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THE ILSE KOCH SENATE INVESTIGATION AND ITS LEGAL PROBLEMS WITH OBSERVATIONS ON DOUBLE JEOPARDY AND RES JUDICATA

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I. INTRODUCTION

Ilse Koch was a defendant in the Buchenwald concentration camp case.¹ She was found guilty and sentenced to life imprisonment but General Lucius D. Clay, then supreme commander of the American occupation forces in Germany, reduced her sentence to four years of imprisonment. This decision met with a most unfavorable reaction.² There followed an investigation by a committee of the United States Senate which held hearings in the matter³ and thereupon published its self-styled "interim," actually final report.⁴

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1. Officially styled "United States v. Josias Prince zu Waldeck," tried in Dachau, Bavaria, April 11 to August 14, 1947.

2. CLAY, DECISION IN GERMANY 254 (1950) wherein it is said: "Among the 1672 trials was that of Ilse Koch, the branded 'Bitch of Buchenwald,' but as I examined the record I could not find her a major participant in the crimes of Buchenwald. A sordid, disreputable character, she had delighted in flaunting her sex, emphasized by tight sweaters and short skirts, before the long-confined prisoners and had developed their bitter hatred. Nevertheless, these were not the offenses for which she was being tried and so I reduced her sentence, expecting the reaction which came. . . ."

3. CONDUCT OF ILSE KOCH WAR CRIMES TRIAL, *Hearings Before the Investigation Subcommittee of the Senate Committee on Expenditures in the Executive Departments*, conducted pursuant to Senate Resolution 189, 80th Congress, 2d Sess.; henceforth cited as "Hearings."

4. CONDUCT OF ILSE KOCH WAR CRIMES TRIAL, INTERIM REPORT, 80th Congress, 2d Sess.; henceforth cited as "Report."

(1)

The Senate investigation was unique as compared with at least most of the other investigations by legislative committees⁵ because of the matter to which it was devoted and the effect of the committee's recommendations. Its result was that Ilse Koch was tried *de novo*, this time before a German court and jury, and sentenced *de novo*, this time for good, to imprisonment for life.

Official copies of the most important parts of the record of that subsequent German trial⁶ have been perused in preparation of this paper. Another important source was, of course, the cited Senate record which, among other interesting material includes the full text of the accusation in the Buchenwald concentration camp case.⁷ A discussion of certain legal points related to that Senate investigation and its aftermath in Germany is the main purpose of this study. But prior to taking up those jural problems, the lineaments of Ilse Koch's evil character and nefarious doings are drawn. This historical sketch, attempting a synthesis between the facts established in the war crimes case and those only proven in the subsequent German trial, includes features which were not part of the record existing at the time of General Clay's decision, or at the time of the Senate investigation.

5. See TAYLOR, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS* (1955).

6. Indictment dated May 10, 1950, signed by the then chief prosecutor at the superior court in Augsburg, Dr. Hans Ilkow; judgment dated June 15, 1951, rendered after a trial before a court and jury in Augsburg that lasted from November 27, 1950 to January 15, 1951; decision of the supreme federal court in Karlsruhe, dated April 22, 1952, rejecting Ilse Koch's appeal. The judgment dated June 15, 1951 is henceforth cited as "*German Judgment*."

7. *Hearings*, *supra* note 3, at 1197. It is entitled "charge sheet," and expressly indicates that a "violation of the laws and usages of war" is charged, names the defendants, and in its extremely involved additional language avers that they "and divers other persons, German nationals, or persons acting with German nationals, during various periods between the 1st of September, 1939, and the 8th of May, 1945, at or in the vicinity of Thuringia, Saxony, Hesse, the Rhineland, the Ruhr, and Westphalia, Germany, acting in pursuance of a common design to commit the acts hereinafter alleged, did, wrongfully and unlawfully, encourage, aid, abet, and participate in the operation of Concentration Camp Buchenwald and its subcamps and out-details, which operation included the wrongful and unlawful subjection of citizens of the United States of America, Poles, Frenchmen, citizens of the Grand Duchy of Luxemburg, Norwegians, British subjects, Greeks, Yugoslavs, citizens of the Soviet Union, Belgians, citizens of the Netherlands, stateless persons, Czechs, and other non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, to killings, beatings, tortures, starvations, abuses and indignities, the exact names and numbers of such persons being unknown but aggregating many thousands."

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A reader who has gullibly swallowed all of the sensational stories about her that were published by the newspapers, which were not in every respect in accordance with the proven facts,⁸ will miss in the following profile any reference to her alleged possession of articles made of tattooed human skin, and even more, will miss any reference to the alleged fact that merely to add to that perverse collection, prisoners were put to death. There is, however, no place for this feature in a detached, rather than uncritical account, since those allegations, if they contain any element of truth, have never been proved.

In the poetic words of Lord Byron, there is no fact "without some leaven of a lie."⁹ And Herman Melville, in his *Moby Dick*, observes that "wild rumours abound wherever there is any adequate reality to cling to." Rumor has a tendency to embroider on the true facts, to color them by adding fictitious elements. This must have been particularly so in the case of rumors about Ilse Koch, circulating, by means of the grapevine, among concentration camp inmates who had reason to see in her the devil incarnate.

There is no denying the fact that human-skin processing was officially practiced in the Buchenwald concentration camp for pseudo-scientific purposes. But that Ilse Koch had any connection therewith was not even alleged by the prosecution or shown by the judgment in the subsequent German trial. The related evidence in the war crimes case came from the mouth of two witnesses whose credibility was shaken by most forceful impeachment and whose testimonies, apart from containing striking inconsistencies, were not conclusive even on their face. Significantly enough, the human skin feature is not even mentioned in the Deputy Theatre Judge Advocate's summary of what appeared to him as proved against her by the record of the Buchenwald war crimes trial.¹⁰

8. See *Hearings*, *supra* note 3, at 1112, 1113 (testimony of former Theatre Judge Advocate, containing this passage: "Many newspaper articles appear to be based upon the premise that . . . she was the principal moving force in the killing of inmates to procure interestingly designed and colored skins to be used for lampshades and for other decorative purposes. In my opinion the record of trial does not warrant such conclusions").

9. "And after all what is a lie? 'Tis but—The truth in masquerade; and I defy Historians, heroes, lawyers, priests, to put—A fact without some leaven of a lie." BYRON, DON JUAN, canto XI, stanza 37. See also WINGFIELD-STRATFORD, *TRUTH IN MASQUERADE* (1951).

10. He thus summarized what he believed remained after discounting untrustworthy testimonies: "The evidence establishes that the accused reported inmates for infractions and violations of camp regulations on several occasions; that she knew severe punishments were customarily administered in similar cases; and that some of the inmates she reported were severely punished. The accused personally beat an inmate on at least one occasion." *Hearings*, *supra* note 3, at 1235.

The tribunal in that case, in passing on the degree of her guilt, seems not to have attributed much, if any importance, to that particular accusation.¹¹

II. ILSE KOCH AND HER CONDUCT IN BUCHENWALD

Ilse Koch was a widow, pregnant with a child conceived after her husband's death, when she appeared as a defendant in the Buchenwald concentration camp case.¹² In June 1937 she had married SS Colonel Karl Koch, a close friend of the infamous Himmler. Shortly before their wedding Colonel Koch had become Commandant of the Buchenwald concentration camp. Three children, born in Buchenwald, were the offspring of their fateful marriage, and she seems to have played successfully the role of faithful wife, although she secretly entertained an adulterous relationship with one of her husband's subordinates, a camp physician.¹³

Koch's brutal regime in Buchenwald came to an abrupt end in the winter of 1941, when he was arrested on suspicion of having enriched himself by an organized system of malversations. On intercession of Himmler he was soon released from custody, though not reinstated in Buchenwald. But in August 1943 he was rearrested. At that time Ilse Koch was also taken into custody as an accomplice in his peculations. Both were indicted and tried before an SS court, which in December 1944 found him guilty and sentenced him to death, but acquitted her. His sentence was executed a few days prior to April 11, 1945, the date of Buchenwald's occupation by American troops. She remained at large until her arrest as a war crime suspect on June 30, 1945. Subsequently she was tried in Dachau as the only female defendant in the Buchenwald concentration camp case.

Her attitude toward Buchenwald prisoners shows the symptoms of a strong sadistic proclivity. Testifying in the war crimes trial, she described her conduct in Buchenwald as that of a housewife concerned

11. *Hearings*, *supra* note 3, at 1025 (testimony of former chief prosecutor in the Buchenwald case, mentioning the "tenuousness of the proof" of the human skin feature, and intimating that this part of the case carried no weight in the tribunal's determination of her sentence).

12. *Hearings*, *supra* note 3, at 1027, 1084, and *German Judgment*, *supra* note 6, at 50 (referring to the circumstances under which, while attending her trial as an inmate of the war crimes prison in Dachau, she became pregnant). The child was born subsequent to her conviction.

13. *German Judgment*, *supra* note 6, at 13, 15 (referring to her admission of this fact).

Koessler: Koessler: ILSE Koch Senate Investigation and Its Legal Problems with Observations solely with the performance of her duties toward her husband and children, but not interested in the conduct or treatment of camp inmates. She claimed to have made reports against prisoners only in two instances, in both of them on the ground of flagrant offenses personally affecting her. But her testimony is strikingly rebutted by the credible part of the evidence against her in the war crimes trial and to an even higher degree by that abundant *de novo* evidence which was given credence in the subsequent German judgment, as the result of a very careful discussion of credibility matters. It appears therefrom that she intermeddled with the treatment of prisoners in a most vicious manner.

Prisoners would come within the focus of her hostile observation and the reach of her malignant initiative on various occasions, for instance, when they worked in her house or in the garden attached thereto, when she saw them laboring at outlying places through which she passed while indulging in the sport of horseback riding, when she inspected the construction, by prisoners, of a manege for her, or when she came across a prisoner while she was walking in a camp street alone or with her husband. On quite a few of such occasions she apparently looked for and found something which she could pin on a prisoner as the basis of her action in either causing him to be summarily mistreated right on the premises and in her presence, or in herself assaulting him, usually with her riding stick or whip, sometimes with her bare hand, or in reporting him for punishment.

When she intended to denounce a prisoner, she would indicate this intention by jotting down the number appearing on his prison garb. Her reports were almost automatically followed by punishment which usually consisted of lashing a prisoner a certain number of times on a whipping table called the "Bock." She was well aware of the results of her reports—in fact, she would often sadistically announce to a prisoner that she would cause his "buttock to be softened." In the subsequent German trial it was proved that in some instances she had incited her dog against a prisoner. It was also proved that some prisoners died as a result of mistreatment provoked by her reports against them.

One of her numerous complaints against prisoners was occasioned by serious misconduct in her house.¹⁴ Mostly, however, she acted under

14. A prisoner who, during her absence on a trip, was working in her house, put on her underwear, housecoat, and shoes, opened bottles of wine that were stored in the cellar, got heavily intoxicated, and smashed up pieces of furniture and crockery. *Hearings, supra* note 3, at 1261, 1262, 1267, 1273, 1274.

flimsy and even frivolous pretexts. For instance, she would report a prisoner for punishment, or instigate his mistreatment in her presence, by alleging that he had dared to gaze at her. Yet she herself, by the sexually provocative attire in which she allowed herself to be seen by prisoners, was bound to cause them to look at her.¹⁵

III. VARIANCE BETWEEN WAR CRIMES ACCUSATION AND PROOF?

The Buchenwald concentration camp case was not tried before the Nuremberg "International Military Tribunal" nor was it one of the subsequent Nuremberg trials conducted before courts exclusively composed of civilian American judges, though officially entitled "Military Tribunals."¹⁶ It belonged to the category of war crimes trials that were conducted in Germany by American military tribunals entitled "Military Government Courts."¹⁷ The fundamental principle that criminal guilt must be established by proof beyond any reasonable doubt was followed, or at least not intentionally disobeyed, in those proceedings.¹⁸ And, of course, proof in a criminal case means proof of all the essential elements of the charge. There may not be a variance between accusation and proof. Was there such a variance in the war crimes case of Ilse Koch? Before answering this question, the nature and the essential elements of the accusation as set forth in the war crimes charge quoted before¹⁹ must be examined.

A. Nature and Limits of the Accusation

The offense charged was "violation of the laws and usages of war." Since it was established for the category of war crimes trials to which the Buchenwald concentration camp case belongs, that only offenses

15. The *German Judgment*, *supra* note 6, at 72, observes in this respect (writer's translation): "The reports of the accused were mostly based on the flimsy ground that prisoners had indecently, voluptuously, or otherwise improperly looked at her. But in the opinion of the court, she provoked any such looking at her by her conduct and by her kind of clothing, strongly accentuating her bodily features and only moderately covering her body. . . . And she knew well what effect this would have on men who had been detained in the concentration camp for years."

16. See Taylor, *The Nuremberg War Crimes Trials*, 1949 INT'L CONCILIATION 243, 257, 273, 363.

17. For an attempt to deal comprehensively with the general features of those trials, see Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18-112 (1950). For the historical background of the existence, in the American occupation zone of Germany, of two sets of war crimes tribunals operating under different rules, see Fratcher, *American Organization for Prosecution of German War Criminals*, 13 MO. L. REV. 45-47 (1948).

18. *Hearings*, *supra* note 3, at 1080, 1109, 1110, 1172.

under the "traditional" international law could be prosecuted,²⁰ that clause does not cover the novel conception of internationally punishable "crimes against humanity," which was applied in the Nuremberg trials²¹ as well as in the trial against the major Japanese war criminals,²² and which includes offenses committed by a national of a belligerent country against his or her connational or connationals. In other words, since an act victimizing a connational of the perpetrator is not a "violation of the laws and usages of war" as understood by the "traditional" international law, it could not fall within the scope of accusation in a war crimes trial of the category here involved, as was obviously meant to be expressed by the specification of the national status of the victims in the quoted Buchenwald charge, despite a certain ambiguity of its wording in this respect.²³

Another important feature of the quoted charge is that it does not accuse a defendant of having mistreated or killed a Buchenwald prisoner of the specified national status, but accuses him or her of participation in a common design resulting in such an administration of the Buchenwald camp whereby those prisoners were mistreated or killed. In this connection attention must be called to the following.

Under Anglo-American law an agreement for an unlawful purpose constitutes as such a crime called conspiracy,²⁴ in some jurisdictions a

19. Note 7 *supra*.

20. Fratcher, *supra* note 17, at 66 and Koessler, *supra* note 17, at 37-50.

21. TAYLOR, *supra* note 16, at 356, 358 (quoting London Charter of August 8, 1945 pursuant to which the case against Herman Goering et al. was conducted before the International Military Tribunal in Nuremberg, and Control Council Law No. 10 of December 20, 1945 which was applied in the subsequent Nuremberg trials).

22. Horwitz, *The Tokyo Trial*, 1950 INT'L CONCILIATION 475, 484 (quoting Charter of the International Military Tribunal for the Far East, April 26, 1946, under which major Japanese war criminals were tried).

23. On its face, the respective language is open to the construction that its reference to the national status of the victims is merely a descriptive part, but not a constituent element of the accusation. That it cannot have been meant, however, but as a constituent element is elaborately discussed and persuasively shown in the argument concerning the *res judicata* issue, *German Judgment*, *supra* note 6, at 35-40.

24. CLARK, SUMMARY OF AMERICAN LAW 118 (1947) (stating that "the crime of conspiracy is committed by merely making the agreement"); 3 BURDICK, THE LAW OF CRIME 435 (1946) (pointing out that although ordinarily to constitute a crime there must be some act in addition to the necessary mental element, "if two or more persons agree to commit a crime, then, regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any of such persons to carry out their common purpose, a crime is committed by each and every one who joins in the agreement"); 2 WHARTON, CRIMINAL LAW 1940 (12th ed. 1952). See also the following statement in *Seafroon v. United States*, 332 U.S. 575 (1948): "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

so-called "overt" act being required in addition to the bare agreement, which overt act may, however, consist of something short of an attempt as distinguished in criminal law from mere preparation.²⁵ But this general criminality, as such, of an agreement for an unlawful purpose does not exist in the civil law systems,²⁶ although certain special crimes may be committed there by entering into an agreement or "complot," even where this is not followed up by action pursuant to it.²⁷

Since in the absence of any applicable specific rule of international law, a tribunal supposed to adjudicate a matter under international law can apply only such legal principles as are generally recognized among the civilized nations,²⁸ "traditional" international law does not include a crime of "naked conspiracy" as is pointed out in the opinion of the president of the tribunal before which the trial against the major Japanese war criminals was conducted.²⁹ However, a charge that a person committed a substantive crime, for instance, homicide or assault, pursuant to a common design, in other words, a charge merging the conspiracy element with the particular offense actually committed pursuant to the conspiratorial plan, scheme, or plot, is nothing peculiar to Anglo-American law—rather it is in accordance with universally recognized principles of criminal law.³⁰

The accusation in the Buchenwald case was obviously meant in the last mentioned sense, that is, as charging mistreatment and killing of prisoners of war pursuant to a common design, and not as charging a

25. 11 AM. JUR., *Conspiracy* § 6, at 546, 547 (1937). See also BURDICK, *op. cit. supra* note 24, at 454-56.

26. "Many European jurists view the Anglo-Saxon concept of criminal conspiracy with deep suspicion." TAYLOR, *supra* note 16, at 345.

27. KEENAN & BROWN, *CRIMES AGAINST INTERNATIONAL LAW* 105, 107 (1950) (quoting French Penal Code, article 265, and pre-Nazi German Criminal Code article 49(b)). For the abolition by certain pre-Empire German legislation of the conspiracy-like crime of "Komplotz," see WHARTON, *op. cit. supra* note 24, at 1861.

28. See references in art. 8, subd. 3 of "statute" of former Permanent Court of International Justice, and art. 38 of "statute" of present International Court of Justice to "the general principles of law recognized by the civilized nations."

29. HORWITZ, *supra* note 22, at 554 (quoting part of that opinion wherein it is said, among other things, that "it would be nothing short of judicial legislation for this Tribunal to declare that there is a crime of naked conspiracy for the safety of the international order"). For the conspiracy provisions in the charter of the International Military Tribunal in Nuremberg, part II, art. 6(a), and in Control Council Law No. 10 (governing subsequent so-called Nuremberg trials), art II-1(a), see TAYLOR, *supra* note 16, at 356, 359; for the corresponding provision in the charter of the International Military Tribunal for the Far East, see HORWITZ, *supra* note 22, at 484.

30. To the same effect, 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS (United Nations War Crimes Commission, 1949) 91, 95.

Koessler: Koessler: ILSE Koch Senate Investigation and Its Legal Problems with Observations common design as such. The words "and participate in the operation," which the quoted charge contains, are therefore not redundant, but are an essential element of the accusation. This was obviously the assumption on which the variance point was raised to which we turn now.

B. Variance Point Raised in Course of Post-Trial Review

In his post-trial review of the Buchenwald concentration camp case, the Deputy Theatre Judge Advocate was assisted by three legally trained members of his staff. In so far as Ilse Koch was concerned, these three lawyers, as a result of their study of the file, unanimously suggested to him that he should recommend setting aside her conviction on the ground that she had had no assigned function in the "operation" of the camp, participation in that operation being an essential element of the accusation set forth in the charge sheet.

The Deputy Theatre Judge Advocate was not swayed by this argument. He believed that her kind of conduct in Buchenwald brought her within the scope of the "operation" element of the charge and accordingly recommended confirmation of her conviction.³¹ It would seem that this was the better view. It is true that Ilse Koch had no official position or function in the camp. But she arrogated to herself, and was at least by acquiescence allowed, to exercise such a strong influence on the treatment given to prisoners who came within her reach that this could well be considered as *de facto* participation in the operation of the camp.

Because of the mentioned disagreement between the Deputy Theatre Judge Advocate and his legal assistants and the fact that two of the latter nevertheless co-signed his review, the Senate committee's report expresses the suspicion that that recommendation may have been arrived at as a compromise between the questions of guilt and sentence.³² It would seem, however, that there is no sound basis for that suspicion. There is no reason to disbelieve the Deputy Theatre Judge Advocate's testimony before the Senate committee that his recommendation was motivated by his belief that the life sentence was excessive in view of the minor extent and degree of Ilse Koch's participation in the Buchenwald atrocities, as it appeared to him from that part of the evidence in the war crimes trial which remained after the discounting of incredible parts thereof.³³ He

31. *Hearings, supra* note 3, at 1115, 1155, 1175, 1235.

32. *Report, supra* note 4, at 17.

33. *Hearings, supra* note 3, at 1175.

alone was in charge of the review and the recommendations to be contained therein. He did not need the concurrence of his assistants, and thus was not dependent on a compromise to take action disregarding their opinion.

IV. THE PROBLEM OF RES JUDICATA

Before dealing with the particular res judicata issue involved in the Ilse Koch case, we wish to submit certain terminological and comparative law observations of a general nature on double jeopardy and res judicata.

"Jeopardy" in its general meaning of danger or peril has an interesting semantic derivation. It is a "pidginized" version of the French words "jeu parti," literally translated "divided game," and referring to the equal risk of loss incurred by two persons participating in a game of chance fairly played. In its common law meaning, having been "once in jeopardy" means having been brought to trial, for the offense involved, in a criminal proceeding that had reached a certain initial stage satisfying the legal requirements of jeopardy in its technical sense. The point at which this stage is reached, or, as is usually said, when "jeopardy attaches," is generally defined with reference to a jury trial.³⁴ It has, however, also been defined with reference to a trial by a court without a jury.³⁵

From all these definitions it appears that as understood in modern law it is not essential to "once in jeopardy" that there has been an adjudi-

34. "A person is in legal jeopardy when he is put on trial, before a court of competent jurisdiction, on an indictment or information which is sufficient in form and substance to sustain a conviction and a jury has been charged with his deliverance. A jury is said to be thus charged when it is impaneled and sworn." 15 AM. JUR., *Criminal Law* § 369, at 46 (1938). See also similar definition in 1 WHARTON, *op. cit. supra* note 24, at 541, 544.

35. "Jeopardy attaches in a case without a jury when the accused has been subjected to a charge and the court has begun to hear evidence." *Hunter v. Wade*, 169 F.2d 973 (1948); *Clawans v. Rives*, 104 F.2d 240 (1939). See also *Kepner v. United States*, 195 U.S. 100, 128 (1904), where it is said: "It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal."

Koessler: Koessler: ILSE Koch Senate Investigation and Its Legal Problems with Observations of guilt or innocence in the former trial for the same offense.³⁶ This has not always been the case. Under the original common law of England the plea of former or double jeopardy could be raised only in the form of either the plea *autrefois convict* or the plea *autrefois acquit*, in other words only on the theory that there had been a conviction or an acquittal.³⁷

A particular provision on former jeopardy, based on the corresponding provision in the Articles of War,³⁸ is contained in the Uniform Code of Military Justice.³⁹ It prescribes in part that no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of former jeopardy "until the finding of guilty has become final after review of the case has been fully completed."⁴⁰ Since it seems to be settled that the constitutional protection against double jeopardy applies also in a proceeding before a military tribunal,⁴¹ the question arises whether the cited code

36. See *Jackson v. Superior Court*, 10 Cal. 2d 350, 356, 74 P.2d 243, 247, (1937) (quoting with approval from 8 Ruling Case Law 138: "But as soon as a jury has been impaneled and sworn jeopardy attaches, and a dismissal of the case, when not authorized by law and without the consent of the defendant, after the jury has been sworn and the trial actually commenced is equivalent to an acquittal of the charge and will constitute former jeopardy on a subsequent trial on the same charge"). See also 4 BLACKSTONE, COMMENTARIES *336 where it is said that "the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be . . . is a good plea in bar to an indictment."

37. Miller, *The Plea of Double Jeopardy in Missouri*, 22 Mo. L. Rev. 162, 165, 166 (1957).

38. Art. 40, reading in part: "No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case." MANUAL FOR COURTS MARTIAL U. S. ARMY 284 (1949).

39. U.C.M.J., art. 44(b), 10 U.S.C.A. § 844(b) (Spec. 1956 Pamph. containing new title 10).

40. See *United States v. Werthman*, 18 C.M.R. 64, 68 (1955) where the Court of Military Appeals says that U.C.M.J., art. 44 "sets out the military law in that field and . . . indicates that that defense may be sustained only where there has been a termination of proceedings by a judicial act of some recognized form or a trial of the accused on the merits."

41. *Wade v. Hunter*, 336 U.S. 684, rehearing denied 337 U.S. 921 (1949); *Wrublewski v. McInerney*, 166 F.2d 243 (9th Cir. 1948), disapproving on this point, though otherwise affirming, *In re Wrublewski*, 71 F. Supp. 143 (S.D. Cal. 1947); 36 AM. JUR., *Military* § 104.5 (Cum. Supp. 1956). Cf. *United States v. Zimmerman*, 2 U.S.C.M.A. 12, 6 C.M.R. 12, 17 (1952), where the Court of Military Appeals, after referring to *Wade v. Hunter*, *supra*, says, "However . . . we hesitate to accept that decision as the Supreme Court's definite and final ruling on the issue. . . ."

provision is constitutionally valid in so far as it deviates from the general conception of when jeopardy attaches.⁴²

Even under the general law on "once in jeopardy," that defense does not lie if in the former trial the jury was properly discharged before rendering a verdict⁴³ or because of failure to agree on a verdict.⁴⁴ The protection against double jeopardy is, on the other hand, enlarged by the generally recognized rule that there cannot be an appeal by the prosecutor from a judgment acquitting the defendant, since this would amount to placing him twice in jeopardy for the same offense.⁴⁵ Actually, the appeal stage of the proceeding is not a second trial, but a continuation of the same trial, as is pointed out, in effect, in a judicial opinion representing the minority view that an appeal by the prosecutor from an acquittal has nothing to do with double jeopardy.⁴⁶ A Connecticut statute, enabling the prosecutor to appeal from an acquittal,⁴⁷ has been upheld by the United States Supreme Court as constitutionally valid against the objection that it was in violation of due process of law.⁴⁸

Different from the doctrine of "once in jeopardy" or "former jeopardy," which does not exist in the so-called civil law system, for instance not under German law,⁴⁹ is the criminal law branch of the doctrine of *res judicata*.⁵⁰ This doctrine, even under the common law

42. Touched upon, but expressly left undecided, by the United States Supreme Court in note 4 of its opinion in *Wade v. Hunter*, *supra* note 41.

43. Miller, *supra* note 37, at 245; 15 AM. JUR., *Criminal Law* § 406 (1938).

44. Miller, *supra* note 37, at 260.

45. *Green v. United States*, 355 U.S. 184, 188, 2 L. Ed. 2d 199, 204 (1957) ("it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear erroneous"); 15 AM. JUR., *Criminal Law* § 433 (1938); Miller, *supra* note 37, at 295, 296.

46. *State v. Brunn*, 22 Wash. 2d 120, 154 P.2d 826 (1945). See also *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894), and the most forceful argument against the majority view presented by Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486 (1927). As mentioned in *Green v. United States*, *supra* note 45, Holmes' dissent in *Kepner v. United States*, 195 U.S. 100 (1904), from the holding that the Government could not appeal an acquittal in a criminal prosecution, was based on the argument that there was only one continuing jeopardy until final decision of the case, no matter how many times the defendant was tried.

47. CONN. GEN. STAT. § 8812 (1949) (numbered 6494 at time of decision, note 48 *infra*).

48. *Palko v. Connecticut*, 302 U.S. 319 (1937).

49. See Wolff, *Criminal Justice in Germany*, 43 MICH. L. REV. 155, 171-72 (1944).

50. "Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue and adjudicated in the first suit." 2 FREEMAN, JUDGMENTS 1322 (5th ed. 1925). For distinction between *res judicata* as applied in criminal cases and double jeopardy see 14 CAL. JUR. 2d 419, 420, and cases there cited.

system, is applicable not only in civil but also in criminal cases,⁵¹ although in criminal cases in countries under the common law system it is for most practical purposes eclipsed by the more effective doctrine of former jeopardy. It supplements, however, the protection there extended by the prohibition of double jeopardy in the following two respects.

In a prosecution of the same defendant, but for a different offense, it estops the raising of issues that have been finally adjudicated in the defendant's favor in his former trial.⁵² Also, where there has been a final judicial discharge of the defendant prior to the attaching of jeopardy, it prevents his being prosecuted de novo for the same offense.⁵³

Disregarding certain technical refinements of the double jeopardy doctrine, for example the determination of when jeopardy attaches and the effect of a proper discharge of the jury, the theoretical difference between the respective effects of the two principles in a criminal case would seem to be the following. *Res judicata* prevents the raising, in a subsequent proceeding against the same defendant, of an issue, including the question of guilt or innocence, which has been finally adjudicated in a prior proceeding. The prohibition of double jeopardy prevents a new prosecution for an offense for which the person has been definitely placed on trial in a prior proceeding under a valid accusatory pleading and before a court having jurisdiction of the subject matter, irrespective of whether there has or has not been an adjudication of guilt or innocence in that former trial.

In the civil law countries, which, as mentioned before, do not have the jeopardy doctrine, *res judicata*⁵⁴ protects a person against being prosecuted de novo for an offense of which he has in a former proceeding been *finally* convicted or acquitted or otherwise been discharged on the

51. *United States v. Williams*, 341 U.S. 58 (1951); *Collins v. Loisel*, 262 U.S. 426 (1922); *United States v. Oppenheimer*, 242 U.S. 85 (1916). See also *Doctrine of Res Judicata in Criminal Cases*, 147 A.L.R. 991 (1943); Schmidt, *Res Adjudicata (sic) in Criminal Cases*, 26 CALIF. ST. B.J. 366 (1951).

52. *United States v. Williams*, *supra* note 51.

53. *United States v. Oppenheimer*, *supra* note 51; *State v. Wear*, 145 Mo. 162, 46 S.W. 1099 (1898); 15 AM. JUR., *Criminal Law* § 367, at 45 (1938). See also the statement by Miller, *supra* note 37, at 162, that "the doctrine of *res judicata* . . . was formulated into the criminal procedure as a complementary principle to the plea of former jeopardy."

54. Derived from Roman law, according to BOUVIER, *LAW DICTIONARY* 2910 (8th ed., Rawle's rev. 1914); according to BLACK, *LAW DICTIONARY* 1470 (4th ed. 1951) "a phrase of the civil law"; according to *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894), "a principle common to all systems of jurisprudence."

ground of established innocence or failure of proof of guilt. Only to this extent, and only with the important qualification mentioned immediately below, does he receive from the *res judicata* principle the protection inherent in the common law doctrine of former jeopardy.⁵⁵

While there cannot be *res judicata* without finality of the prior adjudication,⁵⁶ even though there is a final acquittal the statutes of certain civil law countries, including Germany and Austria, but not France, qualify the defendant's protection inherent in *res judicata* by allowing a reopening of the prosecution of the defendant on specified grounds and within a specified period of time following final acquittal. Those grounds include a credible confession made subsequent to his trial by the person acquitted and discovery that the acquittal was based on a forged document or on perjured testimony.⁵⁷ A general feature of the criminal procedure in civil law countries is that the public prosecutor may appeal from an acquittal.⁵⁸

We now turn back to the Ilse Koch case. When in the course of the Senate investigation the suggestion was voiced that General Clay's decision should be set aside and replaced by a new decision reinstating the original life sentence, army representatives invoked in effect, though not in terms, the principle of *res judicata* as the ground for their opinion that action according to that suggestion would be highly improper. The correctness of their position is recognized in the committee's report.⁵⁹

55. Wolff, *supra* note 49.

56. RESTATEMENT, JUDGMENTS § 41, at 161 (1942).

57. German law: Wolff, *supra* note 49; BRITISH FOREIGN OFFICE, MANUAL OF GERMAN LAW 154 (1952) (the latter publication mentions, however, only subsequent credible confession as ground for reopening); Austrian law: CODE OF CRIMINAL PROCEDURE § 355.

58. German law: Wolff, *supra* note 49; French law: Wright, *French Criminal Procedure*, 45 L.Q. REV. 92, 108, 109 (1929); Austrian law: CODE OF CRIMINAL PROCEDURE § 281. The Austrian law recognizes, however, the independent principle of *no reformatio in pejus* according to which on reversal of a conviction as a result of an appeal by the defendant no more severe sentence may be meted out in the new trial than was imposed by the reversed judgment. See LOHSING, DAS VERBOT DER REFORMATIO IN PEJUS IM STRAFVERFAHREN (1907). Contrariwise, in this country a defendant who was sentenced only to life imprisonment might, on retrial as the result of his appeal, validly be given a death sentence for the same offense. This actually happened in a California case. *People v. Grill*, 151 Cal. 592, 91 Pac. 515 (1907). See also *Stroud v. United States*, 251 U.S. 15 (1919), discussed as to this aspect by the dissenting opinion in *Green v. United States*, *supra* note 45.

59. Report, *supra* note 4, at 21, where it is said, "Representatives of the military establishment testifying at the hearings . . . took the position that to violate the rule of finality of decision in this case would be contrary to well-established principles of criminal jurisprudence . . . this subcommittee does not disagree with the position taken by the military authorities. . . ."

That report expresses the view, however, that the finality of the adjudication of Ilse Koch's war crimes guilt should not prevent her being tried de novo before a German court for crimes under German criminal law committed against German inmates of the Buchenwald concentration camp, since she was prosecuted in the American trial only for crimes under international law committed against prisoners of other than German nationality. In other words she was not prosecuted for offenses of the same kind as would be the subject of the suggested subsequent prosecution.⁶⁰ The Bonn government acted accordingly and in the subsequent de novo proceeding the plea of res judicata was held unfounded, as the result of an interesting reasoning contained in that part of the judgment which is entitled "Verbrauch der Strafklage" (exhaustion of the state's right to prosecute).⁶¹

The court's discussion of the problem starts with the statement that Ilse Koch's acquittal in the SS trial could not be the basis of a defense of res judicata since she was not tried there for her conduct against prisoners, but only for having been an accomplice in her husband's peculations, the requirement of identity of subject matter thus not being satisfied. The court's opinion then proceeds to examine whether res judicata could be inherent in a judgment passed by an American war crimes tribunal, the German law being that a judgment rendered in a foreign jurisdiction has no res judicata effect in a proceeding before a German court. On this preliminary point the court reaches the conclusion that a judgment of a tribunal set up in Germany by an occupation power must, pursuant to international law, be given the same res judicata effect as a judgment of a German court, and that this applies also to a judgment of a war crimes tribunal.

The opinion then turns to the merits of the particular res judicata plea raised by defense counsel on behalf of Ilse Koch. In this connection two things were beyond dispute: that the war crimes charge had accused her only of an offense of victimizing prisoners of other than German nationality and that the German de novo indictment charged her only with offenses committed against prisoners of German national status. Defense counsel referred, however, to the undeniable fact that in the Buchenwald concentration camp trial, including that part which con-

60. *Report, supra* note 4, at 24.

61. *German Judgment, supra* note 6, at 31-43.

cerned Ilse Koch as a defendant, evidence of unlawful treatment of camp inmates was introduced irrespective of the nationality of the victims involved—their nationality in some instances not having been established, in others having been German.⁶² From this, counsel concluded that the limitation of the accusation set forth in the charge sheet was not adhered to in the course of the trial proceedings, that the prosecution in the latter extended also to offenses against prisoners of German nationality, and that consequently such offenses were included in the basis of her war crimes conviction.

In holding this argument unsound and rejecting the *res judicata* plea based on it, the judgment of the superior court in Augsburg in substance reasons as follows: The accusation as limited in the charge sheet, and not the kind of evidence introduced in the course of the trial, must be looked at in determining what the subject of the prosecution in the war crimes trial was. Moreover, from the fact that evidence was introduced irrespective of the national status of the victim involved it does not follow that the prosecution, as a matter of fact, was not limited to offenses against prisoners of other than German nationality. Evidence of incidents involving German prisoners may have been used merely to prove the over-all element of the war crimes charge—administration of the Buchenwald camp in a manner subjecting inmates, including foreigners, to unlawful treatment. This reasoning is of course highly technical and sounds unrealistic, but it may nevertheless be correct. It was upheld by the supreme federal court in Karlsruhe in rejecting Ilse Koch's appeal.

V. WEIGHING OF CREDIBILITY IN EXCESS OF PROPER SCOPE OF POST-TRIAL REVIEW?

Since the hue and cry in the Ilse Koch case was directed against the reduction, on post-trial review, of the life sentence meted out to her by the war crimes tribunal, the investigation by the Senate committee centered on the question whether proper methods were applied in that post-trial review. In this connection particular attention was given to the fact that the reviewers, in adopting a factual basis for their recommendations, discounted certain testimonies which they considered devoid

62. *Hearings*, *supra* note 3, at 1167 (testimony of the former Deputy Theatre Judge Advocate: "The indictment, or the particulars, only covered crimes against non-Germans but in practice testimony of atrocities against Germans was admitted on the theory of the course of conduct").

of credibility. In the course of the committee's hearings this action was criticized by the committee's legal counsel as having been in excess of the proper scope of post-trial review. It was alleged that in weighing the credibility of evidence the reviewers unduly disregarded the limits of review ordinarily exercised by an appellate court. Similar observations appear in the committee's report. In an attempt to show that this criticism had no sound foundation, we must elaborate what is briefly indicated in a recent opinion of the U. S. Supreme Court: "Reviewing authorities have broad powers under military law."⁶³

A. *The Requirement of Command Approval and Its Implications*

Two features so fundamentally distinguish a military judgment from that of a civilian court, and post-trial review in a military case from ordinary appellate review, as to render an argument based on analogy limping. The one is the traditional requirement of command approval,⁶⁴ which has been retained in the Uniform Code of Military Justice and which impresses on a judgment passed by a military tribunal the character of a merely inchoate rather than complete adjudication. The other is the broad scope of that command review which extends far beyond the review ordinarily exercised by an appellate court and which, according to the leading textbook on principles of military law, gives the judgment of a military tribunal the intrinsic nature of "a recommendation only."⁶⁵

63. *Jackson v. Taylor*, 353 U.S. 569, 574 (1957), citing, in note 5, Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. REV. 15 (1949). See also Connor, *Reviewing Authority Action in Court-Martial Proceedings*, 12 VA. L. REV. 43 (1925); Currier and Kent, *The Boards of Review of the Armed Services*, 6 VAND. L. REV. 241 (1953).

64. WALKER, *MILITARY LAW* 359-65 (1954). See also *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955), wherein it is said that "strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them," but that "from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."

65. WINTHROP, *MILITARY LAW AND PRECEDENTS* *683 (2d ed. 1896, reprinted by Gov't Printing office in 1920). See also *United States ex rel. Toth v. Quarles*, *supra* note 64, at 17, where it is said that there is "nothing in the history of constitutional treatment of military tribunals which entitles them to rank along with Article III [of the Constitution] courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property." *State ex rel. Madigan v. Wagener*, 74 Minn. 518, 519, 77 N.W. 424, 425 (1898) states that courts-martial are "an executive agency, and belong to the executive, and not the judicial, branch of the government," citing WINTHROP, *op. cit. supra*. 36 AM. JUR., *Military* § 88, at 244 (1941), points out that "while courts-martial may and do discharge judicial functions, and are therefore in a certain sense courts, they are not a part of the judiciary department of the government." Cf. *Runkle v. United States*, 122 U.S. 543, 555 (1887), mentioning that "a court-martial organized under

As most clearly appears in cases where finality of adjudication is reached because of the absence of an appeal filed within the time limited by statute, the judgment of a civilian trial court stands on its own feet, being in itself a complete, and not merely an initial form of, adjudication, although it may be put out of existence as the result of an appeal.⁶⁶ The settled practice of appellate courts in this country is not to disturb the trial court's weighing of conflicting evidence, except where a finding of the trial court is "clearly against the weight" or "clearly against the preponderance" of the evidence.⁶⁷

All this is different in the field of military jurisdiction. A judgment of a military tribunal does not go into effect unless or until it has been approved by the military commander who is vested with the power variously referred to in military parlance as that of the appointing, convening, reviewing, approving, or confirming authority or officer. Such a judgment is not definite—it is merely a tentative adjudication. Or, referring to language used in the previously cited textbook, "The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him."⁶⁸ Even in the absence of a petition therefor or of anything else in the nature of an appeal, the case must be submitted to the reviewing authority for approval or disapproval of the judgment, this final decision being made by the military commander in charge only after the trial record has been reviewed by a member or members of his legal staff, whose opinions and recommendations are, however, not binding on him, but merely advisory. He has the discretionary power to act accord-

the laws of the United States is a court of special and limited jurisdiction"; *McLean v. United States*, 73 F. Supp. 775 (W.D.S.C. 1947), stating that "courts-martial are lawful tribunals existing under the Constitution and acts of Congress having plenary jurisdiction of offenses committed to them by the military law"; *United States v. Shibley*, 112 F. Supp. 734 (S.D. Cal. 1953), where it is said that courts-martial are courts of special and limited jurisdiction, the proposition that they are instruments of executive power being "the older concept."

66. For "automatic" appeal see CAL. PENAL CODE § 1239(b) (1956), providing that "when upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

67. 3 AM. JUR., *Appeal and Error* § 901, at 471 (1936).

68. WINTHROP, *op. cit. supra* note 65, at *683. See also the statement in a reported opinion of a Department of the Army Review Board, *United States v. Moore*, ACM 4433, 5 C.M.R. 438, 444 (1952), that it is the subsequent approval of the convening authority (and the additional approval, when required, of other reviewing authorities and appellate agencies) "which actually breathes life and effectiveness into the findings" of a court-martial.

ing to his own best judgment, in the light of the facts as found and the law as understood by him.⁶⁹ He may affirm or set aside a conviction and, where he affirms it, either approve or reduce the sentence announced by the tribunal.

Now, what is most important for the present purpose, his power, and thus also the function of those who legally assist and advise him in its exercise, extends to credibility matters, including the weighing of conflicting evidence, although in most cases the assumption is indulged that the tribunal made a proper determination of the credibility of witnesses whose demeanor it had the benefit of seeing and observing.⁷⁰ This has always been settled practice⁷¹ and is incorporated as a statutory rule in the Uniform Code of Military Justice.⁷²

An attempt in the course of the Senate investigation, to show the contrary by quoting a certain passage from the previously cited textbook,⁷³ must be considered as abortive since that passage is merely descriptive of the usual qualifications of officers acting as members of courts-martial, but is not meant by implication to challenge the settled principle, expressly stated by the learned author in the proper connection,⁷⁴ that post-trial review includes credibility matters.

B. *The Review in the Ilse Koch Case*

The so-called Military Government Court before which the Buchenwald concentration camp case was tried, had the legal nature of what in American military law is termed a "military commission."⁷⁵ It was an

69. WINTHROP, *op. cit. supra* note 65, at * 687. See also *Runkle v. United States*, *supra* note 65, at 557, where it is said that "his [the reviewing commander's] personal judgment is required."

70. WINTHROP, *op. cit. supra* note 65, at *691. Compare the interesting observations on the danger of fallibility of "demeanor evidence" in the late Jerome Frank's posthumously published book, *NOT GUILTY* 216-18 (1957).

71. *MANUAL FOR COURTS MARTIAL U.S. ARMY* 93 (1949); SCHILLER, *MILITARY LAW AND DEFENSE LEGISLATION* 485 (1941).

72. U.C.M.J., art. 66(c), 10 U.S.C.A. § 866 (Spec. 1956 Pamph. containing new title 10). See WALKER, *op. cit. supra* note 64, at 360, 725.

73. WINTHROP, *op. cit. supra* note 65, at *546, where it is said, "A court martial, by reason of the superior education and intelligence of the members, is a species of jury which should be peculiarly qualified for the discriminations and comparisons necessary to be made in estimating the relative weight and credibility of oral testimonies."

74. See note 69 *supra*.

75. See Koessler, *supra* note 17, at 55-58.

American, not an international court,⁷⁶ although supposed to apply the "traditional" international law in adjudicating war crimes.⁷⁷ It was subject to certain special regulations which, however, had taken over the substance of the above stated general military law on the requirement of command approval and the scope of the power of the reviewing authority.⁷⁸

It is true that those regulations did not specifically cover the question of whether the review should extend to an examination of the credibility of evidence. But the general principles of military law were considered as of supplementary applicability. And it was thus the understanding of at least those highest in rank among the judge advocate officers in the theatre that the credibility review feature of the courts-martial law was applicable as a matter of course.⁷⁹

Such was also the understanding of General Lucius D. Clay, who exercised the described command power in the Buchenwald concentration camp case.⁸⁰ The trial record was reviewed for him first by the Deputy Theatre Judge Advocate for War Crimes, then by the Theatre Judge Advocate himself, and thereupon by a review board.⁸¹ But the recommendations of the Deputy Theatre Judge Advocate were adopted by the subsequent reviewers and thus formed the basis of General Clay's decision to affirm her conviction, yet to reduce her life sentence to four years of imprisonment.

The proper weighing of the credibility of evidence was a most important, though not always sufficiently heeded, part of the responsibility of those in charge of the adjudication of war crimes, especially since in those trials the exclusionary rules of evidence were not applied and types of evidence were admitted that would have been inadmissible under the exclusionary rules.⁸² In so far as evidence produced against Ilse Koch

76. *Eisenstrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949) (dealing with similar American military commission in China), disapproved on other grounds in *Johnson v. Eisenstrager*, 339 U.S. 763 (1950).

77. Fratcher, *supra* note 17, at 66.

78. *Regulation on Military Commissions*, pars. 12, 13, 15, and *Regulation on Military Government Courts*, par. 5, both issued by Headquarters, U.S. Forces, European Theatres, and quoted by Koessler, *supra* note 17, at 106-112.

79. *Hearings*, *supra* note 3, at 1098, 1111, 1112.

80. *Id.* at 1015 (telegram from General Clay wherein he says, "In these reviews I must base my action on the evidence as it is evaluated by the reviewing authorities").

81. *Id.* at 1028.

82. Koessler, *supra* note 17, at 69-77.

Koessler: Koessler: ILSE Koch Senate Investigation and Its Legal Problems with Observations was concerned, it included various kinds of hearsay, such as written statements of persons who did not appear as witnesses and whose allegations could thus not be tested by cross-examination, and testimonies on concentration camp rumor. Moreover, in the concentration camp cases the bulk of the witnesses consisted of former camp inmates who, naturally biased against the defendants, were not always aware of their responsibilities as witnesses when attempting to "cooperate" with the prosecution. All this had, of course, to be kept in mind by the reviewers in conscientious discharge of their duties.

In the Ilse Koch case they disbelieved four witnesses. The extreme lack of credibility appears even on the face of the testimonies of two of these witnesses and the reviewers had extrinsic reasons to discount the testimonies of the other two. In the light of the remainder of the evidence, they considered four years of imprisonment a sufficient punishment and they so recommended. Referring thereto, an official memorandum of the Judge Advocate General reaches the conclusion that "there was no abuse of discretion in the reduction of the term of confinement to four years."⁸³ And the report of the Senate committee, while expressing severe strictures on the reduction of the life sentence, expressly states that it was an error committed in good faith, as there could have been an honest difference of opinion on this matter.⁸⁴

C. *The Sentence Quandary*

When, as in the war crimes cases, the range of applicable punishment is unlimited, neither a minimum nor a maximum sentence being provided for,⁸⁵ those supposed to exercise their discretion in meting out a sentence appropriate to the particular case may easily err, indeed, either by being too severe or by being too lenient. According to the previously cited memorandum of the Judge Advocate General, a "substantial sentence to confinement" was proper in the Ilse Koch case, "the exact amount being determinable as a matter of judgment based on an honest evaluation of the degree of guilt."⁸⁶ But, as to the degree of her guilt, there could be a reasonable difference of opinion as would seem to be illustrated by the fact that while the tribunal in her war crimes case was unanimous

83. *Hearings, supra* note 3, at 1254.

84. *Report, supra* note 4, at 22.

85. See GLUECK, WAR CRIMINALS 107, 108 (1944); 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS (United Nations War Crimes Commission, 1949) 200-02.

86. *Hearings, supra* note 3, at 1254.

in finding her guilty, the life sentence was determined only by a majority of six against three. One of the dissenters voted for the death sentence, but the other two voted for a short term of imprisonment.⁸⁷

In the writer's opinion it was not necessarily erroneous to reduce her original sentence, but it was an erroneous extreme of leniency to reduce it to a term of only four years of imprisonment. This, the writer believes, was utterly inadequate despite her relatively minor role in the administration of the Buchenwald camp, since the circumstance was to be considered as highly aggravating that she had acted as a volunteer in her baneful intermeddling with the treatment of the prisoners. The report of the Senate committee would seem to go to the other extreme. It concludes that in the absence of mitigating circumstances in her case, the death sentence was the only punishment properly applicable to her and that it was therefore a flagrant mistake to reduce the life sentence.⁸⁸ Such reasoning appears to neglect the fact that not only aggravating and mitigating circumstances, but also the extent of participation in the charged criminal design had to be taken into consideration in determining the degree of guilt of a defendant in the Buchenwald case.

VI. CONCLUSION

Nobody will deny that human justice is fallible. This is primarily due to the fallibility of testimony on which it depends,⁸⁹ sometimes due to errors of judgment. But miscarriage of justice is certainly a much more minor evil where a guilty person has been acquitted or too leniently punished than where an innocent person has been convicted or a guilty one has been too severely punished.

It has been alleged, rightly or wrongly, that convictions in war crimes trials were not always properly arrived at, and the only other case where the United States Senate, by way of an investigation, looked into a war crimes trial involved a complaint of that kind.⁹⁰ The sentences meted

87. *Id.* at 1169, 1170.

88. *Report, supra* note 4, at 16.

89. See Koessler, *Fallibility of Testimony and Judicial Accident Risk*, 4 *CRIMINAL L. REV.* 56 (1957).

90. *MALMEDY MASSACRE INVESTIGATION, Hearings Before a Subcommittee of the Senate Committee on the Armed Services, Hearings and Report*, U.S. Senate, (1949). For the denial, in that case, of a petition for habeas corpus, see *Everett v. Truman*, 334 U.S. 324 (1948).

out in the war crimes trials are known to have been very severe, and the Ilse Koch case was probably the only one in which a finally adjudicated war crimes sentence was criticized as excessively lenient. It has been mentioned before that in the writer's opinion this criticism was justified. He also believes that the practical result of the Senate investigation, whereby Ilse Koch received a life sentence *de novo*, was not iniquitous in view of the enormity of the degree of her guilt as revealed in the subsequent German trial. He cannot help wondering, however, whether the miscarriage of justice in her case, consisting merely of a too lenient sentence, was of sufficient importance to necessitate resort to a Senate investigation.

Although this is not the first time that the relation to the constitutional purpose of such investigations, that is, "to aid in legislating,"⁹¹ if it existed at all, was extremely tenuous and far fetched, the Ilse Koch investigation is probably singular because of the fact that by its practical effect it had the character of an extraordinary remedy, as it were, for the correction of an error in an American final adjudication, to be brought about by the means of a *de novo* proceeding in a foreign jurisdiction. Even if this was all right as a matter of law, it would seem to represent a most curious phenomenon in the field of legislative investigations as well as in that of foreign relations.

91. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

