"SMOOTHING OUT" THE IMT JUDGMENT: THE LEGAL LEGACY OF THE TWELVE SUBSEQUENT MILITARY TRIBUNALS*

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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."[1]

World War II had ended; the Nazis surrendered on 8 May 1945 and the Japanese three months later.[2] 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.[3] 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.[4]

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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 2 Impact on LOAC*, YOUTUBE (Nov. 20, 2020), https://youtu.be/GkkKnlFTcok?t=2964, for a video recording of these remarks.

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[1] INT'L MIL. TRIBUNAL: NUREMBERG, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1947).

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

[3] *Allied Control Councils and Commissions*, 1 INT'L ORG. 162, 167 (1947).

[4] *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.[5] His mission, like that of the Allied Control Council, was to bring back a functioning German government.[6] 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.[7] After the IMT concluded, Allied war crimes policy would be executed under the authority of Control Council Law No. 10.[8] 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.[9] 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.[10]

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.[11] 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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[5] 1 EUROPE SINCE 1945: AN ENCYCLOPEDIA 205 (Bernard A. Cook ed., 2001).
[6] 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).
[7] 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.
[8] 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).
[9] *Id.* at 306–07.
[10] *Id.* at 307.
[11] *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,[12] doctors,[13] industrialists,[14] 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.[15] Nineteen of them were convicted, twelve were sentenced to be hanged, and three were acquitted.[16] Among the IMT's most notable rulings, it held that there was individual criminal responsibility for war crimes,[17] 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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[12] 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).
[13] 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).
[14] 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).
[15] 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).
[16] *Id.*; United States v. Göring, 1 Trial of the Major War Criminals Before the International Military Tribunal, Sentences, at 365–67 (Oct. 1, 1946).
[17] 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[18] and the 1928 *Manual for Courts-Martial*.[19] 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.[20] 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.[21]

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."[22] 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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[18] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE (1 Oct. 1940) [hereinafter FM 27-10].
[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1928).
[20] RICHARD HARWOOD, NUREMBERG AND OTHER WAR CRIMES TRIALS 50 (1978).
[21] *Id.* at 48.
[22] *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.[23] 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.[24] 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.[25] 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."[26] The qualification for tribunal judgeship was five years of legal practice.[27] 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.[28]

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[23] 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).
[24] TAYLOR, *supra* note 23, at 34–35.
[25] *Id.* at 177.
[26] *Id.* at 35.
[27] *Id.*at 29.
[28] *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.[29]

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."[30] 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."[31] 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.[32] Soon after the war ended, the U.S. Army was holding nearly 100,000 German suspects.[33] 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[34]—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."[35] That was a difficult process itself and sometimes had subtle differentiations, but BG

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[29] *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").
[30] TAYLOR, *supra* note 23, at 50.
[31] 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).
[32] *Id.* para. 8*b*.
[33] *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).
[34] TAYLOR, *supra* note 23, at 64–65.
[35] *Id.* at 76.

Taylor eventually came up with twelve subject-matter trial categories that were the result,[36] 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.[37] 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.[38]

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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[36] *Id.* at 76–77.
[37] *Id.* at 73–85.
[38] *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."[39] 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.[40]

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[41] and, particularly, in the outstanding judgments of the International Criminal Tribunal for the former Yugoslavia.[42]

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*.[43]

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

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[39] KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 3 (2011).
[40] TAYLOR, *supra* note 23, at 118–19, 241.
[41] *Some Questions and Answers*, INT'L CRIM. CT., https://legal.un.org/icc/statute/iccq&a.htm (last visited June 16, 2021).
[42] 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.
[43] 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.

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> 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.[44]

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)[45] 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)?[46] 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.[47]

One of the accused in *Pohl* was Rudolf Scheide, a former SS colonel. He was acquitted of war crimes and crimes against humanity.[48] 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*."[49] 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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[44] *Id.*

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

[46] 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.").

[47] 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).

[48] *Id.* at 1017–18.

[49] *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?[50] Each subsequent proceeding required *actual knowledge* rather than the broader negligence standard of "should have known."[51]

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.[52] Captain (CPT) Medina's 1st Platoon was led by Second Lieutenant (2LT) William Calley.[53]

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.[54] 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.[55] The trial counsel requested an instruction to the members that, to convict, they

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[50] 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].
[51] HELLER, *supra* note 39, at 293.
[52] 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).
[53] Brenda J. Taylor, *Calley, William Laws, Jr.*, *in* VIETNAM WAR: A TOPICAL EXPLORATION AND PRIMARY SOURCE COLLECTION 250–51 (James H. Willbanks ed., 2018).
[54] 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).
[55] 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.[56]

Actual knowledge was not then, and is not today, an element of aiding and abetting required by the *Manual for Courts-Martial*,[57] the Uniform Code of Military Justice,[58] or the *Military Judges' Benchbook*.[59] 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[60] and today's *Law of War Manual*.[61] 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.[62] 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.[63] The members acquitted on all charges as a result.[64]

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."[65] After the 1944 change to the FM—a one-page insert in most of the older

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[56] *Id.* at 10–11.
[57] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVIII, ¶ 156 (1968); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 1.b (2019).
[58] UCMJ art. 77(1) (1950).
[59] 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).
[60] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 501 (18 July 1956) (C1, 15 July 1976).
[61] LAW OF WAR MANUAL, *supra* note 50.
[62] *See supra* note 55.
[63] 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 . . . .").
[64] *See supra* note 55.
[65] FM 27-10, *supra* note 18, para. 347.

manuals—obedience to orders no longer was a complete defense.[66] 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.[67] 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 . . . ."[68]

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."[69]

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."[70]

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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[66] U.S. DEP'T OF ARMY, *supra* note 60, para. 509.
[67] 1 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMES 18 (1947).
[68] 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.
[69] United States v. Göring, 1 Trial of the Major War Criminals Before the International Military Tribunal, Judgment, at 224 (Oct. 1, 1946).
[70] 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[71] and Farben[72] 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."[73]

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.[74] 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.[75] 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.[76] 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.[77] 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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[71] 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).
[72] 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).
[73] LAW OF WAR MANUAL, *supra* note 50, § 18.22.4.
[74] TAYLOR, *supra* note 23, at 13.
[75] *See id.* at 15–17, 69–70 (describing the International Military Tribunal's handling of "membership" cases).
[76] *Id.* at 69–70.
[77] *Id.* at 118–19.

177 went to verdict.[78] 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.[79]

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*,[80] which is a portrayal of the subsequent proceedings' Justice Case, in which sixteen senior German jurists were tried.[81] 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.[82] The Federal Republic of Germany achieved

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[78] *Id.* at 91, 241.
[79] *Id.*
[80] JUDGMENT AT NUREMBURG (Roxlom Films 1961).
[81] 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).
[82] Thomas Alan Schwartz, *John J. McCloy and the Landsberg Cases*, *in* AMERICAN POLICY AND THE RECONSTRUCTION OF WEST GERMANY, 1945–1955, at 438 (Jeffry 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.[83] 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.[84]

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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[83] *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).

[84] FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955, at 3 (1989).