>

Were these releases, commutations, and reductions in war crime sentences worth the price? Did a firm and rearmed central European ally merit what seems an abdication of World War II's resolution to punish Nazi war criminals? Regardless of one's opinion, the work of the subsequent proceedings was completed well before the political winds changed. Lacking currency in the public's eye, and without the popular media following of the IMT, the subsequent proceedings were lost in the rush to post-war security and European rebuilding and resurgence. They are not the *forgotten* trials, but they are the *unappreciated* trials.

Thank you.

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<sup>83</sup> *E.g.*, René Staedtler, *The Price of Reconciliation: West Germany, France and the Arc of Postwar Justice for the Crimes of Nazi Germany, 1944–1963*, at 8–9 (Apr. 17, 2020) (Ph.D. dissertation, University of Maryland, College Park) (on file with the University of Maryland, College Park).

<sup>84</sup> FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955*, at 3 (1989).





**GUIDELINES ON INVESTIGATING VIOLATIONS OF  
INTERNATIONAL HUMANITARIAN LAW AND PRACTICAL  
MECHANISMS FOR ACCOUNTABILITY—TODAY AND  
BEYOND\***

ANDREA JOY HARRISON<sup>†</sup>

I. Introduction

Thank you. It is a pleasure to be here today. I have not been in this auditorium in a few years, but I have been a regular guest of various events for The Judge Advocate General's Legal Center and School and the University of Virginia over the years. Special thanks to Brigadier General Berger, Lieutenant General Pede, Sergeant Major Martinez, Colonel McGarry, Mr. Borch, Lieutenant Colonel Marchese, Major Medici, and I am sure there was a lot of other people who had a lot to do with organizing this. It is a really great and timely topic.

Today, I am going to talk about accountability for war crimes, where we are today, and where we are going. Before I do that, I would like to give a few disclaimers because of questions like, "Why is the humanitarian lawyer talking about the battlefield?" and "What experience would I have to be able to speak to that?" I think it is really important to give you a little bit about where I am coming from professionally and personally.

I am here in my capacity as the Chair of the Lieber Society. I do not know if there are any members of the American Society of International

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Law here, but it is a great society. I know Gary Solis has been a member, as well as Geoff Corn, and Rachel VanLandingham is one of my executive committee members right now. It is really a great community of active duty and reservist Service members, academics, students, Europeans, Americans, and other nationalities. It is a group of people who love the law of armed conflict (LOAC), so it has been a privilege to serve in that capacity.

That being said, I am a lawyer for the International Committee of the Red Cross (ICRC), and I have been for ten years. I am sure you have read about the ICRC because you have memorized the Geneva Conventions, but has anyone had a chance to work with the ICRC in the field or elsewhere? There are a few in the room, but I hope at some point in your careers you will be deployed and you will run into us somewhere in the field. We are really everywhere you do not want to be; Afghanistan, Iraq, and Yemen are our biggest offices. We tend to be in the areas of conflict and other places where there is violence, but we are also in capital cities (e.g., Washington D.C.), where we are able to have a dialogue with authorities on higher-level topics.

The ICRC is mandated by the Geneva Conventions to provide assistance and protection to those affected by armed conflict.<sup>3</sup> And that is not just civilians; we are also mandated to visit prisoners of war<sup>4</sup> and we take it upon ourselves to be concerned about what happens to those military members who are affected by armed conflict.<sup>5</sup> I think we really try to have all the different aspects and perspectives in mind when we are working. On the ground, we go unprotected and unarmed into these places and work with local communities. We only go somewhere if we are accepted by all

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<sup>3</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 9, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 9, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 9, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 10, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287.

<sup>4</sup> Geneva Convention Relative to the Protection of Prisoners of War, *supra* note 3.

<sup>5</sup> INT'L COMM. OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 3 (2009) ("Since it was founded in 1863, the [International Committee of the Red Cross (ICRC)] has been working to protect and assist the victims of armed conflict and other situations of violence. It initially focused on wounded soldiers but over time it extended its activities to cover all victims of these events."); *ICRC Relations with Armed Forces*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/en/doc/what-we-do/building-respect-ihl/dialogue-weapon-bearers/armed-forces/overview-armed-forces.htm> (last visited June 17, 2021).

the parties, which means we have to talk to everyone—not just the state authorities, but also non-state actors.<sup>6</sup> Sometimes that puts us into a bit of a tricky position, but we have found that by having a bilateral and confidential dialogue, we are able to access most places.

That is a brief the history of the organization for which I work. Interestingly enough, one of the big things ICRC is known for is that we do not testify in any kind of international criminal proceeding.<sup>7</sup> We have a special rule, rule 73 in the International Criminal Court (ICC), that explicitly grants us immunity from any kind of testimony or having to be brought before that court to provide evidence.<sup>8</sup> It is always interesting when I hear people talking about international criminal law, because it is kind of a tricky area for us and it can make us a little squeamish because we obviously support these processes and believe in them, but we also have to keep our distance in some respect.

From a personal level, I am a sister and sister-in-law to two U.S. Navy Sailors, so I really appreciate the military perspective. I have shared an office for six of my ten years at the ICRC with three different Judge Advocate General's Corps colonels. Our interns have become judge advocates. I was trying to count today, and I think I have had four interns that have become judge advocates, so I am fully invested in the idea that you all serve as a conscience of the military.

Again, I really appreciate being here today to share my thoughts. I do not think we are always going to agree necessarily, but I think we all have the same objective in mind. We are coming from different places, but we all want to get to the same objective of having the best outcome you can have in a war that protects civilians. But, obviously, we have different, other objectives that we have to work around as well.

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<sup>6</sup> *Id.* at 4 (“To be able to carry out its mission effectively, the ICRC needs to have the trust of all States, parties [meaning all entities (*de jure* or *de facto*) having obligations] and people involved in a conflict or other situation of violence.”).

<sup>7</sup> *See, e.g.*, Prosecutor v. Simić, Case No. IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶¶ 45–80 (Int’l Crim. Trib. for the Former Yugoslavia July 27, 1999) (providing an overview of the ICRC’s international mandate, to include its confidentiality interest).

<sup>8</sup> INT’L CRIM. CT. R.P. & EVID. 73(4).

I am going to break today's session into three parts. They are not of equal lengths, but I think they are of equal importance. The first is where we are today with respect to accountability. We have talked a lot today about history and where we have been, but I am going to talk about where we are now, the mechanisms we have and can use now, and, to some extent, how effective they are, though I will leave it to Professor Nachbar to discuss the efficacy and how successful we have been. The second part that I will discuss will be grouped as aspects that I might suggest should change. Professor Corn's entire presentation was my second point, so I will be able to skip through that session quickly. I might add a couple of thoughts, but I would not even try to compete with that. Finally, I will end with why accountability matters and provide some empirical evidence on that aspect.

## II. Where We Are Today

You have already heard from the experts on the International Military Tribunal (IMT), so I am going to set all of that to the side and look at some of the other processes. Even though we do have some tribunals that are sort of the successors to the IMT and, to some extent, the International Criminal Tribunal for the former Yugoslavia and others, I really want to look at things that are a bit more functional and that can be used going forward. I am going to look at some of the practical mechanisms, not just the formal tribunals that we have talked about so far today.

I am going to quickly touch on investigations, reparations, amends, the International Humanitarian Fact-Finding Commission, and domestic and international accountability mechanisms that are not tribunals. This discussion will not be comprehensive, but in the time I have I will hopefully give you a picture of what is out there, much of which will be familiar to you. I am really only going to focus on LOAC mechanisms. I am not going to talk about anything related to human rights, the European Court, or the Human Rights Committee.

### A. Investigations

We will start with investigations, which is where you should always begin when discussing accountability. Investigations in armed conflict are complex. We heard a little bit from Geoff, who talked about some of his work, and from Gary, who talked about what it is like to investigate a war crime. Certainly in Nuremberg they faced some of the challenges that we

still see today of not just the legal complexity of having to figure out what the law is going to be—this is obviously a bit more specific to when you are outside your own territory in a conflict—but also the logistics of how you are going to collect the evidence, get to the witnesses, and get the translators to talk to the witnesses. I think these are incredibly difficult and becoming more difficult as we become more remote, whether it be because of drone technology, cyber, or something else. In many cases, we are starting to remove ourselves from the battlefield. How do we continue to have investigations when the logistics become quite overwhelming?

Law of armed conflict investigations must take place.<sup>9</sup> The United States has one of the most sophisticated systems and if anybody were going to get it right, I would hope that it would be you all. Judge advocates are the center of that, which means that we are relying on you to be able to carry out these investigations, begin these processes, and get accountability off to a good start. The 1949 Geneva Conventions state that the high contracting parties must provide effective penal sanctions.<sup>10</sup> While there is a mandate in the Geneva Conventions to do this, there are not many details.

To provide some meat to the bones on what constitutes an effective investigation, the ICRC and the Geneva Academy of International Humanitarian Law and Human Rights, of which I am an alumnus, have carried out in the last few years a series of expert consultations, and they published in 2019 the *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*.<sup>11</sup> It is a great resource, and it has every aspect you could imagine of how an investigation in LOAC should look.

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<sup>9</sup> GENEVA ACAD. OF INT'L HUMANITARIAN L. & HUM. RTS. & INT'L COMM. OF THE RED CROSS, GUIDELINES ON INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: LAW, POLICY, AND GOOD PRACTICE para. 119 (2019).

<sup>10</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 3, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 3, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva Convention Relative to the Protection of Prisoners of War, *supra* note 3, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 3, 6 U.S.T. at 3616–18, 75 U.N.T.S. at 386–88.

<sup>11</sup> GENEVA ACAD. OF INT'L HUMANITARIAN L. & HUM. RTS. & INT'L COMM. OF THE RED CROSS, *supra* note 9.

Based on my limited time, I picked one topic, efficacy of investigations, to give you a taste of what the guidelines considered. The guidelines found that in order for an investigation to be effective and to lead to appropriate accountability under international law, the following guidelines should be considered:

- “Military operations should be recorded at the earliest possible time. The scope of recording may depend on the feasibility of doing so in the circumstances,” but there should be some record.<sup>12</sup>
- “A commander present at the scene of an incident should take all feasible steps to ensure the securing and preservation of relevant information and evidence if more appropriate authorities are not available.”<sup>13</sup>
- “Any incident must be promptly reported by a commander to the competent authority for assessment.”<sup>14</sup>
- “An internal process should be in place for persons other than a commander to report incidents through the chain of command or to corresponding law enforcement agencies where they exist. Individuals must be free to make such reports without fear of retribution.”<sup>15</sup>
- “Accessible and effective processes for receiving external allegations of an incident should be provided for.”<sup>16</sup> Especially in contexts like Afghanistan or Yemen, where there might be ongoing strikes or detention taking place, those civilian populations should have some mechanism to be able to report any allegations that they may have.
- “Internal reports or externally received allegations related to an incident should be passed on to the appropriate authority for an assessment of the action to be taken in response.”<sup>17</sup>

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<sup>12</sup> *Id.* at 16.

<sup>13</sup> *Id.* at 18.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 21.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* at 23.

I think these are the basic building blocks that you all know. I am sure that this is standard fare, but, of course, what is on paper is not always what happens in practice. I think that we can all agree that these are agreeable guidelines.

I would like to share a recent example of how these investigations can help and why the efficacy of investigations matter. I think that this can help to concretize the concepts so that it is not just a list of what you should do but rather how investigations can help us change. In the United States, there has been an absence of a standardized tool for civilians to report civilian harm to the U.S. military.<sup>18</sup> In 2018, we saw that Congress passed in the National Defense Authorization Act for Fiscal Year 2019 a provision for the “development of publicly available means, including an Internet-based mechanism, for the submittal to the United States Government of allegations of civilian casualties resulting from United States military operations.”<sup>19</sup> I think there is a recognition not only on how you all carry out investigations but also that the aspect of the external reporting is becoming recognized as being an important element, especially in the extraterritorial conflicts we see today.

Again, if it is remote and you do not have your own troops on the ground to collect that evidence, it still must be investigated. How are you going to do that? You have to develop mechanisms to reach out to the local population. The United States has become very good at this and is still getting better. This is not something that you all lack, but it is something that is clearly being more emphasized over time, and I think that is very important to recognize.

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<sup>18</sup> See, e.g., MARLA KEENAN & JONATHAN TRACY, *CTR. FOR CIVILIANS IN CONFLICT, UNITED STATES MILITARY COMPENSATION TO CIVILIANS IN ARMED CONFLICT* (2010).

<sup>19</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 936(b)(3), 132 Stat. 1635, 1939 (2018). Responsive to this requirement, the Under Secretary of Defense for Policy published a report to describe the progress on the required policy and the Department of Defense’s implementation efforts, U.S. DEP’T OF DEF., *REPORT ON CIVILIAN CASUALTY POLICY* (2019), and the Deputy Under Secretary of Defense (Policy) has coordinated to create a Department of Defense Instruction, Memorandum from Deputy Under Sec’y of Def. (Pol’y) to Sec’y of the Mil. Dep’ts et al., subject: Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations (31 Jan. 2020).

## B. Reparations and Amends

Investigations are a starting point, and they should always lead to something—maybe a conclusion that nothing needs to happen, or maybe an action needs to be taken in one direction or another, depending on where the evidence takes you. Prosecution may be one of those outcomes, but another one that has become more common over time is the idea of reparations and amends.

Some of you may know already that reparations are a legal remedy that are normally owed from one state to another (i.e., it is not something that individuals normally utilize).<sup>20</sup> Under human rights law, a state might owe reparations to its own citizens, but, generally in the LOAC, we are talking about reparations that are owed from state to state. You could have reparations for a violation of the LOAC but that is going to be a bit high-level without addressing individual need. These investigations often will not prove necessarily that any war crime or international humanitarian law (IHL) violation was committed, so reparations are not relevant anymore.

How else can accountability take place if it was just a mistake or if it was not a mistake and was completely lawful but civilians were killed or civilian property was destroyed (i.e., if the incidental harm was proportionate and every other step was taken)? One thing that we see is that we still might need accountability. Even if you can say that something was perfectly lawful, you still might need to make some kind of amends. Amends can take many forms, but it can have an important role in reconciliation and post-conflict recovery. It is important to take into account when you are going through these investigations that there are these different avenues, one of which might be that, though nobody was at fault, we still need to show that we are accountable for what we do. It could be a simple apology but, more often than not, it takes the form of payment.<sup>21</sup>

Being that amends are policy decisions, you might not be required to make the payment, but you might have the option to do so. There is a U.S. policy on this under Army Regulation 27-20, paragraph 10-11, which

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<sup>20</sup> *E.g.*, G.A. Res. 60/147, at 5 (Mar. 21, 2006) (describing each state's duty to "[p]rovide effective remedies to victims, including reparation, as described [in the resolution].").

<sup>21</sup> Madison Hunke, *Making Amends: A Guide to US Law and Policy on Post-Harm Amends*, CTR. FOR CIVILIANS IN CONFLICT (Jan. 7, 2021), <https://civiliansinconflict.org/blog/making-amends-a-guide-to-us-law-and-policy-on-post-harm-amends>.



authorizes the use of solatia payments.<sup>22</sup> We often call them “ex gratia” payments in the ICRC, but I think the U.S. term has been “solatia.” These have been used quite liberally in Afghanistan and, I am sure, in other countries, as well.<sup>23</sup> In a study of these payments that were made in Afghanistan that was carried out by the Center for the Protection of Civilians in Armed Conflict found that the forces who actually paid out these solatia payments (or were somehow involved in them) were strongly in favor of them afterward.<sup>24</sup> They saw that they had positive effects: they built popular support and helped to build relationships with local leaders, both of which helped them to do other things that were imperative to their mission. Again, it was not that they thought they had done anything wrong, but they saw the importance in showing that they would be accountable for making people whole for any damage they suffered, and that had a really positive impact not only on the civilians but also on the troops and their mission as well.

### C. Domestic Prosecutions and the International Criminal Court

Investigations might go in another direction if you find out something has happened—maybe there has been an IHL violation or there has been a war crime committed, which is certainly the theme of today’s conference. Here, we start to think about what we are going to do to hold people individually liable and what our options are.

We have talked about the international tribunals in the form of the IMT. Obviously, there were a number of tribunals that have followed that were ad hoc tribunals: the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and many other iterations. I think that sometimes we forget that domestic prosecutions have played an even greater role than these tribunals, as important as they have been. Domestic prosecutions can be of one’s own citizens, but it can also be the prosecution of contractors

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<sup>22</sup> U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 10-11 (11 May 2016) (“Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her Family is common in some overseas commands.”).

<sup>23</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE’S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 1–2 (2007) (“From fiscal years 2003 to 2006, DOD has reported about \$1.9 million in solatia payments and more than \$29 million in condolence payments to Iraqi and Afghan civilians who are killed, injured, or incur property damage as a result of U.S. or coalition forces’ actions during combat.”).

<sup>24</sup> KEENAN & TRACY, *supra* note 18.

you have employed, troops of partnered forces, troops of enemy forces, or possibly individuals who have committed war crimes who have no connection to your military or your state under the so-called universal jurisdiction,<sup>25</sup> which we have heard a little bit about today.

However, experience shows us how difficult the path toward holding individuals accountable outside of one's own territory can be. It is easy enough for the United States to use the Uniform Code of Military Justice to prosecute its own troops, but when we start looking at enemy forces you encounter abroad, you start to deal with not only legal challenges (e.g., jurisdiction), but also logistical challenges of getting them to a place where you can actually prosecute them. This can make it difficult to hold accountable those persons who have committed war crimes.

If we look at what happened after World War II and compare it to Syria today and we think about what we saw with the IMT, we see a lot of similar atrocities, such as the use of torture, arbitrary detentions, chemical weapons, and aerial bombardments against civilian populations,<sup>26</sup> but we do not see the world coming together and creating a tribunal for Syria. There are many reasons that we can debate on why that is, but it is clearly not happening. What other options might we have if we cannot count on an ad hoc tribunal for Syria to see the same accountability that we saw with the IMT and subsequent proceedings?

Starting in 2013, the Swiss actually led a campaign to have Syria referred to the ICC.<sup>27</sup> Of course, while Syria is not party to the Rome Statute, the charges could still be referred through the United Nations Security Council.<sup>28</sup> But, in 2014, Russia and China vetoed any referral of charges to the ICC with respect to Syria.<sup>29</sup> What other options might there be if the Security Council will not refer the case of Syria to the ICC? I imagine it

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<sup>25</sup> Beth Van Schaack, *National Courts Step Up: Syrian Cases Proceeding in Domestic Courts* (2019) (manuscript at 2), <https://ssrn.com/abstract=3327676>.

<sup>26</sup> Julian Borger, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, *GUARDIAN* (Mar. 17, 2015), <https://www.theguardian.com/world/2015/mar/17/call-for-special-tribunal-to-investigate-war-crimes-and-mass-atrocities-in-syria>.

<sup>27</sup> Letter from Thomas Grüber, Ambassador, to Mohammad Masood Khan, President, United Nations Sec. Council (Jan. 14, 2013), <https://www.news.admin.ch/newsd/message/attachments/29293.pdf>.

<sup>28</sup> Rome Statute of the International Criminal Court art. 13(b), July 17, 1998, 2187 U.N.T.S. 90.

<sup>29</sup> U.N. SCOR, 69th Sess., 7180th mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014).

will be just as difficult to get an ad hoc tribunal. Not only would there be the same political barriers, but you would also have to pay to create a new tribunal, so you would have an additional burden. At least with the ICC you have an existing infrastructure, so we can imagine that an ad hoc tribunal is not anywhere in the near future because there is just not the political will to get that through the Security Council.

What about the General Assembly? Could they create something? There has actually been one tribunal created by the General Assembly rather than the Security Council, and that was in Sierra Leone.<sup>30</sup> But that was done with the consent of Sierra Leone.<sup>31</sup> I do not imagine that Syria would necessarily be open to consenting to having a tribunal to try the government's and other groups' potential war crimes on its own territory.<sup>32</sup>

You would also need a compliant host state to do a hybrid tribunal. We talked a little bit about those earlier, as well, where you would have international judges on local Syrian courts or Syrian judges on international courts, whatever type of combination would make sense in the case of Syria. But, again, without the compliant host state, it is unlikely that you would see any success there.

#### D. International Humanitarian Fact-Finding Commission

Without the hybrid tribunal option, we are left with another possible option: the International Humanitarian Fact-Finding Commission (IHFFC). Article 90 of Additional Protocol I created a permanent body in Geneva that is mandated to investigate grave breaches or serious violations of IHL.<sup>33</sup> It is only applicable in international armed conflicts and if both states are party to Additional Protocol I, and they need to make a declaration in advance

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<sup>30</sup> “The [General Assembly] has been involved in the creation of prior *ad hoc* tribunals (such as the Special Court for Sierra Leone (SCSL)), but always with the involvement and consent of the target state.” Beth Van Schaack, *Options for Accountability in Syria*, JUST SEC. (May 22, 2014), <https://www.justsecurity.org/10736/options-accountability-syria>.

<sup>31</sup> Permanent Rep. of Sierra Leone to the U.N., Letter dated Aug. 10, 2000 from the Permanent Rep. of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786, annex (Aug. 10, 2000).

<sup>32</sup> See generally Van Schaack, *supra* note 30.

<sup>33</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 90, June 8, 1977, 1125 U.N.T.S. 3.

that they both accept its jurisdiction.<sup>34</sup> You can make ad hoc requests later, so it does not preclude jurisdiction, but it is not going to be automatically applicable unless you have that declaration. Again, this seems like a very unlikely scenario in Syria.

The IHFFC was used most recently in 2017, when the Organization for Security and Co-operation in Europe asked the IHFFC to carry out a forensics inquiry after several of its employees were killed in the bombing of Eastern Ukraine.<sup>35</sup> That is one example of an ad hoc use of that body. The IHFFC also recently offered its services in Armenia and Azerbaijan for the Nagorny-Karabakh conflict.<sup>36</sup> As far as I am aware, this did not lead anywhere.

Again, the IHFFC exists and could be requested, but it is very unlikely, especially when the other states involved (e.g., the United States, Israel, Turkey) are not party to Additional Protocol I. Russia actually is, but I am also not really imagining Russia is going to do that either. That mechanism exists but would be very hard in a case like Syria.

#### E. Using Domestic Law to Prosecute War Criminals

What we are left with is going to be some kind of mix of domestic and transnational prosecutions. Many states have created some sort of universal jurisdiction for war crimes so that they can prosecute things that have taken place entirely outside of their jurisdiction,<sup>37</sup> but those can be difficult to find the evidence or witnesses for because they are so far removed from the issue. There has been some progress made in cooperation between states. I think of INTERPOL and Europol as one example, but there have been other special prosecutorial units dedicated just to investigating these types of international crimes—not just war crimes, but crimes of terrorism and crimes against humanity—and states have started to create joint

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<sup>34</sup> *Id.* art. 90(2); CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 para. 3617 (Yves Sandoz et al. eds., 1987).

<sup>35</sup> *The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?*, HUMANITARIAN L. & POL'Y (Jan. 9, 2014), <https://blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken>.

<sup>36</sup> *News from the IHFFC*, INT'L HUMANITARIAN FACT-FINDING COMM'N, <https://www.ihffc.org/index.asp?Language=EN&page=news> (last visited June 18, 2021).

<sup>37</sup> Van Schaack, *supra* note 25.

investigative teams to pool their resources to try to prosecute some of these.<sup>38</sup>

We have now seen, especially in Europe, some successful prosecutions, particularly for war crimes of ISIS.<sup>39</sup> Again, it is always easier to get the non-state actor than the state actor, I think, but there have been a few. Even in that case, you see a focus on lesser-known war crimes (e.g., desecration of a corpse rather than the murder of the person that the corpse used to be), because the evidence and the difficulty in proving the “greater” crime proves impossible but they are able to get them on a “lesser” war crime.<sup>40</sup>

That is a brief overview of some of the things that exist today and, again, a lot of it does not look great for cases like Syria. But there is some small movement and some small successes that we can be really happy about.

### III. What Needs to Change Before “Battlefield Next”?

My next section is what needs to change, and I generally have three points. First, we have to figure out how to create accountability for the great powers. The IMT is really the last time that we see great power state actors brought before a tribunal. The subsequent tribunals tended to be poorer or less powerful states. In a conflict between Russia, the United States, and China, it would be incredibly difficult to see anything happen at an international level if it needed to happen. But you can have successful domestic prosecutions in your own state.

Second, we need to be clear about why war crimes are different. That was Geoff’s entire presentation.<sup>41</sup> The only thing I would add is that we are starting to see more and more, not just from the United States, that instead of war crimes, it is material support for terrorism.<sup>42</sup> There is a reason that war crimes are supposed to be special and that they are supposed to be designated differently and have different mechanisms for accountability

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<sup>38</sup> *Id.* at 3–4.

<sup>39</sup> *Id.* at 2–3.

<sup>40</sup> *Id.* at 5.

<sup>41</sup> See generally Geoffrey S. Corn, *Individual Criminal Responsibility for War Crimes*, 229 MIL. L. REV. 191 (2021) (discussing the charging and prosecution of war crimes).

<sup>42</sup> See generally James G. Vanzant, *No Crime Without Law: War Crimes, Material Support for Terrorism, and the Ex Post Facto Principle*, 59 DEPAUL L. REV. 1053 (2010) (analyzing material support for terrorism under domestic and international lenses).

than terrorism.<sup>43</sup> It is a different ballgame, so we do not want to rely overly on that as a fallback every time. We really need to find a way to focus in on the war crimes, and I think Geoff had some great suggestions for how that might happen with the Uniform Code of Military Justice, but this is a global phenomenon.

Third, we need to take advantage of technologies as we go forward to hold perpetrators accountable (e.g., the use of remote technology to gather evidence). As I am running out of time, I am going to skip the rest of this section to focus on my last point: Why does accountability matter?

#### IV. Why Accountability Matters

I would argue that accountability is not only important because it enhances not only the international legal order and rule of law at a local level but also because it has practical implications for the development of the rules of LOAC, for customary law, and for adjustments in future conduct on the battlefield (e.g., standard operating procedures, reduction of the total harm to civilians), and it can create progress toward post-conflict reconciliation.

On the development of rules, the ICRC has been collecting success stories of IHL compliance in a project called “IHL in Action.”<sup>44</sup> One example that I found was the civilian casualty tracking cell that was created in 2008 within the NATO-led International Security Assistance Force to collect data on civilian casualties.<sup>45</sup> This mechanism resulted in the issuance of new tactical directives and guidelines by the International Security Assistance Force and NATO to mitigate civilian casualties.<sup>46</sup> As a result, civilian casualty rates actually dropped.<sup>47</sup> Creating some sort of accountability mechanism, even if it is not for an IHL violation or you are not looking to prosecute, knowing what is happening and what impact it has on a local population, and finding a way to reduce the impact on the

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<sup>43</sup> See Corn, *supra* note 41, at 197–98.

<sup>44</sup> *About the Project*, IHL IN ACTION, <https://ihl-in-action.icrc.org/about> (last visited June 18, 2021).

<sup>45</sup> *Afghanistan, Implementation of a Civilian Casualty Tracking Cell*, IHL IN ACTION, <https://ihl-in-action.icrc.org/case-study/afghanistan-implementation-civilian-casualty-tracking-cell> (last visited June 18, 2021).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

civilian population so that you can have new practices developed, as was the case in that particular example, is helpful.

If we go back to solatia payments as another example, it is a lot of good practice that we see, but in order to develop a new rule, especially a new customary rule of LOAC, we do not need just practice. We need *opinio juris*, the expression by states that they believe they are doing it out of a sense of legal obligation.<sup>48</sup> I do not think that we see that with solatia payments. I think it is a good practice, but we are not seeing it move to a rule. Maybe, eventually, we will start to see states say they think that they are legally obligated to do that, and we could see the development of a new customary rule. Again, I think it is important to think about accountability because it could lead to new rules that seek to enhance civilian protection.

Finally, I will end with a focus on the importance of accountability on the impact to the civilian population because, as lawyers, we tend to talk about accountability in terms of the law (e.g., legality, procedural guarantees, and due process, which are all important, of course). We also have to remember that it can have real-life consequences for people on the ground. We should not just seek to avoid LOAC violations because they are illegal but also because of the impact that they can have on the affected population.

With that in mind, the ICRC has launched a separate empirical study from the one I mentioned a moment ago to determine what the measurable impacts of IHL violations can be on a given population and to try to quantify both the human and economic costs of such violations. This will be slowly published online. It is not all up yet, but the first report that came out was on displacement in armed conflict.<sup>49</sup> The study demonstrated that while displacement will always be an inevitable feature of war, LOAC violations exacerbated displacement and, more importantly, were a leading cause in preventing returns, even once the conflict or the violence had ended.<sup>50</sup> People are less likely to return when LOAC violations have been committed due primarily to the fear created by intentional violations versus incidental

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<sup>48</sup> *Opinio Juris Sive Necessitatis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle that for conduct or a practice to become a rule of customary international law, it must be shown that countries believe that international law (rather than moral obligation) mandates the conduct or practice.").

<sup>49</sup> INT'L COMM. OF THE RED CROSS, DISPLACEMENT IN TIMES OF ARMED CONFLICT: HOW INTERNATIONAL HUMANITARIAN LAW PROTECTS IN WAR, AND WHY IT MATTERS (2020).

<sup>50</sup> *Id.* at 5–6.

harm.<sup>51</sup> Extensive damage to property that often resulted from unlawful conduct of hostilities (e.g., a lack of precautions or distinction) also exacerbated this.<sup>52</sup> The ICRC's empirical studies show that where mere hostilities occur, where people are dying and property is being destroyed, displacement was likely to be short-term,<sup>53</sup> whereas in cases where intentional IHL violations that were not held accountable, displacement was likely to be long-term or permanent.<sup>54</sup>

#### V. Conclusion

What we can conclude from this is that if not only the perpetrators know they will be held accountable, but the civilian population knows that the perpetrators will be held accountable, you can see that, at least in the case of displacement, you will make an impact and lessen the long-term consequence of displacement. I imagine that some of the future studies that they plan to do will demonstrate similar data that this applies to other kinds of violations, as well.

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<sup>51</sup> *Id.* 38–39.

<sup>52</sup> *Id.* at 31.

<sup>53</sup> *Id.* at 38.

<sup>54</sup> *Id.*



**NUREMBURG AND THE ROLE(S) OF ACCOUNTABILITY  
IN THE LAW OF ARMED CONFLICT\***

THOMAS B. NACHBAR<sup>†</sup>

Thanks so much. This is a fantastic day, and I have learned a tremendous amount; I hope you have, too. It is an honor to share the stage with people who know as much about international law as my co-speakers do.

Unlike the preceding speakers, I am not going to tell you much that you do not already know. What I am going to do is to put things together in a slightly different way and to think about these topics in a different way. Those differences start with where I start, which is not actually in international law at all but in the application of domestic constitutional law by the United States Supreme Court.

On 2 November of this year, the United States Supreme Court granted a petition for certiorari in a case called *Taylor v. Riojas*.<sup>1</sup> That case involved prison guards who had kept Taylor in a series of disgusting prison cells, the first covered, “nearly floor to ceiling, in ‘massive amounts of feces’”<sup>2</sup> and the second one frigidly cold and in which the only drain, which was in the floor, had been blocked.<sup>3</sup> As a result, because the cell had no bunk, Taylor had to sleep in his own waste.<sup>4</sup>

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\* This is an edited transcript of remarks delivered on 19 November 2020 at “The International Military Tribunal at Nuremberg: Examining Its Legacy 75 Years Later,” a symposium hosted by the National Security Law Department of The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia. See The Judge Advoc. Gen.’s Legal Ctr. & Sch., *Nuremberg@75 Part 3 Legacy for Great Power Competition*, YOUTUBE (Nov. 20, 2020), <https://youtu.be/v3HNKlfabY0?t=2780>, for a video recording of these remarks.

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<sup>1</sup> *Taylor v. Riojas*, 141 S. Ct. 52 (2020).

<sup>2</sup> *Id.* (quoting *Taylor v. Stevens*, 946 F.3d 211, 218 (5th Cir. 2019), *vacated*, *Taylor*, 141 S. Ct. 52).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Taylor sued for violations of his constitutional rights under 42 U.S.C. § 1983, and the trial court granted summary judgment to the prison officials on the basis of qualified immunity.<sup>5</sup> Qualified immunity, as I am sure most of you are aware, is a requirement that, in order to be subject to damages under Section 1983, constitutional violations have to be clearly established.<sup>6</sup> The district court held that, while keeping Taylor in those cells might be a constitutional violation, it was not a clearly established one, and therefore the case should be dismissed.<sup>7</sup>

Now, that seems plainly wrong. I think a reasonable prison official would know that it is unconstitutional to keep a prisoner in those conditions. And, so, the Supreme Court held *per curiam*, with only Justice Thomas dissenting.<sup>8</sup> It might be remarkable, then, that Justice Alito actually wrote his own opinion in the case, agreeing on the merits but disagreeing with the decision to grant certiorari in the case.<sup>9</sup>

In this regard, Justice Alito had a pretty good argument. Supreme Court Rule 10 describes the types of cases for which the Supreme Court grants certiorari,<sup>10</sup> and while the Court has discretionary authority (that is, the Court is not bound by Rule 10), this kind of case was not the kind of case covered by Rule 10. The district court had arguably applied the correct legal standard—it had done so incorrectly, as the Court concluded—but the Supreme Court does not generally hear those kinds of cases.

That goes to a larger tradition about the Supreme Court: that it is generally uninterested in correcting the misapplication of law and is much more interested in managing the development of the law in U.S. courts.<sup>11</sup>

My point is not that that is the right approach, but rather to emphasize the different things that courts do. They decide individual cases (they issue judgments about what happened and allocate legal rights and duties between parties) and they explain why (they render opinions that explicate

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<sup>5</sup> *Id.*

<sup>6</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

<sup>7</sup> *Taylor*, 141 S. Ct. at 52.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 52, 54, 56.

<sup>10</sup> U.S. SUP. CT. R. 10.

<sup>11</sup> See Lawrence Baum, *Case Selection and Decisionmaking in the U.S. Supreme Court*, 27 L. & SOC'Y REV. 443, 446–47 (1993) (book review).

the content of the law). Those are different things that courts do, although they are often conflated.

My talk today is going to focus on that distinction and its relationship to the legacy of Nuremberg and the development of the law of armed conflict (LOAC) (which I am going to use in its generic sense to describe the law applicable in this area generally as opposed to *jus in bello* or *jus ad bellum*<sup>12</sup>) in the context of great power competition. I am largely going to tell a story that is the flipside of Geoff Corn's talk from earlier today<sup>13</sup> and, I think, dovetails nicely with Andrea's talk.<sup>14</sup> Geoff talked about how the failure of the United States to codify war crimes in the Uniform Code of Military Justice has led to stagnation in the development of the LOAC and raised questions of legitimacy.<sup>15</sup> I am going to come at the question from the other side: to talk about how accountability mechanisms can improve the content of the LOAC and why that would be an advantage to the United States in an era of great power competition.

This being an Army-sponsored event, I feel obligated to provide a roadmap. My thesis is that the United States needs to engage judicial processes for the development of the content of the LOAC. My key takeaways are that the real risk to the United States in the context of great power competition comes from the fragmentation of the substantive rules of the LOAC and that the United States' approach to the LOAC should reflect that risk from fragmentation. Essentially, I am going to argue that the LOAC needs more case law, and the question is how to generate that case law. Nuremberg made it possible to think of reliable accountability mechanisms for LOAC violations, but today, the greatest thing that might be standing in the way of LOAC accountability mechanisms might be the concept of accountability itself.

In support of this argument, I am going to try to make three-and-a-half points. The first is that stable and well developed LOAC is an advantage

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<sup>12</sup> See OFF. OF GEN. COUNS., DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.3.1.1 (2016).

<sup>13</sup> Geoffrey S. Corn, *Individual Criminal Responsibility for War Crimes*, 229 MIL. L. REV. 191 (2021).

<sup>14</sup> Andrea Joy Harrison, *Guidelines on Investigating Violations of International Humanitarian Law and Practical Mechanisms for Accountability—Today and Beyond*, 229 MIL. L. REV. 221 (2021).

<sup>15</sup> See generally Corn, *supra* note 13.

to the United States in great power competition, which I take to be a period of increased competition from other major powers, specifically China and Russia.<sup>16</sup> The second point is that we need judgments in order to develop a stable LOAC, and this is going to take us on a hopefully brief journey into jurisprudence and what it says about the legitimacy of law. The third point is that accountability is paradoxically at least in some tension with the development of stable LOAC, depending on how that accountability comes about. This, to some extent, is the strongest connection I am going to draw to Nuremberg and the various approaches to accountability in the International Military Tribunal and the subsequent proceedings. Here, I am going to try to distinguish between different forms of accountability and, indeed, between accountability and accounting. My half point will be some thoughts about how to do that, but I am going to be asking for your participation both here today and after, as you think about these problems in the future.

As I mentioned before, I am both a law professor and an Army judge advocate. I will try to recognize those different roles and how they are connected. I am clearly speaking in my professorial capacity, which will become clear as I wander through theories of jurisprudence, but I cannot help, as a professor, to be influenced by my experience as a judge advocate. I hope that that experience informs my approach and does not cloud it. Also, as a Soldier in the U.S. Army Reserve, I am someone with a distinctly pro-American viewpoint. My approach is not a detached and analytical one; mine is an argument about how I think America can best succeed in great power competition, a competition in whose outcome I am not indifferent.

## II. Well Developed Law of Armed Conflict Benefits the United States More Than Its Great Power Competitors

I am probably telling you something that you already know, but I take a robust LOAC to be a matter of U.S. advantage in great power competition. This is really a point that underlies the rest of the argument that it is going to be easier in the United States to comply with any likely set of LOAC

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<sup>16</sup> RONALD O'ROURKE, CONG. RSCH. SERV., R43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS (2021).

rules than it will be our great power competitors. As a result, strong LOAC disproportionately benefits the United States in great power competition.

I would offer two versions of this argument—a weaker and a stronger one.

The weaker version is that the United States is better with a settled, and maybe suboptimal, LOAC than a contested LOAC that aspires to the best possible rule. Here, I am talking about the consistency and durability of the law apart from the content of the rules, and so, to some extent, the real threat is from fragmentation itself. The problem of fragmentation from an American standpoint is particularly strong. I think America is going to be capable of adjusting to practically any set of LOAC rules that are likely to be produced in the international order, partly because our domestic democratic order is generally consistent with any likely set of rules. The U.S. position on the LOAC is roughly aligned with the international position. We frequently write about tensions between U.S. and other interpretations of the LOAC<sup>17</sup> because our tendency is to focus on the points of disagreement. Maybe this is because we are all lawyers and this is what lawyers tend to do: focus very heavily on the points of disagreement that we have with other sources of law in the LOAC. But the points of disagreement are far outweighed by our overall embrace of the LOAC.

What I am really arguing for is a greater degree of engagement in service of providing a more systematic approach to the LOAC and one that travels across jurisdictions better than the current disputes do. I went to school at The Judge Advocate General's Legal Center, and I know how the class goes: "This is the U.S. position and this is the other position." I think that we should be trying harder to close that gap in order to come up with a "single" position, but my argument really is more about the value of consistency itself and how that is in service of U.S. interests. So, that is the weaker argument: that consistent, suboptimal—or mediocre from a U.S. standpoint—LOAC is better for us than the quest for the perfect LOAC. And I think that that means that the United States should be comparatively willing to compromise on interpretations of the LOAC if we think it will create more durable legal rules.

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<sup>17</sup> See, e.g., NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 41–43 (2020) (describing the "U.S. view" on various aspects of the law of armed conflict (LOAC)).

The stronger version is that any likely form of LOAC likely to be adopted in the international community will likely be more consistent with American approaches and values than those of our great power competitors. I can make this as a practical argument that it is just hard to make consistent LOAC internationally without the involvement of the United States,<sup>18</sup> and I think that is why we have seen as much fragmentation as we have seen—to the extent the United States disagrees with a legal rule in the LOAC, it is hard to say that it actually is the law.

More centrally, I think America is particularly careful with the way that it fights wars. I think a lot of the conversations that we are having about the LOAC are actually the result of the great care that the United States has taken in fighting wars over the last twenty years or so, and I would say even before that, and the possibility that such standards of care might be built into the LOAC in ways that represent other values and approaches to conducting war.<sup>19</sup>

While I recognize that there are challenges to U.S. views on the LOAC, I do not think since Nuremberg has the United States faced a military adversary whose conduct has more closely complied with any reasonable interpretation of the LOAC than has our own. We are a particularly compliant nation, and I think that compliance runs both through domestic political understandings and also through international law. The norms of Nuremberg reflect the norms of the United States, and we can only benefit from their development and vigorous enforcement in international law.

### III. Judgments Will Facilitate the Development of a Stable Law of Armed Conflict

My second claim is that we need judgments in order to develop that law. Here, I would take a step back to think a little more fundamentally

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<sup>18</sup> Cf. Deborah Pearlstein, *Armed Conflict at the Threshold?*, 58 VA. J. INT'L L. 369, 379–80 (2019) (explaining that “the practice of the United States is indisputably important to the development of customary international law” and that disagreement between the United States and other governments regarding non-international armed conflict has generated considerable legal confusion).

<sup>19</sup> Compare Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745 (2009) (arguing that counterinsurgency practice reflects changes to the LOAC), with David E. Graham, *Counterinsurgency, the War on Terror, and the Laws of War: A Response*, 95 VA. L. REV. IN BRIEF 79 (2009) (arguing that Sitaraman confuses counterinsurgency strategies and the LOAC).

about what law is and about how the international legal order fits into our conceptions of law. I am going to suggest that, as international lawyers working this area, we might have more to learn from H. L. A. Hart than we do from Vattel.

As asked by modern approaches to jurisprudence, there is a sort of fundamental tension among jurists between different conceptions of law. On the one side, there are positivists who believe that the law is what the duly constituted authority says the law is,<sup>20</sup> and on the other extreme, there are the natural lawyers. Natural lawyers argue that what makes law is the connection between the rule and some sort of fundamental conception of morality.<sup>21</sup> Most people sit somewhere in between the positivist and natural lawyers. And that is why the Nuremberg laws—not the tribunals, but the adopted laws of Germany that the Nazi regime used as the legal basis for the Holocaust<sup>22</sup>—produce a common argument and common discourse among jurists about whether or not those actually constitute law<sup>23</sup> because, even though they were duly adopted, they lacked any kind of connection to morality. You can see the positive/natural law divide in domestic U.S. law as well. The common law looks comparatively natural; modern statute law is largely positivist.

I would contend that the modern international legal order falls very heavily on the positivist side. There really are very few international norms that drive the content of international law. The preferred form of making the international is treaty law<sup>24</sup> and while there are *jus cogens* norms, they are the exception, not the rule. Almost all international law is made through the positivist act of agreement. I would say that international law is almost hyper-positivist in the sense that it is states that are agreeing to be bound by the law.

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<sup>20</sup> See H. L. A. HART, *THE CONCEPT OF LAW* 94–95 (2d ed. 1994).

<sup>21</sup> See, e.g., Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221 (1973).

<sup>22</sup> Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law for the Protection of German Blood and Honor], Sept. 15, 1935, *RGBL I* at 1145 (Ger.); Reichsbürgerschaftsgesetz [Reich Citizenship Law], Sept. 15, 1935, *RGBL I* at 1146 (Ger.).

<sup>23</sup> See Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 632–33 (1958).

<sup>24</sup> Christopher Greenwood, *Sources of International Law: An Introduction*, UNITED NATIONS 1–2, [https://legal.un.org/avl/pdf/ls/greenwood\\_outline.pdf](https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf) (last visited July 12, 2021).

In order for that agreement to form a legitimate basis of law, it has to have some teeth. You have to have something to lose. I think we recognize that as well. A state enters into a treaty and when the treaty does not go quite the way they want it to, they just withdraw.

We want to be concerned about that. We certainly feel that way about private contract law that gets formed between individuals—you cannot just get out of a contract when it is no longer beneficial to you. That bite in the law is what makes it legitimate.<sup>25</sup>

Given those features of international law (i.e., that it has to be agreed to and it has to be binding to be legitimate), I think we should back away a little bit from underlying substantive rules. As lawyers, we tend to focus on what the content of the law is, but the real question for contested LOAC is, “What makes the rules legitimate?” The rule in any legal system is the rule for recognizing what are and are not binding rules.<sup>26</sup> What makes law that is viewed as legitimate by the relevant players, which, in this case, includes nations and, after Nuremberg especially, individual soldiers and fighters who are going to be bound by that law.

This is where I get to judicial action. Because of the state-centric, assent-based approach, the preferred form of international lawmaking is by treaty. I do not think that a comprehensive treaty on the content of the LOAC is likely. I have been hearing talk about a next Geneva Convention for a long time,<sup>27</sup> but it does not seem like we are heading in that direction. That leaves other fora, such as the opinions of scholars and other non-state actors, who, despite their best intents and wisdom, are not fantastic sources of law in this area. This is a very Westphalian, state-centric area of law. Because only states really are able to engage in armed conflict,<sup>28</sup> certainly as a practical matter, it is states who have to make the kinds of compromises embodied in the LOAC. It is states that we have to think about in terms of accountability. This is rightly a state-centric area of

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<sup>25</sup> See HART, *supra* note 20, at 86 (describing the internal perspective of an actor toward law). The lack of an internal perspective led Hart, the leading positivist, to reject international law as “law.” See *id.* at 214.

<sup>26</sup> See *id.* at 94–95.

<sup>27</sup> See, e.g., Callin Kerr, *Mexico’s Drug War: Is It Really a War?*, 54 S. TEX. L. REV. 193 (2012) (collecting references).

<sup>28</sup> See Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL’Y REV. 253, 255 (2011).



international law because states are the ones who face the balance of rights and responsibilities of the LOAC.

There are ways states participate other than by treaty. They make unilateral pronouncements of law,<sup>29</sup> and many would like to rely on those as a *source* of law. I do not want to underestimate the value of unilateral pronouncements, but they contribute little to the settled meaning of international law. A problem with unilateral pronouncements of law by states is that they rarely resolve contested issues of law; they often explain contested positions of law, but they do not tend to resolve them. Even that explanation of a consistent position of law can be valuable in the formation of law over time—it feeds the conversation. Part of my argument is that the United States should take more advantage of unilateral pronouncements, but it is clearly a second best.

Given the alternatives, judicial development seems the most promising. For legitimacy, it is important that states have something to lose. It is often hard to get states to completely specify what their obligations are going to be by treaty,<sup>30</sup> and courts can help resolve those disputes and help to further specify what wind up being relatively vague standards. The LOAC is a perfect example. When you study the conventions and you study other aspects of international law related to armed conflict, you wind up a lot of indeterminate or relatively vague terms.<sup>31</sup>

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<sup>29</sup> *E.g.*, John O. Brennan, Assistant to the President for Homeland Sec., Nat'l Sec. Council, *The Ethics and Efficacy of the President's Counterterrorism Strategy* (Apr. 30, 2012) ("There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat."); Ari Shapiro, *U.S. Drone Strikes Are Justified*, *Legal Adviser Says*, NAT'L PUB. RADIO (Mar. 26, 2010, 2:45 AM), <https://www.npr.org/templates/story/story.php?storyId=125206000> (quoting State Department Legal Adviser Harold Koh as stating, "The U.S. is in armed conflict with al-Qaida as well as the Taliban and associated forces in response to the horrific acts of 9/11 . . . and may use force consistent with its right to self-defense under international law.").

<sup>30</sup> See Cindy Galway Buys, *Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon*, 14 SANTA CLARA J. INT'L L. 363 (2016) (describing not only "reservations" but also the "murky" practice of Senate conditions on treaty ratifications).

<sup>31</sup> JEAN S. PICTET ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 183 (Ronald Griffin & C. W. Dumbleton trans., 1958) (explaining that the terms in paragraph 2 of Article 23 of the Third Geneva Convention regarding the right of free passage in

If the point of legitimacy is to feed the development of rules, the question then is how to provide legitimately in a way that states will accept. Here is a place where one of Nuremberg's innovations, which certainly has been taken up by military tribunals like the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, and International Criminal Court, might actually be a barrier: individual liability. While the law has to have bite in order for its content to be viewed as legitimate, it is not clear that individual accountability is the kind of consequence we need for the development of the law.

I am cautious in saying this because I do think that what Nuremberg did was incredibly important and I am not pushing against the overall concept of individual liability at all. I just want to point out that two distinct points about the relationship between individual and national accountability. There is the initial question about whether individual liability is itself legal. What Nuremberg did was defeat the defense to individual liability that one was relying on national authority, but you can defeat that *defense* of relying on national authority and continue to subject individuals to liability without having individual liability be the only way to develop the law. The existence of individual liability and the focus on individual liability has been a barrier to at least U.S. participation in some international legal fora,<sup>32</sup> and I think that the United States' absence has harmed both the content and the legitimacy of the LOAC.

Along those lines, I would make two observations regarding individual and national accountability. The first is that we should expand a model of national accountability that is predicated on the failure to provide individual accountability for war crimes. The nation has the obligation to provide individual accountability, and its failure to do can certainly form the basis for national accountability. The second is that our heavy emphasis on ad hoc tribunals that tend to focus on the very worst LOAC violations has led to a LOAC applicable only to those least likely to follow it. It is not clear to me that individual accountability itself does a lot of work in those worst cases—that budding dictators or war criminals are thinking about the likelihood that

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relation to a blockade was made intentionally vague because “the Diplomatic Conference of 1949 had to bow to the harsh necessities of war; otherwise they would have had to abandon all idea of a general right of free passage.”); *id.* at 625 (noting paragraph 4 of Article 158 is “vague, and obviously deliberately so”).

<sup>32</sup> See JENNIFER K. ELSEA, CONG. RSCH. SERV., RL31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT (2006).

an as-yet-non-existent ad hoc tribunal might be formed to try them—it is not clear that that is providing substantial deterrence to their behavior. Given the way the law is being applied, it is really not clear what individual accountability is buying us because the impulse toward individual accountability is prompted by egregious violations, and egregious violators are the ones unlikely to comply regardless of the legitimacy of the system. The current approach to individual liability thus seems to ignore the value of building compliance rather than punishing bad acts.

In the context of great power competition, with the possibility of applying these rules to great powers in a way that has not really happened since Nuremberg, we should be thinking more about designing systems for nations who are interested in the benefits of compliance. And I think the benefits of compliance are many, especially to more developed nations or nations with more heavily developed foreign policy. More importantly, from the standpoint of legal development, it is not clear to me why a system of national accountability cannot provide the substantive rules of the LOAC to do the work the system needs to do.

#### IV. The Relationship Between Accountability and Legitimacy

My third point is to distinguish between accountability and accounting, and, specifically, to focus on how accountability might contribute to legal development in ways that accounting does not. The LOAC presents a great area of the law to ask about the relationship between accountability and legitimacy. Here, I go back to Nuremberg to talk about two different accomplishments.

The first thing that Nuremberg did was make it possible for me to stand on the stage and have this conversation in the first place. Before Nuremberg, we were in a completely different world when it came to accountability for war crimes, and the history of tribunals before Nuremberg shows that.<sup>33</sup> Nuremberg inaugurated an era of credible international accountability for violations of the LOAC. Although Nuremberg started that process, it did not finish it.

The question is, “How do you develop the law from then on?”—a prospective understanding about the law, which takes further tribunals and

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<sup>33</sup> See Fred L. Borch III, *The Nuremberg Military Tribunals: A Short History*, 229 MIL. L. REV. 159, 161–62 (2021).

further conversations. Accountability, at some level, is inherently backward-looking—it is hard to hold someone “accountable” for something they have not done yet. Tribunals develop the law retrospectively—with reference to what has happened—not prospectively, and Nuremberg is exhibit number one for the retrospective application of the LOAC. That itself creates problems of legitimacy, thus, the conversations that we have had today about *ex post facto* concerns and innovation in the law.<sup>34</sup>

More importantly for my purposes, though, is that Nuremberg solidified and legitimized the rule of ad hoc tribunals. Andrea talked about the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone,<sup>35</sup> all of which were and are ad hoc tribunals. Ad hoc tribunals do a lot of different things, but their existence as ad hoc tribunals makes it hard to develop the law over time.

The second thing that Nuremberg did was legitimize the concept of an accounting more generally—it created a record. Nuremberg provided accountability for the Nazi regime as a whole, which might have been necessary for a variety of reasons: in recognition of the harms they did more generally, as a matter of reconciliation for Germany moving forward, and, of course, as a matter of justice. The creation of a record or an accounting can be important for a variety of reasons. I think we have started to confuse what some of those reasons might be and, as lawyers, we need to be careful about that.

My concern is about the confusion that can arise from the conflation of accountability and accounting. Investigations, for instance, can be useful not only to determine whether there has been a LOAC violation but also useful for other purposes, such as evaluating civilian casualties more generally in ways that might not implicate whether there is a LOAC violation. I would suggest that the approach to amends, or solatia,<sup>36</sup> highlights some of this tension. Amends can be paid as a policy matter to further some objective, in recognition of some legal wrong, or in recognition of some non-legal

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<sup>34</sup> See Lieutenant General Charles N. Pede, *The Significance of the Nuremberg International Military Tribunals on the Practice of Military Law*, 229 MIL. L. REV. 253, 265 (2021).

<sup>35</sup> Harrison, *supra* note 14, at 229–30.

<sup>36</sup> 32 C.F.R. § 536.145 (2020) (“Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands.”).

wrong.<sup>37</sup> It is hard to specify just from the existence of the payment what the underlying understanding was. The same is true of investigations and other mechanisms of providing an account, which can serve multiple purposes, many of which can become easily confused.

I think it is important that we distinguish mechanisms of legal accountability from mechanisms of providing an account—to recognize that they do different things and to evaluate the distinct value of legal development and decide whether it is a good idea to invest in institutions that do that, perhaps at the cost of either an accounting or accountability. Just as we might push toward institutions that focus on developing an account without providing accountability, as happens with some truth and reconciliation commissions, we might also push towards legal institutions that provide development, even though they provide imperfect accounting or accountability.

With all this complexity, and given the perils of confusing accountability and accounting, my half point of suggestions might seem out of the blue (and they are certainly incomplete), but I think they follow naturally from my earlier points.

First, given the history and barriers to international application, the United States should be looking for application of the LOAC in its national courts. This is really picking up Geoff Corn's argument from earlier today: we should be looking for opportunities to include LOAC in our national law.<sup>38</sup> We saw it happen in *Hamdan*,<sup>39</sup> which I would be tempted to call the high point of LOAC accountability and enforceability in U.S. national law, when the Supreme Court applied the law against the preferences of the executive branch; in Geoff's proposal for the codification of war crimes in the Uniform Code of Military Justice;<sup>40</sup> the Military Commissions Act<sup>41</sup>

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<sup>37</sup> "An offering of solatia seeks to convey personal feelings of sympathy or condolence toward the victim or the victim's family. Such feelings do not necessarily derive from legal responsibility; the payment is intended to express the remorse of the person involved in an incident." U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10-10a (21 Mar. 2008).

<sup>38</sup> Corn, *supra* note 13, at 191–92; Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309 (2020).

<sup>39</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>40</sup> Corn, *supra* note 13, at 191–92.

<sup>41</sup> 10 U.S.C. §§ 948a–950t.

and the appellate court decisions that have followed<sup>42</sup> are a tremendous source of development in the LOAC; and there are even other venues, like the Alien Tort Claims Act<sup>43</sup> and the Torture Victim Protection Act.<sup>44</sup>

Second, the United States needs to take a more active role in announcing its position on LOAC application. There are too many statements on the LOAC that are being made without rebuttal or address by the United States.<sup>45</sup> I think it is hard to do this at the interagency level, to get everybody together to make a joint statement, but I would recommend that these become the bread and butter of U.S. foreign policy engagement on the LOAC, especially given the lack of other international fora like regular international courts.

Third, and far more complicated, is to suggest that we should be thinking more about national accountability as a general matter. Individual accountability is attractive, but it is costly for a nation to subject its nationals to individual accountability to international tribunals. An emphasis on national accountability might provide the space to develop the law, even if it falls short as a matter of complete accountability for violations.

## V. Conclusion

Nuremberg was a hugely important and perhaps a historically singular event. It made it clear that the world was not going to permit these kinds of crimes to go unpunished, and I do not think I could make any of the arguments I have made today but for the existence of Nuremberg. The commitment to accountability displayed at Nuremberg and the subsequent proceedings fundamentally changed world perceptions of aggressive war, crimes against humanity, and human rights violations like genocide. But,

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<sup>42</sup> *E.g.*, *Al-Bihani v. Obama*, 590 F.3d 866, 884–85 (D.C. Cir. 2010) (Williams, J., concurring) (applying the LOAC to determine whether Al-Bihani is detainable).

<sup>43</sup> 28 U.S.C. § 1350.

<sup>44</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

<sup>45</sup> *E.g.*, NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). The United States has not accepted the International Committee of the Red Cross's *Direct Participation in Hostilities* study, but neither has it published a formal response challenging the International Committee of the Red Cross's interpretation. *See* Major Ryan T. Krebsbach, *Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 J. NAT'L SEC. L. & POL'Y 125 (2017).

while the use of extraordinary tribunals like Nuremberg can provide critical accountability, when they are the only form of accountability, they can stifle legal innovation and development. I think a durable and more consistent understanding of the LOAC would benefit the United States in great power competition, and it is hard to get that kind of durable understanding from the kind of ad hoc tribunals that have focused on individual accountability.

In terms of great power competition, my argument is that the United States needs to find a way back into the ongoing dialogue regarding the development of the LOAC. That dialogue is happening all over the world in a variety of fora, and the United States, I would argue, needs to engage it before it winds up with a LOAC that is hopelessly fragmented or it does not find favorable to fit U.S. interests or U.S. morality. While Nuremberg represented the beginning of what I think could be a robust and widely enforced international LOAC, our generation has the responsibility to take that beginning and carry it forward.





**THE SIGNIFICANCE OF THE NUREMBERG  
INTERNATIONAL MILITARY TRIBUNALS  
ON THE PRACTICE OF MILITARY LAW\***

LIEUTENANT GENERAL CHARLES N. PEDE<sup>†</sup>

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Lieutenant General Pele most recently served as the fortieth Judge Advocate General of the United States Army until his retirement on 9 July 2021. His previous assignments include: Trial Defense Counsel, Mannheim Field Office, Germany; Chief, Criminal Law and Chief, Administrative and International Law, 21st Theater Army Area Command, Mannheim, Germany and OPERATION PROVIDE COMFORT, Army Forces-Turkey; Chief, Military Justice, 10th Mountain Division (Light Infantry), Fort Drum, New York and OPERATION RESTORE HOPE, Mogadishu, Somalia; Professor of Law, Criminal Law Department, The Judge Advocate General’s Legal Center and School, Charlottesville, Virginia; Assignments Officer, Office of The Judge Advocate General, Washington, DC; Assistant Executive Officer, Office of The Judge Advocate General, Washington, DC; Staff Judge Advocate, 10th Mountain Division (Light Infantry), Fort Drum, New York and Joint Task Force Mountain and Combined Joint Task Force-180, OPERATION ENDURING FREEDOM, Afghanistan; Legislative Counsel, Office of the Chief Legislative Liaison, Pentagon, Washington, DC; Chief, Criminal Law Division, Office of The Judge Advocate General; Staff Judge Advocate, United States Forces Iraq, OPERATION IRAQI FREEDOM, Baghdad, Iraq; Chief, Criminal Law Division, Office of The Judge Advocate General; Executive Officer to The Judge Advocate General of the Army, Washington, DC; Commander, United States Army Legal Services Agency and Chief Judge, United States Army Court of Criminal Appeals, Fort Belvoir, Virginia; Commander, The Judge Advocate General’s Legal Center and School, Charlottesville, Virginia; and Assistant Judge Advocate General for Military Law and Operations at Headquarters, Department of the Army, Washington, DC.

Lieutenant General Pele offers special recognition and gratitude to Lieutenant Colonel Amy Nieman for her exceptional assistance in the formation of these remarks.

## I. Introduction

I begin my remarks to this wonderful symposium with a quote.

If all the leaders of the Third Reich had been sadistic monsters and maniacs, then these events would have no more moral significance than an earthquake or any other natural catastrophe. But this trial has shown that under a national crisis, ordinary—even able and extraordinary—men can delude themselves into the commission of crimes so vast and heinous that they beggar the imagination.<sup>1</sup>

These are the words of Spencer Tracy, referred to earlier today by Professor Solis, as he pronounced judgment at his trial in the movie *Judgment at Nuremberg*, which I commend to all of you. And, yes, it is a bit of Hollywood, but, frankly, it is emblematic of what we have talked about today.

This is why I begin with this notion of a crushed and discarded moral compass. That is what I want to discuss with all of you today, and why our focus on principled counsel in our Army Judge Advocate General's (JAG) Corps<sup>2</sup>—or in the vernacular, “doing the right thing”—and constantly talking about doing the right thing is so important.

Good afternoon to all of you; I am grateful to be here. I listened to the marvelous speakers from this morning, beginning with the Dean, who talked about our purpose, how these lessons learned are still relevant, and that the process did not have to be what it was.<sup>3</sup> From Mr. Borch, that the trials were not inevitable, that an individual—and I think that we all should have written this down—has obligations that transcend obligations to the state.<sup>4</sup> From Dr. Meinecke, that the judges must consider the effect on those judged, and that the judges who took a principled stand were made

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<sup>1</sup> JUDGMENT AT NUREMBURG (Roxlom Films 1961).

<sup>2</sup> LIEUTENANT GENERAL CHARLES N. PEDE & MAJOR GENERAL STUART W. RISCH, TJAG & DJAG SENDS, VOL. 40-16, PRINCIPLED COUNSEL—OUR MANDATE AS DUAL PROFESSIONALS (2020).

<sup>3</sup> Colonel Sean T. McGarry, *Opening Remarks for the Seventy-Fifth Anniversary of the International Military Tribunal at Nuremberg*, 229 MIL. L. REV. 155 (2021).

<sup>4</sup> Fred L. Borch III, *The Nuremberg Military Tribunals: A Short History*, 229 MIL. L. REV. 159 (2021).

irrelevant.<sup>5</sup> From Geoff Corn, what right looks like in the international community and the role of legitimacy.<sup>6</sup> And from our guest speakers this afternoon who, reluctantly and sadly, I was not able to listen to, but I know provided great counsel to each and every one of us.

I want to start by thanking our speakers and our sponsors for marking this anniversary so purposefully and meaningfully. And a very warm welcome to our students of the Fighting 212th Officer Basic Course, the 69th Graduate Course, and our guests from the University of Virginia, my alma mater. I am privileged and humbled to be a part of this remembrance today.

Marking such profound history—indeed, legal history—ensures *our* compass is in working order and sets each of us on the right path. The lessons that we have discussed resonate, even if on a grand and hard-to-comprehend scale. Even if in your mind you say, “I will never be faced with such calamity or difficulty,” I say to you, “Do not be so sure.” Frankly, whether the difficulty is large or small, wherever you might find yourself, reference points in learning like the Nuremberg Symposium today will light your way and illuminate how you solve your problems. Your personal reflections on Nuremberg will serve as the magnetic north for *your* compass.

I am certainly humbled by my role this afternoon in closing out this important discussion, but I take heart that my experience in the practice of law permits me the vantage point, perhaps, of seeing clearly one aspect that serves as a mooring for each of us as we approach the future: having studied the lessons of the past.

I want to talk with you as we close today about values-based lawyering; practicing law where the wellspring of your advice and counsel is virtue. We sometimes flounder at such notions as virtue in our world today. Aristotle was good enough to establish timeless guideposts for us. His list of virtues is something that, once consumed, we all recognize instantly and

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<sup>5</sup> William F. Meinecke Jr., *German Justice on Trial: The Justice Case*, 229 MIL. L. REV. 173 (2021).

<sup>6</sup> Geoffrey S. Corn, *Individual Criminal Responsibility for War Crimes*, 229 MIL. L. REV. 191 (2021).

say, “Of course.” The timeless virtues of courage, temperance, liberality, truthfulness, and justice, to name but a few.<sup>7</sup>

Why do I start with this discussion of virtue and principled counsel? It is because when we, as lawyers, ask what right looks like, this is where we must begin. And this is why we talk in the Army JAG Corps about principled counsel. Principled counsel is the north-pointing direction on our Corps’s North Star, designed to remind each of us—constantly—the origin of our advice and counsel, which are our shared values sourced from timeless virtues.

And what does principled counsel have to do with Nuremburg? My point exactly. I want to share today three aspects with you that illuminate principled counsel. Two of the examples demonstrate the crushed compass, and they are both lessons which we must absorb and we have learned of this morning and this afternoon. Saying, “It would never happen on my watch,” or “I would know exactly what to say and do to resist such momentum if it were to happen to us,” is naïve. We live in a hard world sometimes, and we learn through examples—sometimes bad ones—so, we must contemplate them. Thankfully, my third example is one of triumph—a triumph of virtue.

## II. The Justice Case

We heard this morning about the Justice Case.<sup>8</sup> Allow me to add my thoughts to the excellent discussion of Dr. Meinecke. Nine officials from the German Ministry of Justice and seven members of the Nazi-era People’s and Special Courts were charged with “judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then utilizing the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale.”<sup>9</sup> The prosecutor, Telford Taylor, called the pretense by the Nazi party of a legitimate regime the “unholy masquerade of brutish tyranny designed as justice.”<sup>10</sup> The events that allowed Hitler to rise to power—a power grab in which lawyers and

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<sup>7</sup> See ARISTOTLE, *NICOMACHEAN ETHICS* (F.H. Peters trans., 10th ed. 1906) (c. 384 B.C.E.).

<sup>8</sup> See Meinecke, *supra* note 5.

<sup>9</sup> *United States v. Altstoetter* (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Opening Statement, at 32–33 (Mar. 5, 1947).

<sup>10</sup> *Id.* at 31.

judges were fully complicit—demonstrates that Hitler understood precisely the power of the law.

The ascension of the Third Reich and its agenda happened right out in the open, and that is at least partly because it was allowed, and even designed, to happen under the veneer of law.<sup>11</sup> That is something that we, as lawyers, do well to remember: law, as Professor Corn reminded us, conveys legitimacy. As its stewards, we are charged with making sure that the law is not contorted in ways that make it unrecognizable to our society.<sup>12</sup> At that time, those who should have provided principled counsel either became complicit, looked away, or were silenced, save the two that Dr. Meinecke described for us. We are sure there were more, but those were the only two he has been able to find.

More than six years before Germany invaded Poland in 1939, Hitler had become Chancellor of the German Republic.<sup>13</sup> He understood the outsized importance of appearing to operate within the confines of the law. Upon the torching of the Reichstag building in 1933, rather than simply mobilizing his militaristic supporters, Hitler obtained from President von Hindenburg the “Reichstag Fire Decree.”<sup>14</sup> That decree rescinded key civil liberties for German citizens and became the legal basis for imprisoning anyone opposed to the Nazis. It allowed for secret arrests and detentions with no hearing, no evidence, no charges, and no counsel. And it set a precedent which would continue for the next twelve years of the Nazi regime, harnessing the power of the law to bring about its crimes against humanity.

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<sup>11</sup> Karl Loewenstein, *Law in the Third Reich*, 45 *YALE L.J.* 779 (1936).

<sup>12</sup> U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 1-5 (31 July 2019) (C1, 25 Nov. 2019) (“Professionals accept the responsibility to be stewards of the people and resources entrusted to them by society and to advance the state of their profession in anticipation of changes to the world around them.”); Major General Stuart W. Risch & Lieutenant Colonel Aaron L. Lykling, *The War for Talent*, ARMY LAW., no. 3, 2020, at 2 n.1 (“Stewardship is one of our Corps’s Constants . . . [A]dvice must be effectively communicated with appropriate candor and moral courage, so that leaders can make fully informed decisions.”).

<sup>13</sup> *Adolph Hitler*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/adolf-hitler> (last updated Mar. 21, 2017).

<sup>14</sup> Lorraine Boissoneault, *The True Story of the Reichstag Fire and the Nazi Rise to Power*, SMITHSONIAN MAG. (Feb. 27, 2017), <https://www.smithsonianmag.com/history/true-story-reichstag-fire-and-nazis-rise-power-180962240>.

The Enabling Act, which followed, dealt a killing blow to the Reichstag and allowed Hitler and the Nazis to pass laws—even unconstitutional ones—without even pretending to go through the Reichstag.<sup>15</sup> The same year, Jews were excluded from the legal profession and the civil service by operation of law.<sup>16</sup> Then—and this contemporaneous anniversary should not go unnoticed—eighty-five years ago this week, in 1935, the Nuremberg Laws were passed.<sup>17</sup> These laws deprived German Jews of citizenship; cancelled their civil, voting, and most employment rights; and prohibited marriage and relationships between Jews and non-Jews.<sup>18</sup>

A parade of new laws legitimizing theft and murder by the Third Reich followed in rapid succession and continued even after the beginning of an illegal war. Those laws forced Jews into ghettos and required them to wear identifying markers.<sup>19</sup> They legalized secret abductions and incarcerations. They authorized the death penalty in sham trials that we learned of this morning, and the summary executions of Soviet political commissars and enemy commandos, even after surrender.<sup>20</sup> The Nazis became experts at sham trials, and—as in the famous Katzenberger and White Rose trials showed us and Dr. Meinecke described for us<sup>21</sup>—proved their willingness to send people to the guillotine and the hangman’s noose. Yes, I said, “guillotine.” It is estimated that the Germans executed in their preferred method upwards of sixteen thousand people by guillotine.<sup>22</sup>

Even the horrors of the concentration camps were duly authorized by law.<sup>23</sup> The regime later consolidated the camps, in which many of the worst

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<sup>15</sup> *Id.*

<sup>16</sup> *Antisemitic Legislation 1933–1939*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939> (last visited Mar. 17, 2021).

<sup>17</sup> Greg Bradsher, *The Nuremberg Laws*, PROLOGUE MAG., Winter 2010, at 24, 25.

<sup>18</sup> *Id.* at 24, 27; *Antisemitic Legislation 1933–1939*, *supra* note 16.

<sup>19</sup> *Ghettos*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/ghettos> (Dec. 4, 2019).

<sup>20</sup> *United States v. Von Leeb (High Command Case)*, Case No. 12, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 492–93 (Oct. 27, 1948); 2 OFF. OF U.S. CHIEF OF COUNS. FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 535 (1946).

<sup>21</sup> See Meinecke, *supra* note 5, at 184–88.

<sup>22</sup> *COMPARATIVE CAPITAL PUNISHMENT* 170 (Carol S. Steiker & Jordan M. Steiker eds., 2019).

<sup>23</sup> Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law for the Protection of German Blood and Honor], Sept. 15, 1935, RGL I at 1145 (Ger.); Reichsbürgerschaftsgesetz [Reich Citizenship Law], Sept. 15, 1935, RGL I at 1146 (Ger.).

atrocities of the Holocaust occurred under Heinrich Himmler and the SS, empowered to create their own systems of administration, regulations, and de facto laws.<sup>24</sup> The reference to some kind of law was never discarded. The camps, murders, torture, barbarity—the Nazi regime endeavored to whitewash them all with the protective cloak of legal trappings. Put succinctly in the opinion of the Justice Case: “The dagger of the assassin was concealed beneath the robe of the jurist.”<sup>25</sup>

For example one, our lesson as lawyers is clear: when we allow the power of law to be co-opted and corrupted by those who would seek to use it against the powerless, we have collectively failed. Simply, the stewards of the rule of law allowed the law to be debased. This was not simply an act of omission. It was, in fact, a crime of commission. Virtue was trampled. The moral compass was crushed on a scale the world had not yet known and which, once observed and discovered, seemed incomprehensible.

I want each of you to reflect and ask, “How could this happen? How could judges trained in the law and precepts of impartiality and fairness be so corrupted?” This is where our Corps’s drumbeat matters. You may think us immune to such horrid notions as we have seen with the Justice Case, and I do believe we are, absolutely. But it makes a difference that our standard of principled counsel based on virtue and shared values is bigger than any one person. What principled counsel means must be so fixed in our culture and cultivated constantly that individual or collective lapses are truly seen as aberrations—as anathema to the health of our system and each other. I want each of you to think of lapses and transgressions, even when minor, as lapses and transgressions, not to be ignored but corrected. Our culture of what right looks like must be so common among all of us—so infused into our professional and personal legal ethos—that variances from the norm produce the now-proverbial reaction, “Wait, what? Did I hear what I thought I heard?” Transgressions stop conversation and should produce shock and dismay.

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<sup>24</sup> *E.g.*, Theodor Eicke, Disciplinary and Punitive Regulations for the Internment Camp (Oct. 1, 1933), in 3 OFF. OF U.S. CHIEF OF COUNS. FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 550, 550–54 (1946).

<sup>25</sup> *United States v. Altstoetter (Justice Case)*, Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Opinion and Judgment, at 985 (Dec. 3, 1947).

Admittedly, the gross violations of legal professionals in the years preceding Nuremberg seem impossible to replicate or conceive. We tend to dismiss these failures as too grand to be repeated or to seriously be at risk in today's transparent, flat world. I would commend each of you to never be comfortable with this notion. It is not always evil that looms; sometimes, it is complacency. To Tracy's eloquent point in the movie, the wrongs were committed by ordinary lawyers of ordinary means.

### III. The Malmedy Massacre

This brings me to my second example of a different sort of lapse in virtue. It is one smaller in scope than the lapses which led to the International Military Tribunal. As I describe this, I want you again to challenge yourself and ask, "How could this happen?"

And I want to be very clear on this point: Americans are not immune from failures in virtue or from failure to uphold our values. Every judge advocate should be familiar with the Malmedy massacre trial at Dachau in 1946,<sup>26</sup> which is why I speak of it today and why I am grateful that other speakers mentioned it earlier. The Malmedy trial was one of the many proceedings, described by Professor Solis and others, after the Nuremberg trial. Instead of an international tribunal, the respective Allies attempted to bring to justice those responsible for war crimes within their designated sectors. The failure of principled counsel manifest in this joint trial of seventy-three German soldiers should be part of our collective regimental memory. It is a cautionary tale that we, as judge advocates, should hold as a reference point in our shared legal history, albeit an unpleasant one.

The crimes themselves were appalling. Near Malmedy, Belgium, during the Battle of the Bulge in 1944, hundreds of American Soldiers and a number of Belgian civilians were lined up and murdered with machinegun fire by Kampfgruppe Peiper, an advancing German SS unit.<sup>27</sup> Prisoners who tried to flee or feign death were shot at point-blank range or bludgeoned with rifle butts. The massacre outraged Americans in the United States and

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<sup>26</sup> United States v. Bersin, Case No. 6-24 (U.S. Mil. Gov't Ct. July 16, 1946).

<sup>27</sup> See Fred L. Borch III, *The "Malmedy Massacre" Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath*, ARMY LAW., Mar. 2012, at 22; WHITNEY R. HARRIS, TYRANNY ON TRIAL 181 (1954).



in Germany and, in 1946, there was great pressure to prosecute and convict the SS members responsible for these crimes.<sup>28</sup>

The Malmedy war crimes trial took place between May and July 1946 inside the former Dachau concentration camp, under the authority of the U.S. Third Army's Judge Advocate General's Office.<sup>29</sup> The panel of commissioned officers found all of the defendants guilty of some part in the murders<sup>30</sup> and handed down forty-three death sentences.<sup>31</sup>

A Senate investigation later revealed that the seventy-three convictions in the Malmedy trial were compromised by misconduct by American investigators and prosecutors.<sup>32</sup> For some time, the investigators were unable to gain statements from the German soldiers that would implicate their fellow soldiers. To break the evidentiary impasse, the investigators and Army lawyers got creative—a cautionary mark on the road to failure—and implemented a mock trial known as the “Schnell Procedure.”<sup>33</sup> The Senate subcommittee described them as follows:

There was a table within a room, which was covered with a black cloth and on which was a crucifix and two lighted candles. Behind this table would be placed two or three members of the war crimes investigation team, who, in the minds of the suspects, would be viewed as judges of the court. A prisoner would be brought in with his hood on, which was removed after he entered the room. Two members of the prosecution team, usually German-speaking members, would then begin to harangue the prisoner, one approaching the matter as though he were the

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<sup>28</sup> SUBCOMM. OF THE COMM. ON ARMED SERVS., 81ST CONG., MALMEDY MASSACRE INVESTIGATION 33–34 (Comm. Print 1949) (describing the subcommittee's investigation, findings, and recommendations).

<sup>29</sup> *Bersin*, Case No. 6-24, at 1.

<sup>30</sup> *Id.* at 3209.

<sup>31</sup> *Id.* at 3251–67.

<sup>32</sup> See generally SUBCOMM. OF THE COMM. ON ARMED SERVS., *supra* note 28, at 7.

<sup>33</sup> See generally *Investigation of Action of Army with Respect to Trial of Persons Responsible for the Massacre of American Soldiers, Battle of the Bulge, Near Malmedy, Belgium, December 1944: Hearings Before a Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 134–35 (1949) (statement of Morris Ellowitz). This procedure was designed to “get [a prisoner] to make a statement” as the result of psychological manipulation. See, e.g., *id.* at 1267–92 (statements of Harry W. Thon).

prosecutor or hostile interrogator, and the other from the angle of a defense attorney or friendly interrogator.<sup>34</sup>

Interrogators would then convince the soldier of his likely fate—typically execution in the morning—and, prior to announcing findings, would release the prisoner, who then provided incriminating information.<sup>35</sup> The American defense counsel for the multiple accused repeatedly raised the issue of mistreatment and trickery.<sup>36</sup> Despite objections at trial, the soldiers were convicted and forty-three were given death sentences.<sup>37</sup>

Once the disturbing news of the departures from normal methods of investigation were discovered at higher echelons, the commanding general began an investigation. Ultimately, the Senate investigation, which went so far as to conduct hearings on site at Dachau prison, gave the most comprehensive view of the trials.

Because of the mistreatment of prisoners, primarily through the Schnell Procedure, relief was granted in these cases. Eventually, all of the death sentences issued were commuted to sentences of imprisonment in the interests of fundamental fairness. In its criticism of the conduct of investigators, the Senate subcommittee wrote:

The subcommittee feels that the use of the mock trials was a *grave mistake*. The fact that they were used has been exploited to such a degree . . . that American authorities have unquestionably leaned over backward in reviewing any cases affected by mock trials. As a result, it appears many sentences have been commuted that otherwise might not have been changed.<sup>38</sup>

Let no one think I place what happened at the Malmedy trials on the same scale as the state-sponsored crimes of the Nazis. What I do suggest,

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<sup>34</sup> SUBCOMM. OF THE COMM. ON ARMED SERVS., *supra* note 28, at 7.

<sup>35</sup> *E.g.*, *Investigation of Action of Army with Respect to Trial of Persons Responsible for the Massacre of American Soldiers, Battle of the Bulge, Near Malmedy, Belgium, December 1944: Hearings Before a Subcomm. of the S. Comm. on Armed Servs.*, *supra* note 33, at 16 (statement of Sen. Joseph R. McCarthy, Member, S. Comm. on Expenditures in Exec. Dep'ts).

<sup>36</sup> SUBCOMM. OF THE COMM. ON ARMED SERVS., *supra* note 28, at 4.

<sup>37</sup> *United States v. Bersin*, Case No. 6-24, at 3251-67 (U.S. Mil. Gov't Ct. July 16, 1946).

<sup>38</sup> SUBCOMM. OF THE COMM. ON ARMED SERVS., *supra* note 28, at 8 (emphasis added).

though, is a failure of virtue and values—a failure of principle. At Dachau, the interest of justice was subverted to pursue a desired end. Principled counsel fell victim to frustration and revenge. Our normal procedures of investigation, interrogation, and proof were discarded and replaced by novel and unlawful methods.

These images of improper interrogation tactics should give us serious pause. Bells should be ringing. I do not want any judge advocate in the U.S. Army JAG Corps to ever leave this place of learning, our Regimental Home, without the memory of Malmedy and the long shadow of Abu Ghraib in their mind. I want each of you to know how thin the line is between virtue and vice and how Malmedy—that is, changing the rules of interrogation techniques to gain confessions—was done by well-meaning and accomplished lawyers and investigators. And as you think on that, I want you to remember the lessons of Abu Ghraib—so similar in character, so similar in the changes made by well-meaning people—and the extraordinary fact that sixty years later, we again changed the interrogation rules, having forgotten the lessons of Malmedy.<sup>39</sup>

I pause and I finger-wag to all of us—all of us—to never let such a thing happen again due to a lapse of memory. I want your azimuth straight, which is why we talk about Nuremberg seventy-five years later. Because the lessons are ours on the next battlefield. They are yours on the next battlefield.

#### IV. Justice Robert Jackson

To my last example, we come full circle, back to the extraordinary Justice Jackson. And what better way to close than on the high note of virtue. Justice Jackson offers an example of what principled counsel looks like when it works. His commitment to values-based lawyering is the primary reason we celebrate the triumph of the rule of law when we reflect on the International Military Tribunal. He simply insisted that we do what is

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<sup>39</sup> See, e.g., Lieutenant Colonel Jennifer L. Crawford, *Abu Ghraib Trials, 15 Years Later*, ARMY LAW., no. 4, 2019, at 49; Paul T. Bartone, *Lessons of Abu Ghraib: Understanding and Preventing Prisoner Abuse in Military Operations*, DEF. HORIZONS, NOV. 2008, at 1; Colonel Anthony J. MacDonald, *Strategic Lessons Learned from Abu Ghraib* (Mar. 29, 2007) (unpublished manuscript) (on file with author).

right. That insistence is a very big part of the legacy of Nuremberg and an enduring lesson for us.

At Nuremberg, for the very first time in history, individuals were held criminally liable for acts of war and war crimes on a world stage.<sup>40</sup> Gone was the truism that those most responsible for waging war were those least accountable for it. Gone, too, was their ability to hide behind government positions, superior orders, and positive national law. The undertaking of aggressive war was made forever a crime by those who conspired to do so. Aggressive war and associated war crimes were now definitively criminal acts. And, significantly, as a triumph of virtue, individuals accused of crimes under international law were entitled to a fair trial. The watershed trials at Nuremberg, and the principles derived from them, shaped our modern law of armed conflict, which, of course, became the bedrock of our operational law.

What we often forget as we talk about the Nuremberg trials and their place in the development of international law is that they were far from inevitable. As we learned this morning and this afternoon, they were not guaranteed to be trials, even with regard to the presumption of innocence.<sup>41</sup> The fact that some of the worst men in history were given a fair trial at the hands of the international community was the result of something remarkable indeed: principled counsel in action.<sup>42</sup> It was Justice Jackson's overwhelming sense of the importance of legitimacy in history—how the

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<sup>40</sup> *E.g.*, President of the Special Tribunal for Lebanon, Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (June 2009), [https://legal.un.org/avl/pdf/ha/ga\\_95-I/ga\\_95-I\\_e.pdf](https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf).

<sup>41</sup> *See* Borch, *supra* note 4, at 162–64.

<sup>42</sup> Throughout his opening statement at the International Military Tribunal, Justice Jackson remained steadfast in his dedication to impartial justice:

The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two.

United States v. Göring, 2 Trial of the Major War Criminals Before the International Military Tribunal, Opening Statement, at 101 (Nov. 21, 1945).

trials would be remembered.<sup>43</sup> And so we must study it with this lens to learn from it.

Consider the state of the world in 1945. The war was over, the Allies were victors, and it was up to them to make some sense of the devastation and chaos caused by the worst war in history. It is impossible to overstate the magnitude of human suffering and lawlessness caused by six years of war. It devastated on every level every sphere of human life. Soldiers arriving in Frankfurt in 1946 for occupation duties would describe the vast destruction and, most significantly, the stench of death and decay.<sup>44</sup> Estimates range as high as seventy-five million soldiers and civilians dead.<sup>45</sup> We cannot conceive of it: natural resources devastated, industries destroyed, economies wrecked, borders redrawn, legal and financial institutions rebuilt from scratch. The survivors of the war were reeling from the changing face of warfare and the terrifying shock of air campaigns and the first use of nuclear bombs. They were, at the time of the trials, only just discovering the depth and breadth of the Holocaust's horrific cruelty and being confronted with crimes of a magnitude beyond contemplation. The world's power balance had shifted, international law developed at the speed of relevance like an airplane being built in flight, and tensions between new superpowers loomed.

I mention that to place into context the remarkable foresight exercised by the Allies in conceiving and planning the trials. The Nazis had utterly corrupted their laws and legal institutions. Restoration of faith in legal institutions—in the rule of law—was a moral imperative. It was also not the only challenge the Allies faced. By today's standards, the trials were certainly imperfect, and there is extensive scholarship focused on victors'

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<sup>43</sup> Justice Jackson reminded the International Military Tribunal's judges, and the world, of the great import of fair justice and just fairness in his opening statement:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.

*Id.*

<sup>44</sup> DEREK S. ZUMBRO, *BATTLE FOR THE RUHR: THE GERMAN ARMY'S FINAL DEFEAT IN THE WEST* 14 (2006).

<sup>45</sup> *E.g.*, KRISTEN RENWICK MONROE, *A DARKLING PLAIN: STORIES OF CONFLICT AND HUMANITY DURING WAR* 38 (2015).

justice: whether it was even possible to hold fair trials;<sup>46</sup> whether their validity should be questioned because of jurisdictional hurdles, the retroactive application of new crimes;<sup>47</sup> whether the judges should have come only from the Allies; and whether Nuremberg's focus on only a small number of leaders understated the harm of the Holocaust.<sup>48</sup> These are all thought-provoking questions that spur healthy debate.

But what is remarkable to me, as a Soldier-lawyer, what should be remarkable to all of you with an understanding of both the horror of war and the sanctuary provided by due process, is that these victors wanted not revenge, but justice. That is attributable in no small part to Justice Jackson.

In the course of his passionate advocacy for fair trials, Justice Jackson continually modeled principled counsel and championed due process of law. Before he knew he was to become the chief prosecutor at Nuremberg, he took the podium at the annual meeting of the American Society of International Law, which still holds its meeting annually. He said,

The ultimate principle is that you must put no man on trial under the form of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect for courts that are merely designed to convict.<sup>49</sup>

It was a memorable speech, delivered the day after the death of President Roosevelt, who had only recently been won over to Jackson's position. It was a controversial one, particularly with the Allies from civil law traditions. The presumption of innocence is steeped in our common law. It took tireless advocacy for what he knew was morally right, and Jackson eventually succeeded in winning over his client, the American Government. Two weeks after he succeeded Roosevelt, President Truman asked Jackson

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<sup>46</sup> E.g., JONATHAN HAFETZ, *PUNISHING ATROCITIES THROUGH A FAIR TRIAL: INTERNATIONAL CRIMINAL LAW FROM NUREMBERG TO THE AGE OF GLOBAL TERRORISM* (2018).

<sup>47</sup> E.g., DANILO ZOLO, *VICTORS' JUSTICE: FROM NUREMBERG TO BAGHDAD* (M. W. Meir trans., 2020).

<sup>48</sup> See Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085, 1089–90 (2011).

<sup>49</sup> Robert H. Jackson, *The Rule of Law Among Nations*, 31 A.B.A. J. 290, 293 (1945).

to be the chief prosecutor at Nuremberg and approved his plan to negotiate with the Allies to conduct fair trials.<sup>50</sup>

It is not easy to do the right thing. In the post-war planning phase and later in the long, contentious negotiations that produced the London Charter governing the proceedings, Justice Jackson, Secretary of War Henry Stimson, and other legal professionals worked tirelessly to model American values. They were candid; they were courageous. They knew, and Jackson admitted as much in his opening statement before the tribunal, that the nature of the crimes committed by the Nazis was such that they must be judged and that any tribunal ran the risk of being reduced to victors' justice in retrospect.<sup>51</sup> You should never think they were not conscious of the criticisms we levy today; they were hypersensitive to it. Knowing that there would be criticism and feeling immense pressure, Jackson persevered with his moral compass fixed on what he knew to be right. He said, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."<sup>52</sup>

The legal advisors to the Allied team wrestled for weeks in London with the question of what justice looked like. Simply securing an agreement to conduct trials was difficult enough. Stalin, in a nod to the wartime atrocities committed against Soviet soldiers and civilians on the Eastern front, had once suggested shooting the fifty thousand top Nazis outright.<sup>53</sup> Churchill agreed that the crimes and responsibility of the Nazis were too great to be reviewed by a juridical procedure.<sup>54</sup> And even Roosevelt had to be convinced that summary executions were not in the best interests of

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<sup>50</sup> Executive Order 9547, 10 Fed. Reg. 4961 (May 4, 1945).

<sup>51</sup> United States v. Göring, 2 Trial of the Major War Criminals Before the International Military Tribunal, Opening Statement, at 101 (Nov. 21, 1945).

<sup>52</sup> *Id.*

<sup>53</sup> Tripartite Dinner Meeting, November 29, 1943, 8:30 P.M., Soviet Embassy (Nov. 29, 1943), *reprinted in* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: CONFERENCES AT CAIRO AND TEHRAN: 1943, at 552, 553–54 (1961); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 147 (2000).

<sup>54</sup> *E.g.*, Michael J. Bazzyler, *The Role of the Soviet Union in the International Military Tribunal at Nuremberg*, in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945, at 45, 45 (Herbert R. Reginbogen & Christoph J. M. Safferling eds., 2006).

justice.<sup>55</sup> Prominent American jurists opposed the plan, including Harlan Fiske Stone, Chief Justice of our Supreme Court and Jackson's boss.

When the Allies finally agreed to conduct trials at all, legal teams from four nations and at least two very different systems of law had to figure out what they would look like. The Allies knew from the failed Leipzig Trials after World War I that to allow Germans to conduct their own trials of Nazi leaders would be both farcical and futile.<sup>56</sup> But bringing them to trial before an Allied court meant the legal teams were faced with the monumental task of reconciling two very different perspectives on the law—civil law and common law—into something which looked like justice to the world.

The common law practiced in the United States and the United Kingdom differed on many major points from Russia, France, and Germany. Every detail was negotiated, from the form of the indictment to the presentation of evidence to cross-examination and whether it would even be allowed. Jackson argued vigorously with his counterpart, Soviet General Nikitchenko, who was diametrically opposed to a presumption of innocence—that was not a given. Jackson carried the day on that point only after threatening that the United States would not participate if the proceedings were to be premised on the presumption of guilt. Jackson's insistence on the presumption of innocence led to the acquittal of three defendants, and this is of critical importance. Even knowing that insisting on due process could allow the commissioners of horrific crimes to evade conviction, Jackson stuck to his guns.

Each of us at that point should ask ourselves what we would have done with such a horrific world that we had just lived in and produced after war—where we would have fallen on Jackson's spectrum.

Veteran and journalist Norbert Ehrenfreund, who was a member of the press at the tribunals, called "the decision in London to have a fair trial in Nuremberg . . . a splendid victory for Robert Jackson, [and] an even greater

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<sup>55</sup> Arieh J. Kochavi, *Discord Within the Roosevelt Administration over a Policy Toward War Criminals*, 19 *DIPLOMATIC HIST.* 617, 635–39 (1995).

<sup>56</sup> See generally CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY* (1921) (describing and evaluating the trials and their context).



victory for humanity.”<sup>57</sup> I submit to you that it was also, in no small part, a victory for the concept of principled counsel. The lawyers who were involved in the negotiation of the London Charter and, later, in the trials at Nuremberg and those that followed, felt the heavy mantle of its responsibility. It was through their tenacity that leaders hardened and scarred by war agreed to end it in a way that war had never ended before. It defied the imagination of many that something as savage as war could be addressed by something as civilized as a trial. It shocked the conscience of many to hear war crimes distilled into indictments. Even more difficult to digest were the acquittals. But we must remind ourselves of what Jackson admonished amid the critics’ cries of victors’ justice: “The world yields no respect for courts that are merely designed to convict.”<sup>58</sup> A fair trial, predicated on the presumption of innocence and grounded in incontrovertible evidence created by the defendants themselves, would stand the test of time. And now we can say that it has, along with Jackson’s values—our values—which demand fairness and which inform principled counsel.

#### V. Conclusion

In trying to articulate the legacy of the Nuremberg trials, there is a quote I find instructive, even without its rather entertaining context. A young Jewish sergeant in the U.S. Army who was in attendance toward the latter end of the trials later reflected about the proceedings. He said,

We gave Goering and the other war criminals a chance not only to defend themselves but in some cases, preach hate and violence. In a ruined Germany, where so many corpses still lay buried in the rubble and life seemed so very fragile, we found it in ourselves to give the worst of men due process.<sup>59</sup>

I do not know that there is a better summation of what occurred between November 1945 and October 1946 in the Palace of Justice in Nuremberg. It turns out the Jewish Soldier was Clancy Sigal, who later became a well-

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<sup>57</sup> NORBERT EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIME TRIALS CHANGED THE COURSE OF HISTORY* 219 (2007).

<sup>58</sup> Jackson, *supra* note 49.

<sup>59</sup> Clancy Sigal, *A Jewish Soldier Witnesses Nuremberg*, NAT’L PUB. RADIO (Oct. 2, 2006, 12:05 PM), <https://www.npr.org/templates/story/story.php?storyId=6166891>.

known journalist, political radical, and Hollywood agent. Clancy had snuck away from his unit with a concealed .45 pistol, determined to, in his own words, “look Herman Goering in the eye and shoot him dead.”<sup>60</sup> It was not a well thought out plan and, to his disappointment, the military police confiscated his weapon in the foyer. Inside the makeshift courtroom without it, Sergeant Sigal said, “I felt something like relief. Suddenly, it was unthinkable to add one more act of violence” to the parade of horrors in the courtroom that day.<sup>61</sup>

For those of you watching this today who have yet to take your place before an impartial trier of fact, charged with arguing one side or another in the wake of the perpetration of an unthinkable act of violence, it may seem too surgical, boiling crimes against humanity down to what Sigal called the “solemn, businesslike presentation of evidence.”<sup>62</sup> But it is what we do as lawyers, and if the trials at Nuremberg have no better lesson for Soldier-lawyers, it may be that the due process of law is the best way to lay bare the very worst things of which humanity is capable. And to preserve the lessons, both good and bad, for introspection and study, decades and decades later, in a fervent attempt to do our part in preventing a recurrence of the evils judged at Nuremberg. The necessary ingredient for this recipe is principled counsel.

As you assemble your reflections on today’s lessons, as you think back on them when facing the challenges posed to you as Soldier-lawyers engaged in our unique practice of law, I ask that you remember in particular two things. One, the example of high virtue we see in Jackson’s measured insistence—not just on trials, but on fair trials—in the face of extraordinary pressure to take an easier route. His role in bringing about trials amid chaos is reminiscent of Kipling’s famous charge to “keep your head when all about you are losing theirs and blaming it on you.”<sup>63</sup> We should all strive to be, like Jackson, the cool head in the room with a steadfast commitment to our values. Two, I ask that you never forget the crushed compass evident in the Nazi laws that enabled the war and in our own failings with respect to Malmedy and Abu Ghraib. I want you to be always aware of the razor-

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> RUDYARD KIPLING, REWARDS AND FAIRIES 200 (1910).

thin line between virtue and vice and of the ever-present pressure to walk that line in tough situations.

Like Jackson, I charge you to be candid, be courageous, be right. Keep your compass intact. And know with unwavering confidence that each of you carry the legacy of principled counsel wherever our great Army sends you.

