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AMERICAN ORGANIZATION FOR PROSECUTION OF GERMAN WAR CRIMINALS

By WILLIAM F. FRATCHER*

I. *Background.* In the Ancient World the adage, "All's fair in love and war," was all too literally true. The Roman conquerors of Carthage massacred or enslaved its citizens and sowed its fields with salt. The hordes of Genghis Khan indulged in such plunder, pillage and torture as they saw fit. Tamerlane took pride in erecting pyramids of the skulls of the inhabitants of cities which he captured. Warfare was cruel enough in the Middle Ages but the Mediaeval Church had some success in creating rules for the conduct of war as well as love. The attempt to introduce a modicum of humanity into the essentially inhumane activity of war resulted in the gradual development of a sort of international "common law of war"¹ or customs governing the conduct of warfare. The primary principle of this customary law of war is that "all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted."² Beside this principle there grew one, perhaps deriving its inspiration from mediaeval chivalry, that war should be conducted only by belligerents clearly distinguished from the general populace by distinctive costume and special discipline. From these principles sprang rules prohibiting warfare against the non-combatant population, cruelty to the wounded, and maltreatment of combatants who have been taken prisoner. The classic statement of the laws and customs of war was made in General Order No. 100, prepared by Professor Francis Lieber of Columbia College and promulgated by the United States War Department on April 14, 1863. This statement received general approval in other countries and most of its provisions have been embodied in treaties adhered to by the major nations, notably the "Regulations respecting the Laws and Customs of War on Land" annexed

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1. *Ex parte Vallandigham*, 1 Wall. 243, 249 (1863).
2. 2 OPPENHEIM, INTERNATIONAL LAW § 67 (1906).

to the Hague Conventions of 1899 and 1907³ and the Geneva Conventions of 1929 regulating the treatment of the wounded and of prisoners of war.⁴

Concurrently with general acceptance of rules governing the conduct of warfare there arose a well-recognized practice of enforcement under which any belligerent power with custody of a violator of the laws of war, whether a member of its own or the enemy forces, might try him by a military tribunal composed of officers of its service and impose death or any less punishment. Since 1847 the United States has normally tried members of the enemy forces for violations of the laws of war by military commissions, which are boards of officers organized similarly to courts-martial but not bound by all the rules of court-martial procedure. The legality of trials by military commission was questioned by the then Judge Advocate of the Army at the outbreak of the Civil War⁵ but such trials were conducted on a number of occasions during that conflict. For example, Captain Henry Wirz, the Confederate commandant of Andersonville Prison, was tried by military commission for maltreatment of Union prisoners of war⁶ and Captain Robert C. Kennedy, C. S. A., was tried for entering the Union lines in disguise and attempting to set fire to the City of New York.⁷ The legality, so far as American domestic law is concerned, of trial of enemy violators of the laws of war by military commission has been firmly established by decisions of the Supreme Court of the United States.⁸

During World War I much public indignation was aroused in Allied and Associated countries by reports of German barbarism in the treatment of inhabitants of occupied Belgium and in the conduct of submarine warfare. The Preliminary Peace Conference appointed a commission to inquire into and report upon (1) the responsibility of the authors of the war; (2) the facts as to breaches of the laws and customs of war by the forces of the German Empire and its allies; (3) the degree of responsibility for these offenses attaching to particular members of the enemy forces; and (4) the constitution and procedure of a tribunal appropriate for the trial of these

3. 32 STAT. 1803 (1899); 36 STAT. 2277 (1907).

4. 47 STAT. 2074 (1929); 47 STAT. 2021 (1929).

5. Case of Col. Ebenezer Magoffin, C.S.A., 1 MS Op JAG, p. 285. See Fratcher, *Notes on the History of the Judge Advocate General's Department*, 1 JUDGE ADV. JL. 5, 7 (1944).

6. See Annex II to Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 AM. J. INT'L L., 95, 142 (1920).

7. G. O. No. 24, Dept. of the East, Mar. 20, 1865.

8. Ex parte Vallandigham, 1 Wall. 243 (1863); Ex parte Quirin, 317 U. S. 1 (1942).

offenses. The American members of the commission were Secretary of State Lansing and Major James Brown Scott, formerly Professor of Law at Columbia University. This commission rendered a report on March 29, 1919 finding that all enemy persons guilty of offenses against the laws and customs of war or *the laws of humanity*, are liable to criminal prosecution, and recommending the creation of an international "high tribunal" to try the principal malefactors.⁹ The American members dissented from the findings and recommendations insofar as they related to offenses against the "laws of humanity," the criminal responsibility of heads of states, and the creation of an international high tribunal.¹⁰ The Treaty of Versailles, as finally adopted by the Peace Conference, contained four articles relative to the punishment of German war criminals.¹¹ Article 227 provided for the trial of the former German Emperor by a special international tribunal for "a supreme offense against international morality and the sanctity of treaties." By article 228 the German Government recognized the right of the Allied and Associated Powers to try violators of the laws and customs of war and agreed to deliver up persons charged with such violations and by Article 230 the German Government agreed to furnish such documentary evidence as might be required. Article 229 provided that persons guilty of crimes against the nationals of one of the Allied and Associated Powers would be brought to trial before military tribunals of that power; those guilty of crimes against the nationals of more than one of the Allied and Associated Powers would be tried by "military tribunals composed of members of the military tribunals of the Powers concerned." Needless to say, the Kaiser was not tried. The project of trial of lesser malefactors by Allied military tribunals was dropped and the German Government was permitted to try the German war criminals before the German Supreme Court at Leipzig. Of some 900 persons accused of serious offenses only twelve were actually tried and but six convicted. Their sentences were unduly light and the two with the heaviest sentences soon escaped from German jails, probably with the connivance of German officials.¹² The result of this experiment did not suggest the desirability of repeating it after World War II.

9. Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 AM. J. INT'L L. 95, 117, 123 (1920).

10. *Ibid.*, Annex II, pp. 127-151.

11. 13 AM. J. INT'L L. Supp. 151, 250-251 (1919).

12. See Glueck, *By What Tribunal Shall War Offenders be Tried?*, 24 NEBR. L. REV. 143, 144 (1945).

II. *The United Nations War Crimes Commission.* On October 25, 1941 President Roosevelt and Prime Minister Churchill made simultaneous statements condemning acts of barbarity being committed by Germans, Mr. Churchill saying that "Retribution for these crimes must henceforward take its place among the major purposes of the war." In notes of November 27, 1941 and January 6, 1942 Commissar Molotov warned that the German crimes were being noted and registered, and would be punished. The governments in exile of the nine occupied European countries participated in a conference in London which adopted on January 13, 1942 the Declaration of St. James's Palace, denouncing the German institution in the occupied countries of a regime of terror characterized by imprisonments, mass expulsions, execution of hostages and massacre, and affirming their determination to see that those guilty and responsible were tried and punished. President Roosevelt endorsed the Declaration in a statement of August 21, 1942, Prime Minister Churchill concurred on September 8, 1942 and the Soviet Government accepted the principles announced in the Declaration by a note of October 14, 1942. On October 7, 1942 President Roosevelt and the Lord Chancellor, Viscount Simon, announced simultaneously that, after consultation with the other Allied Governments concerned, the two Governments had decided to propose the creation of a United Nations Commission for the Investigation of War Crimes. The commission was actually set up, under the name of the United Nations War Crimes Commission, on October 20, 1943. It consists of sixteen members, representing Australia, Belgium, Canada, China, Czechoslovakia, France, Great Britain, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, the United States and Yugoslavia. The meetings are held at London and a small secretariat is maintained there. Sir Cecil Hurst, Vice-President of the Permanent Court of International Justice and representative of Great Britain, was Chairman of the Commission until January 1945, since which date Lord Wright of Durley, Lord of Appeal in Ordinary and the Australian representative on the Commission, has served as chairman.¹³ President Roosevelt appointed the Honorable Herbert Claiborne Pell, former American Minister to Portugal and Hungary, as the first American representative on the Commission but he was soon succeeded by Colonel Joseph V. Hodgson, Judge Advocate General's Department, a graduate of the University of Michigan Law School who had served before the war as Attorney General of the Territory of

13. See Glueck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 419 (1946); Bathurst, *The United Nations War Crimes Commission*, 39 AM. J. INT'L L. 565 (1945).

Hawaii. Colonel Hodgson was replaced in May 1946 by Colonel Robert M. Springer, a graduate of the University of California School of Jurisprudence and a career officer of the Judge Advocate General's Department.¹⁴

On the day that the United Nations War Crimes Commission was organized in London a conference of the foreign ministers of the United States, the United Kingdom and the Soviet Union was in progress in Moscow. On October 30, 1943 the conferees agreed to a declaration which was issued three days later in the name of their three governments and in the interests of the 32 United Nations. This Moscow Declaration became a sort of charter and guide for the United Nations War Crimes Commission. The declaration recited that the Hitlerite forces had committed atrocities, massacres and cold-blooded executions in many of the countries which they had overrun, declared that "in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties," and pronounced solemn warning that, on the conclusion of an armistice with Germany,

"those German officers and men and members of the Nazi Party who have been responsible for or taken a consenting part in the above atrocities, massacres, and executions, will be sent back to the countries in which their abominable deeds were done, so that they may be judged and punished according to the laws of those liberated countries and of the free Governments which will be erected in them.

"Lists will be compiled in all possible detail from all those countries, especially the invaded parts of the Soviet Union, Poland, Czecho-Slovakia, Yugoslavia, Greece, including Crete and other islands, Denmark, Norway, the Netherlands, Belgium, Luxembourg, France and Italy. . . ."

The Moscow Declaration concluded with a paragraph which, as will be pointed out, became of considerable significance two years later:

"The above declaration is without prejudice to the case of German criminals whose offences have no particular geographical location, and who will be punished by joint decision of the Governments of the Allies."¹⁵

On the recommendation of the United Nations War Crimes Commission each of the member nations set up a national war crimes office to collect complaints of war crimes from its citizens and forward them to the commis-

14. 9 DEP'T STATE BULL. 3 (1943); 14 DEP'T STATE BULL. 855 (1946).

15. Barry, *The Moscow Declaration on War Crimes*, 17 AUST. L. J. 248 (1943).

sion.¹⁶ The commission has considered such complaints, determined whether the acts complained of constituted war crimes, and published lists of the alleged war criminals, as contemplated by the Moscow Declaration. These printed lists were supplied to the Allied troop commanders during combat and to the occupation authorities in Germany thereafter, to enable them to apprehend the wanted criminals. Incident to its principal task of considering complaints of war crimes and publishing lists of alleged war criminals, the United Nations War Crimes Commission has conducted research into the law governing war crimes and their punishment, discussed the problems of law, morality and international policy involved, and published a number of papers on various aspects of the subject, representing the considered collective view of the member nations. It has recently begun publication of reports of important trials of war criminals. The Commission expects to complete its mission by July 1, 1948.

American sponsorship of, and participation in, the work of the United Nations War Crimes Commission has been of much greater value than the mere compilation of printed lists of war criminals would indicate. The commission has provided a forum in which the smaller nations could express their views and so give the benefit of the work, knowledge and thought of their legal scholars to the major powers. It has, moreover, provided the major powers with the moral support of all the member nations in reaching decisions on questions of policy and in the actual trial and punishment of war criminals.

III. *Over-All American Organization in Germany.*—When an Anglo-American invasion of the European continent from the north was decided upon the expedition was placed under the command of General Dwight D. Eisenhower, United States Army. Control of the forces was exercised through Supreme Headquarters, Allied Expeditionary Forces, commonly known as SHAEF, a combined staff composed of equal numbers of American and British officers. The SHAEF staff section charged with planning the occupation and military government of Germany was the German Country Unit, headed by Brigadier General Cornelius W. Wickersham, Jr., Army of the United States, which was organized at Cheltenham, England, in 1943 and later moved to Versailles and Barbizon, France. The Legal Division of the

16. The United States office was established at Washington. It was headed initially by Brigadier General John M. Weir and later by Colonel David Marcus, theretofore Secretary-General of the Office of Military Government for Germany (U. S.). Both were career officers of the Judge Advocate General's Department.

German Country Unit, directed by Colonel John B. Marsh of the New York Bar, was charged with planning for the apprehension, trial and punishment of war criminals.

The German Country Unit was strictly a planning agency, without operational responsibility. Throughout the combat period all operations of military government and prosecution of war criminals were carried out by the troop commands in the field. At the close of hostilities the major ground force troop commands operating under SHAEF were three army groups, one under British command and two under American command, and the French First Army. The American Sixth and Twelfth Army Group headquarters exercised command over constituent field armies. Each field army was composed of two or more army corps and these in turn were made up of divisions. The staff of each army group, army, corps and division headquarters contained a civil affairs section, charged with the conduct of military government and other problems incident to control of the German civilian population. The staff of each headquarters also had a judge advocate section whose head was the chief legal officer of the command and which supervised the operation of courts-martial and military commissions. As seen at that time the war crimes problem involved primarily the trial by military commission of members of the German armed forces for violations of the laws and customs of war. It did not appear to have much relation to the civilian population and did not include offenses against the newly-established military government. In consequence the judge advocate sections seemed the logical and appropriate agencies to handle war crimes. As the military situation became static the staff judge advocates of the two American army groups set up war crimes branches in their offices. The Twelfth Army Group came to include the bulk of the American ground forces in Germany and its judge advocate section, headed by Colonel Claude B. Mickelwait, a graduate of the University of California School of Jurisprudence and a career officer of the Judge Advocate General's Department, naturally became the chief war crimes operating agency of the American forces.

By the summer of 1945 the combat phase of the war was over. SHAEF and the American army group headquarters were dissolved and command of the American forces in Germany was assumed by a new organization, Headquarters, United States Forces, European Theater, commonly known as USFET, centered at Frankfurt am Main and headed by General Eisenhower. Initially the civil affairs division of USFET took over the military

government functions of SHAEF and the army groups but a policy of sharp distinction between military government and the army proper was initiated. The name of the German Country Unit was changed to United States Group, Control Council (Germany), it was moved from France to Höchst am Main, Germany, greatly enlarged, and placed under the command of Lieutenant General Lucius D. Clay, United States Army, who was given the title of Deputy Military Governor.¹⁷

The Yalta Declaration of February, 1945 and the Berlin Declaration of June 5, 1945, announced that Germany would be divided into four zones of occupation, the Soviet forces to occupy the eastern zone, the British forces the northwestern zone, the American forces the southwestern zone, and the French forces the western zone. Germany as a whole was to be governed by a four-power Allied Control Authority at Berlin, the chief organ of which was to be a Control Council composed of the four commanders-in-chief in Germany of the occupying powers. Beneath the Control Council there was to be a Coordinating Committee, consisting of the four deputy commanders-in-chief, a Secretariat, and twelve directorates, corresponding roughly to the ministries of a normal national government. The directorates contemplated were: military; naval; air; reparation, deliveries, and restitution; economic; finance; transport; man-power; internal affairs and communications; legal; political; and prisoners of war and displaced persons. Each of the four occupying powers was, of course, to be represented on each directorate. United States Group, Control Council (Germany), by then better known as U. S. Group C. C., moved from Höchst am Main to Berlin early in August 1945 and the four-power Allied Control Authority for Germany began to operate during that month. General Eisenhower, as American commander-in-chief in Germany, was the American member of the Control Council. Lieutenant General Clay, as Deputy Military Governor and Commanding General of U. S. Group C. C., was the American member of the Coordinating Committee. U. S. Group C. C. had twelve divisions corresponding to the twelve directorates of the Allied Control Authority and the director of each division was the American representative on the corresponding directorate. The directorates in some cases appointed four-power commit-

17. *American Organizational Plans for Military Government of Germany*, 12 DEPT STATE BULL. 900 (1945).

tees, whose American members were drawn from the divisions of U. S. Group C. C.¹⁸

Initially U. S. Group C. C. was merely the American part of the Allied Control Authority in Berlin and was not responsible for the military government of the United States Zone. It gradually assumed responsibility for the government of the zone and by the end of 1945 all of the military government functions theretofore performed by the civil affairs division of USFET at Frankfurt am Main had been transferred to it. Incident to this expansion of function the name of United States Group, Control Council (Germany) was changed to Office of Military Government for Germany (U. S.), commonly known as OMGUS.

In July 1945 the Honorable Charles Fahy, formerly Solicitor-General of the United States and more recently Legal Adviser to the Department of State, arrived in Germany to act as Legal Adviser to the Military Governor, Director of the Legal Division, and American member of the Legal Directorate, Allied Control Authority.¹⁹ Under Mr. Fahy and his associates the Legal Division was divided into four branches: Administration of Justice, which supervised both the military government court system and the German courts; Legal Advice, which included legislative drafting; Prisons, which supervised the German prison system; and War Crimes. The staff of the division, as organized by Mr. Fahy, was partly military and partly civilian. It has since become almost wholly civilian.

Although at that time war crimes operations were an exclusively Army function, conducted under the Theater Judge Advocate, Brigadier General Edward C. Betts, a career officer of the Judge Advocate General's Department who was formerly Professor of Law at the United States Military Academy, it was recognized that they would involve some four-power problems and a good deal of cooperation on the part of the military government. Accordingly, General Betts was made Deputy Director for War Crimes

18. *The Crimea Conference*, 12 DEP'T STATE BULL. 213, 214 (1945); *Statement on Control Machinery in Germany*, 12 DEP'T STATE BULL. 1054 (1945); *Statement on Zones of Occupation in Germany*, 12 DEP'T STATE BULL. 1052 (1945), Map, 13 *Id.* 275 (1945); see Heneman, *American Control Organization in Germany*, 6 PUB. ADM. REV. 1 (1946).

19. Mr. Fahy was succeeded in May 1946 by Judge J. Warren Madden of the United States Court of Claims, formerly Chairman of the National Labor Relations Board and sometime Professor of Law at the University of Pittsburgh. Judge Madden was succeeded a few months later by Alvin J. Rockwell, Esq., formerly Counsel of the National Labor Relations Board. See, Fahy, *The Lawyer in Military Government of Germany*, 15 DEP'T STATE BULL. 852 (1946).

of the Legal Division, in addition to his duties as Theater Judge Advocate, and the work of the War Crimes Branch of the Division was performed under his supervision.²⁰

IV. *Central Registry of War Criminals and Security Suspects.* Early in 1945 SHAEF established a Central Registry of War Criminals and Security Suspects at Paris, staffed by a group of American and British officers and some 400 French clerks. The original plans for this agency were most ambitious. It was to maintain machine and finger print records of every person in Europe wanted for trial as a war criminal or as a security suspect and of every person apprehended by the Allied forces as a prisoner of war or otherwise. The names of those wanted were secured from the lists published by the United Nations War Crimes Commission, from lists of security suspects compiled by American and British intelligence agencies, and from individual complaints. Lists of the persons wanted were published and distributed to all Allied commanders in the West whose troops were apprehending prisoners of war or other enemy personnel. This publication of lists of wanted war criminals was of material value in the work of apprehending them. The Central Registry was not so successful in its effort to maintain records and publish lists of every person taken into custody by the advancing Allied forces in the West. The advance became so rapid and the number of prisoners of war taken so great that many of the troop commands were unable to report apprehensions promptly to the Central Registry. Even so, the reports of apprehension reached the Central Registry in such volume that it could not handle them and eventually had to give up maintaining records and publishing lists of those apprehended.

After SHAEF was dissolved on July 13, 1945 the Central Registry of War Criminals and Security Suspects continued as a combined Anglo-American agency, administered jointly by the Assistant Chief of Staff for Personnel of USFET and the Deputy Judge Advocate General, British Army of the Rhine. In September 1945 the British Government proposed that the Allied Control Council for Germany assume control of the Central Registry. After considerable delay, occasioned by difficulty in securing agreement by

20. The planning stage of the work having been completed by then, General Betts withdrew from the position of Deputy Director for War Crimes of the Legal Division in January 1946 and the position was then abolished. The writer was Chief of the War Crimes Branch in a military status (Lieutenant Colonel, Judge Advocate General's Department), 1945-46. He was succeeded by Ben A. Smith, Esq., of the Texas Bar, formerly an officer of the Judge Advocate General's Department, who filled the position in a civilian status.

the Soviet Government, this proposal was adopted in January 1946 by the Control Council, which entrusted the immediate supervision of the Central Registry to a Permanent Commission appointed by the Legal Directorate, Allied Control Authority.²¹ At the same time, the Coordinating Committee decided that the Central Registry should move from Paris to Berlin in the summer of 1946. The Permanent Commission met at Paris in March 1946 and decided, as a preliminary to the impending move, to discontinue the keeping of machine and finger print records, the operations relative to security suspects, the reception and recording of reports of apprehension, and the publication of lists of persons apprehended. This reduced the functions of the Central Registry to those of maintaining written records of persons wanted for trial as war criminals and publishing lists of such persons. The Central Registry was moved to Berlin in the summer of 1946 and the French clerks replaced by German clerks employed there.

V. *Extradition of Alleged War Criminals.*—After World War I the chief problem relative to extradition of war criminals which arose was that created by the Allied attempt to persuade the Dutch Government to surrender the former German Emperor for trial. Some fears were expressed during World War II that the Nazi leaders would be given refuge by neutral countries. By the end of the summer of 1945, however, it had become apparent that most of the notorious German war criminals were in American or British custody. In many cases their crimes had been committed in one or another of the liberated European countries. It will be recalled that the Moscow Declaration announced that such persons,

“will be sent back to the countries in which their abominable deeds were done, so that they may be judged and punished according to the laws of those liberated countries and of the free Governments which will be erected in them.”²²

The chief problem this time, therefore, was to devise an orderly procedure for the delivery of identified war criminal suspects to the countries in which their crimes had been committed. The application of existing treaties governing extradition of ordinary criminals to this situation was very doubtful and the procedures prescribed by them unduly cumbersome. Consequently it was decided to establish relatively simple administrative proce-

21. The writer was United States representative on the Permanent Commission. He was succeeded by Mr. Smith. (See preceding note.)

22. Barry, *The Moscow Declaration on War Crimes*, 17 *AUST. L. J.* 248 (1943).

dures for the purpose. A plan for the accomplishment of this object was prepared under the supervision of General Betts, acting in his dual capacities of Theater Judge Advocate and Deputy Director for War Crimes, Legal Division, U. S. Group C. C., by the War Crimes Branch of the Legal Division, working in close collaboration with the International Law Branch, Office of the Theater Judge Advocate, which was headed by Colonel Charles Fairman, Judge Advocate General's Department, Professor of Political Science at Leland Stanford University. The plan was approved by General Eisenhower and put into operation by two letter directives issued on September 13, 1945 by USFET.

Under this plan, all foreign requests for extradition of alleged war criminals from United States areas of occupation in Germany were to be routed to the Theater Judge Advocate, who was empowered to order extradition in ordinary cases after ascertaining that the requested individual was not needed for American purposes or wanted by any country other than that which made the request. Before acting on a case the Theater Judge Advocate was to consult the records of the Intelligence Division of Headquarters, United States Forces, European Theater, and those of the United Nations War Crimes Commission and the Central Registry of War Criminals and Security Suspects. Cases involving important persons, such as general officers of the German forces, or persons wanted by several countries and cases with political implications were to be sent to the Legal Division, U. S. Group C. C., at Berlin. When such a case was received by the Legal Division it was to consult with the Directors of Intelligence and Political Affairs, U. S. Group C. C., and the United States Chief of Counsel for Prosecution of Axis Criminality at Nuremberg. In practice, the Theater Judge Advocate delegated his powers relative to extradition to his Deputy for War Crimes, Colonel Mickelwait.

Provision for decision in cases where several countries wanted the same man was made by Article IV of Control Council Law No. 10 which was drafted by the American Legal Division and adopted by the Allied Control Council for Germany on December 20, 1945.²³ This article lays down priorities to govern certain cases and entrusts the decision to the Legal Directorate, Allied Control Authority. In practice the provision worked smoothly and the interested countries were usually able to settle conflicting claims

23. The text of Control Council Law No. 10 is printed at the end of this article.

“out of court.” For example, if the same German had organized concentration camps in both France and Czechoslovakia but his activities had been more notorious in the latter, the French were quite likely to give up their claim to him on assurance that the Czech Government would bring him to trial speedily.

On the whole, the extradition plan has worked very well and has enabled the United States to comply fully with the promises it made in the Moscow Declaration. Most of the liberated countries seem to be well pleased with the service rendered them by the American authorities.²⁴

VI. *Violations of the Laws and Customs of War.*—When SHAEF and the army group headquarters were dissolved in July 1945 Colonel C. B. Mickelwait, who had been Staff Judge Advocate of the Twelfth Army Group, became Deputy Theater Judge Advocate for War Crimes and Chief of the War Crimes Branch of the Office of the Theater Judge Advocate. This War Crimes Branch had its headquarters at Wiesbaden, where an extensive war crimes library, document center and translation bureau was set up. Most of the liberated countries sent war crimes military missions to the War Crimes Branch at Wiesbaden to consult the library and documents and to facilitate the processing of their governments' requests for extradition.²⁵ A great many complaints of war crimes were on hand and one of the first tasks was to locate all the alleged war criminals among the great masses of Germans who were in American custody as prisoners of war or otherwise and segregate them in special war criminal inclosures, where the possibilities of escape or release by mistake would be at a minimum. At the same time a great net of war crimes investigating teams, each normally consisting of two officers and an interpreter, was spread out over Western Germany to locate and

24. The handling of the related problem of repatriation of renegades and “Quislings,” which was done under the same plan, has not met with such universal approval. In connection with its requests for repatriation of a large number of followers of General Mihailovitch, the Yugoslav Government has objected to the Anglo-American requirement that such requests be accompanied by statements of facts constituting treason or war crime. The Yugoslav position was overruled by the Assembly of the United Nations by a vote of 40 to 7 on October 31, 1947. In the course of debate on this problem the Yugoslav foreign minister complained that only 125 of 2,104 Yugoslav requests for extradition had been granted. *New York Times*, Nov. 1, 1947, p. 1.

25. The Czecho-Slovak mission was headed by General Dr. Bohuslav Ečer, a distinguished international leader of the movement for prosecution of German war criminals. General Dr. Ečer was also the Czecho-Slovak member of the United Nations War Crimes Commission. This gave the War Crimes Branch at Wiesbaden a link with the Commission not provided by the American organization itself.

apprehend alleged war criminals not already in custody, to locate and interrogate witnesses, and to collect documentary evidence.

The military government had set up a system of military tribunals called military government courts for the trial of Germans for offenses against the members and directives of the occupying forces. These tribunals were essentially the traditional American military commission, but appointed, controlled and their proceedings reviewed by regional directors of military government rather than Army tactical commanders. A directive issued by Headquarters, United States Forces, European Theater, on July 16, 1945 authorized the trial of war criminals by either normal military commissions or special military government courts, appointed and controlled by the Army proper (i.e., the tactical forces) their proceedings to be reviewed by the Theater Judge Advocate.²⁶ In practice these special military government courts have usually been used, with some changes from time to time in the manner of appointment and review. Death sentences and, at times, lesser sentences, have required confirmation by the Theater Commander. The rules for these special military government courts have permitted the reception of any evidence which the court deems of probative value. It has been suggested that the rules should have been more restrictive, particularly as to the reception of affidavits in evidence. The writer is not sufficiently familiar with the actual operation of these tribunals to be able to express an opinion as to whether the rules have worked unfairly in practice.

The responsibility of the Theater Judge Advocate and his Deputy for War Crimes for prosecution of war criminals has been limited to violators of the laws and customs of war, largely codified in the Hague and Geneva Conventions. Hence, although many concentration camp and other atrocities committed in Germany were inflicted upon German victims and had no connection with the war, the Theater Judge Advocate has been concerned in prosecuting only those cases involving maltreatment of Allied nationals incident to the war. Some of the more important cases prosecuted under the direction of the Deputy Theater Judge Advocate for War Crimes are familiar to most Americans. The Dachau and Mauthausen concentration camp cases involved the perpetration of horrible cruelties on Allied nationals.

26. See *United States Law and Practice Concerning Trials of War Criminals by Military Commissions and Military Government Courts*, Annex II to LAW REPORTS OF TRIALS OF WAR CRIMINALS, Selected and prepared by the United Nations War Crimes Commission, Vol. I, London: H. M. Stationery Office, 1947; Nobleman, *American Military Government Courts in Germany*, 40 AM. J. INT'L L. 803 (1946).

The Hadamar Insane Asylum case was really one of murder on a wholesale scale. The Malmedy massacre case involved a typical violation of the laws of war: cold-blooded shooting of American troops who had surrendered as prisoners of war and laid down their arms. Buchenwald Concentration Camp is located in the Soviet Zone of Occupation but the American forces first overran it and collected a mass of documentary evidence bearing on its operation. The Soviet government was offered this evidence if it wished to try the camp leaders but, after some negotiations on the subject, it decided not to do so, and the case was tried at the War Crimes Trial Center at Dachau, where the War Crimes Branch erected an inclosure for war criminals, accommodations for willing and unwilling witnesses, and court rooms. The program of the War Crimes Branch (more recently called War Crimes Group) of the Office of the Theater Judge Advocate is now in a winding-up stage and is expected to be completed by July 1, 1948.

One phase of this program involved prosecution and punishment of a large number of Germans, mostly civilians, who killed or beat members of Allied bomber crews after they had parachuted to earth. Unquestionably such killings and beatings were violations of the laws of war because the crew members, in most cases, were entitled to be treated as prisoners of war or wounded and, in any event, members of the civilian populace have no right to engage in hostilities. Unquestionably also this phase of the war crimes program had the enthusiastic support of the American public, who looked upon the killings and beatings as dastardly and cowardly acts. This attitude was engendered in part, however, by a general belief that our strategic bombing was more accurate than it has since been shown to have been. Moreover, it is now known that the German Government had forbidden prosecutions in the German criminal courts for maltreatment of Allied airmen and had conducted a propaganda campaign which declared that the Anglo-American bombing of Germany was in violation of international law and gave the impression that German civilians would be doing a patriotic act in killing British and American airmen in reprisal. Picture the German peasant woman whose village has been bombed, her home destroyed and her children killed, deprived of sleep for weeks by nightly air raids, told by her government that the raids were unlawful: is it surprising that, if a member of a bomber crew parachuted to earth near the ruins of her home, she hit him with a brick? This may be an extreme case; the point is that some of the killings and beatings of Allied airmen, while criminal, were not as vicious as they seemed to us at the time.

VII. *The Nuremberg Trial*.—It will be recalled that the Moscow Declaration concluded with a statement that it was,

“without prejudice to the case of German criminals whose offenses have no particular geographical location, and who will be punished by joint decision of the Governments of the Allies.”²⁷

It is evident that this language was intended to refer to the leaders of the Nazi regime in Germany who had planned and directed a broad scheme or system of criminal acts but had not necessarily themselves engaged in the actual commission of any particular crime. As Lord Wright has aptly put it,

“War crimes are generally of a mass or multiple character. At one end are the devisers, organizers, originators, who would in many cases constitute a criminal conspiracy; at the bottom end are the actual perpetrators; in between these extremes are the intermediate links in the chain of crime.”²⁸

The top Nazis who devised and organized the concentration camp system committed offenses with “no particular geographical location”; the men who threw living women and children into the furnaces at Auschwitz were local criminals. As will be seen, the “intermediate links” were the leaders of the SS and other Nazi organizations.

On May 2, 1945 the President appointed Associate Justice Robert H. Jackson of the United States Supreme Court,

“to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal.”²⁹

Mr. Justice Jackson understood his mission as being confined to those “criminals whose offenses have no particular geographical location” referred to in the Moscow Declaration, and proceeded to negotiate on this basis with representatives of the British, French and Soviet governments.³⁰ These

27. Barry, *The Moscow Declaration on War Crimes*, 17 AUST. L. J. 248 (1943).

28. Rt. Hon. Lord Wright, *War Crimes Under International Law*, 62 L. Q. REV. 40, 46 (1946).

29. Ex. Order No. 9547, May 2, 1945; 10 FED. REG. 4961; 3 CODE FED. REGS. 64 (Supp. 1945).

30. *Justice Jackson's Report to President Truman on the Legal Basis for Trial of War Criminals*, 19 TEMP. L. Q. 144 (1945).

negotiations resulted in the signing of the London Agreement of August 8, 1945, to which was annexed the charter of the contemplated International Military Tribunal.³¹ Article 1 of the Agreement provided that,

“There shall be established, after consultation with the Control Council for Germany, an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location, * * *.”

Curiously, the Charter made no mention of consultation with the Control Council and contained no restriction to “criminals whose offenses have no particular geographical location”, referring instead to “major war criminals of the European Axis.” It provided for a four-member tribunal, each member to have an alternate, one member and his alternate to be appointed by each of the signatory powers, prescribed its jurisdiction and procedure, and provided that,

“In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences but may not increase the severity thereof.”³²

The jurisdictional provisions of Article 6 of the Charter are of great importance. The most significant follow:

“(a) Crimes against peace, Namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing,

“(b) War Crimes. Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

“(c) Crimes against humanity. Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war or persecutions on political racial, or religious grounds in execution of or in

31. *Agreement for the Establishment of an International Military Tribunal*, 13 DEP'T STATE BULL. 222 (1945); 19 TEMP. L. Q. 160, 162 (1945).

32. Article 29.

connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

It will be evident at once that the categories "Crimes against peace" and "Crimes against humanity" go beyond the traditional concepts of the laws and customs of war. Some controversy and a considerable literature have arisen over whether the provisions for punishment of individuals for these offenses, particularly crimes against the peace, are *ex post facto*.³³ It is not my purpose to discuss that question here. The fact that it has been seriously raised, however, indicates that Mr. Justice Jackson was somewhat over-enthusiastic in saying that,

"We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code."³⁴

The Tribunal contemplated by the London Agreement was duly appointed, with the Honorable Francis Biddle, formerly Attorney General of the United States, as the American member and United States Circuit Judge John J. Parker as his alternate.³⁵ In accordance with Article 22 of the Charter it held its first meeting at Berlin in October 1945 and there received an indictment against twenty-four men who had been leaders in Nazi Germany.³⁶ The Tribunal then moved to Nuremberg and proceeded to the trial of twenty-two of the defendants, two having died in the interim. The trial lasted from November 20, 1945 to October 1, 1946. All of the defendants were charged with conspiracy to commit crimes against the peace; eight were found guilty.³⁷ Sixteen of the defendants were charged with the

33. See, for example, Mr. Justice Birkett, *International Legal Theories Evolved at Nuremberg*, 23 INT'L AFF. 317 (1947) Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20 (1947); Glueck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396 (1946); Lauer, *The International War Criminal Trials and the Common Law of War*, 20 ST. JOHN'S L. REV. 18 (1945); Lord Justice Lawrence, *The Nuremberg Trial*, 23 INT'L AFF. 151 (1947); Lord Wright, *War Crimes Under International Law*, 62 L. Q. REV. 46 (1946); Q. Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38 (1947). In this and other respects the Charter is not in accord with the American views presented to the Peace Conference in 1919, Annex II to Report of the Commission on Responsibility, etc., 14 AM. J. INT'L L. 95, 142 (1920).

34. *Justice Jackson's Report to President Truman on the Legal Basis For Trial of War Criminals*, 19 TEMP. L. Q. 144, 151 (1945).

35. 13 DEP'T STATE BULL. 404 (1945).

36. *Indictment against Major Nazi War Criminals*, 19 TEMP. L. Q. 172 (1945).

37. Goering, Hess, von Ribbentrop, Keitel, Rosenberg, Raeder, Jodl and von Neurath.

actual commission of crimes against the peace; twelve were found guilty.³⁸ Eighteen of the defendants were charged with war crimes; sixteen were found guilty.³⁹ Eighteen of the defendants were charged with crimes against humanity; sixteen were found guilty.⁴⁰ The sentences were put into execution by a four power commission established by the Control Council for the purpose.

From an organizational standpoint it is striking that, although the four powers had set up an Allied Control Authority to be the central government of Germany, neither the International Military Tribunal nor its prosecution staff, organized, as they were, to try Germans on German soil, were subject to the Allied Control Authority. The American members of the Tribunal and Mr. Justice Jackson were completely independent of both the American military government and the army proper. General Clay objected to this arrangement from the beginning and it proved to have serious disadvantages. Army morale was impaired when members of Mr. Justice Jackson's staff were permitted to bring their wives to Europe at a time when persons in the Army who had been there much longer and were much more deserving of the privilege were denied it. Pay scales were not uniform. Much worse than that, although there were Mr. Justice Jackson to manage the prosecution and Mr. Biddle and Judge Parker to sit in judgment, no American except the President himself had any right or duty to plan and make arrangements for the entire enterprise. The Charter of the Tribunal required it to hold its first meeting in Berlin and, as the Allied Control Authority Building is in the American sector of the city, it was clearly an American obligation to make the necessary arrangements. Mr. Justice Jackson did not make them and Mr. Biddle was in no position to do so. There are no hotels or restaurants open to Americans in post-war Berlin, so the Tribunal and the prosecution staff might have found themselves in a difficult position if Mr. Fahy had not foreseen the problem and used the staff of the Legal Division of OMGUS to make the arrangements. When the Tribunal moved from Berlin to Nuremberg, after receiving the indictment, it found an

38. Those listed in the preceding note and Frick, Funk, Doenitz and Seyss-Inquart.

39. Hess and Fritzsche were found not guilty; Streicher, Schacht, von Schirach and von Papen were not charged with war crimes.

40. Hess and Fritzsche were found not guilty; Schacht, Doenitz, Raeder and von Papen were not charged with crimes against humanity. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 272-332, 333 (1947); Leventhal, *et al.*, *The Nuernberg Verdict*, 60 HARV. L. REV. 857, 907 (1947).

American prosecution staff of some 650 hard at work but no arrangements made to secure counsel for the defense. Judge Parker asked Mr. Fahy for assistance and the Legal Division undertook the burden of securing counsel for the defense, keeping several of its members at Nuremberg for the purpose. The Legal Division also secured and transported to Nuremberg most of the witnesses and documentary evidence required by the defense.⁴¹ It did a good deal of the work connected with the printing and distribution of the public notices issued by the Tribunal in connection with the trial of allegedly criminal organizations. Eventually the Army had to provide the Tribunal with most of its Secretariat and to set up a special command at Nuremberg to handle supply and administrative problems incident to the trial.

VIII. *Crimes against the Peace and against Humanity.*—Until September 1945 the American Army and military government in Germany had no concern with any crimes committed by Germans except violations of military government law and violations of the laws and customs of war. The former were handled by the military government court system, the latter by the Deputy Theater Judge Advocate for War Crimes. In that month the Theater Commander received a directive from the American Joint Chiefs of Staff which required him to investigate and prosecute not only offenses against the laws and customs of war but also crimes against the peace and crimes against humanity, describing those offenses substantially as they were defined in the Charter of the International Military Tribunal.⁴² Moreover, the new directive extended these concepts, as the

41. The Legal Division, Control Commission for Germany (British Element), British counterpart of the American Legal Division, cooperated fully in these activities. Negotiations with the prisoners were conducted by a British officer, Lieutenant-Colonel Neave. See, Fahy, *The Lawyer in Military Government of Germany*, 15 DEP'T STATE BULL. 852 (1946). The trial judge advocate (prosecuting officer) of a court-martial or military commission is charged with the duty of securing witnesses and depositions for the defense. Par. 97, Manual for Courts-Martial, U. S. Army, 1928.

42. JCS 1023/10; The provisions of this directive broadening the concept of war crimes were foreshadowed in part by paragraphs 4c and 8a of the Directive to the Commander in Chief of the United States Forces of Occupation Regarding the Military Government of Germany, issued in April 1945 (JCS 1067; 13 DEP'T STATE BULL. 596, 598 (1945)) and by paragraph 5, Part III, of the Potsdam Agreement of July 25, 1945 (*Report of the Tripartite Conference of Berlin*, 13 DEP'T STATE BULL. 153, 155 (1945)). They came as a surprise to the Army and military government authorities in Germany, however, because the draft of a similar directive on war crimes which was prepared by the European Advisory Commission and which, it was anticipated, would be adopted by the Joint Chiefs of Staff, was limited to the traditional laws and customs of war.

Charter had not, to offenders whose crimes were merely local in character and did not limit the concept of crimes against humanity to those incident to crimes against the peace or war crimes, as the Charter had done. This raised serious questions. Mr. Justice Jackson could argue understandably that Reichsmarshal Goering and Field Marshal Keitel were guilty of a crime against the peace in "waging of a war of aggression." Did the Joint Chiefs of Staff mean to say that Leutnant Schwarz and Gefreiter Schmid were also criminals, merely because they participated in the "waging of a war of aggression" by fighting with their platoon?

The directive also contained provisions as to extradition of war criminals which were consistent with the plan already adopted, included the London Agreement as part of the instructions governing our forces in Europe, and directed the Theater Commander to seek Control Council agreement to the policies which it prescribed. In compliance with this last requirement, the Legal Division of OMGUS prepared a draft law for submission to the Control Council. After approval by the Legal Directorate and the Coordinating Committee the law was enacted by the Control Council, with minor changes, in December 1945.⁴³ This law made the London Agreement, the Charter of the International Military Tribunal, and the provisions of the Joint Chiefs of Staff directive declaring the punishability of crimes against the peace and crimes against humanity, part of the law of Germany. It also made provision, as noted before, for settling disputes between several countries requesting extradition of the same alleged war criminal.

Responsibility for making arrangements to carry out the provisions of the new directive requiring investigation and prosecution of local crimes against the peace and against humanity was imposed by the Theater Commander upon General Betts in his dual capacities of Theater Judge Advocate and Deputy Director for War Crimes of the Legal Division. General Betts was also concerned with another problem created by the Charter of the International Military Tribunal and the new Joint Chiefs of Staff directive. Both contemplated that the criminality of organizations as well as that of individuals would be tried by the International Military Tribunal. If the Tribunal determined that an organization was criminal, its individual members were to be tried before "national, military or occupation courts," which would treat the determination as to criminality of the organization

43. Control Council Law No. 10, Dec. 20, 1945, 15 DEP'T STATE BULL. 862 (1946). The text of the law is printed in full at the end of this article.

as proved and not subject to question.⁴⁴ Six organizations were included in the Nuremberg indictment and some of them were so large that it would be a tremendous undertaking to bring all their members to trial.⁴⁵ One of the indicted organizations alone, the Leadership Corps of the National Socialist Party, had a membership of some 2,000,000.⁴⁶ General Betts discharged the responsibility so imposed upon him by preparing a plan for handling crimes against the peace and against humanity and membership in criminal organizations, evolved through conferences with General Clay, Mr. Justice Jackson and Mr. Fahy, with the assistance of the Legal Division of OMGUS and the International Law Branch, Office of the Theater Judge Advocate. The completed plan was approved by the Theater Commander on December 5, 1945.

The plan made no change in the functions of the Theater Judge Advocate and his Deputy for War Crimes with respect to extradition and to trials for violations of the laws and customs of war, including concentration camp and related atrocities against Allied nationals which were incident to the war. *Thus the Army proper, as represented by the Judge Advocate General's Department, retained its traditional responsibility for enforcement of the laws and customs of war but did not assume any responsibility for prosecuting crimes against the peace, crimes against humanity or membership in criminal organizations.*

The plan provided for the continuation of Mr. Justice Jackson's prosecution staff after the completion of the first Nuremberg trial, for the purpose of prosecuting important crimes against the peace and against humanity and leaders of the criminal organizations in international tribunals or, if no agreement with the other occupying powers for further international trials should be reached, in special United States military government courts to be appointed for the purpose. To facilitate this continued effort, Mr. Justice Jackson was to appoint a Deputy Chief of Counsel for Subsequent Proceedings, who would begin at once preparing for the later trials. Upon the resignation of Mr. Justice Jackson, his organization was to become subject to OMGUS and his successor was to be appointed by the Military Governor (i.e. the Theater Commander, who heads both the tactical forces and the

44. Articles 9 and 10 of the Charter.

45. *Indictment against Major Nazi War Criminals*, 19 TEMP. L. Q. 172 (1945); Leventhal, *et al.*, *The Nuernberg Verdict*, 60 HARV. L. REV. 857, 887-902 (1947).

46. *Ibid.*, note 137.

military government). General Betts carried this phase of the plan to Washington and it was approved by the President on January 16, 1946.⁴⁷ Mr. Justice Jackson appointed Colonel Telford Taylor, formerly General Counsel of the Federal Communications Commission, as his Deputy for Subsequent Proceedings and Colonel Taylor was promoted to brigadier general to give him a grade appropriate to his position. Mr. Justice Jackson resigned as United States Chief of Counsel after the completion of the first Nuremberg trial and the Military Governor appointed General Taylor to succeed him. No further international trials have been conducted by the Nuremberg organization. Its chief interest has been in prosecuting leading German industrialists for crimes against the peace consisting of their support of the launching of wars of aggression. It was recently announced that the program would be largely completed by the end of 1947 and entirely finished by June 30, 1948. Untried cases on hand are to be turned over to the German courts for trial.

The plan evolved by General Betts provided for the trial of those crimes against humanity which were offenses against the local German law, where the victims were Germans or other non-United Nations nationals, by the German courts, under military government supervision. Appropriate action to enable the German courts to discharge this responsibility was directed by a Theater Staff Memorandum of December 15, 1945. By this time the United States Zone of Occupation in Germany had been divided into three laender or states, Bavaria, Wurttemberg-Baden and Greater Hesse, each with a German ministry and legislature, supervised by an American Office of Military Government. The members of the three ministries met together for consultation at Stuttgart in an organization called the Laenderrat, which was organized and supervised by Professor James K. Pollock, Chairman of the Department of Political Science at the University of Michigan. In the initial stages of the occupation, legislation affecting the German populace which was desired by our forces was promulgated directly by American military orders. By December 1945 the procedure was to submit proposed drafts of the desired legislation to the Laenderrat, which was free to discuss them and suggest changes. After this, the legislation was enacted by the legislatures of the three

47. Ex. Order No. 9679, Jan. 16, 1946, 11 FED. REG. 703; 3 CODE FED. REGS. 86 (Supp. 1946) and see Ex. Order No. 9813, Dec. 20, 1946, 11 FED. REG. 14607; 3 CODE FED. REGS. 187 (Supp. 1946). See Mr. Justice Jackson's Final Report to the President, 15 DEP'T STATE BULL. 771, 773 (1946).

laender and became part of the ordinary German law, enforceable by the German courts the same as any other German law. Accordingly, to carry out the instructions in the Theater Staff Memorandum it was incumbent upon the Legal Division of OMGUS to draft a proposed law for submission to the Laenderrat.

It soon became apparent that there was a difference of opinion within the Legal Division itself as to the proper scope of the law. Most of the staff felt that the law should merely authorize the German courts to try Germans for acts which were crimes against local German law at the time they were committed. Such a law would only eliminate such defenses as the statute of limitations and Nazi pardons and amnesties, thus enabling the courts to try such offenses as burning synagogues (arson), and killing and beating Jews (murder and assault and battery), which were clearly crimes under the German Criminal Code before and during the Nazi regime. It was suggested, on the other hand, that the new law should authorize the German courts to punish acts which were not crimes under German law when they were committed but, perhaps, should have been. The acts in question were those of informing the Nazi authorities of the status or offenses of an individual, where such information led to persecution of that individual. In the Soviet Zone of Occupation the German courts, acting under Control Council Law No. 10, were permitted to punish a German for informing the police, during the Nazi regime, that his neighbor was a Communist, an act which was not only not a crime at the time but may have appeared to him to be a patriotic duty. Should we permit German courts in our zone to do so?⁴⁸ The law as finally drafted in the Legal Division did not. It merely lifted the bar of the statute of limitations, made unavailable as defenses Nazi pardons and amnesties, and permitted the reopening of old cases. Even then the Laenderrat was fearful that it might be given an *ex post facto* interpretation and suggested amendments to ensure that it was not. These amendments were accepted by the military government, the law was passed by the legislatures of the three laender, and it received the approval of the Deputy Military Governor in May 1946.

48. The controversy involved, in part, interpretation of Section 2, Article II, of Control Council Proclamation No. 3, "Fundamental Principles of Judicial Reform," which provided, "Criminal responsibility shall be determined only for offences provided by law." It was argued that this provision did not prohibit *ex post facto* legislation. The entire proclamation is printed at the end of this article. Control Council Law No. 10, which is also printed at the end of this article, should be read in the light of the proclamation.

It was apparent that General Taylor's organization at Nuremberg could not try all the members of the organizations which the International Military Tribunal declared criminal and the plan evolved by General Betts contemplated that those who were not tried by the Nuremberg organization would be handled by the Denazification System, which was then being planned in OMGUS by a Board of which Mr. Fahy was chairman. This Denazification System, which was put into effect by a uniform Law for Liberation from National Socialism and Militarism, enacted by the legislatures of the three laender in the American Zone on March 5, 1946,⁴⁹ called for hearings before administrative tribunals composed of Germans acting under American military government supervision. In essence it is a system of quarantine, rather than of penal sanctions, designed to keep the leaders of the National Socialist movement in custody and limit the activities of its more active adherents long enough to permit the democratic forces to gain firm and effective control of the German political structure and economy. That a German belonged to an organization which the International Military Tribunal declared criminal is not necessarily given any weight or effect by a German denazification tribunal. This solution of the organization problem, therefore, does not carry out the intention of Articles 9 and 10 of the Charter of the International Military Tribunal, which contemplated that the members of organizations declared criminal would, from that fact alone, be treated and punished as criminals. The International Military Tribunal declared parts of three of the six indicted organizations criminal,⁵⁰ with the qualification that criminality would not attach to an individual member unless he joined voluntarily and knew of the organization's criminal objects or participated in its criminal activities. The International Military Tribunal and the prosecution staff devoted a great deal of time and effort to this organization problem. They were largely wasted, except to the extent that the record made of the activities of the organizations will be of permanent historical value. It has been suggested that this failure to carry out Articles 9 and 10 of the Charter of the International Military Tribunal was due to deficiencies in Control Council Law No. 10 and to these qualifications added by the Tribunal to

49. See Fahy, *The Lawyer in Military Government of Germany*, 15 DEP'T STATE BULL. 852, 858 (1946). See also, Control Council Directive No. 38, Oct. 12, 1946.

50. The Leadership Corps of the Nazi Party, the SS and the Gestapo, *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 249-272 (1947).

its declaration of criminality.⁵¹ It may well be asked whether the plan proposed by the Charter was not unworkable in practice and whether the provisions of both the Charter and Law No. 10 might not have been better if Mr. Justice Jackson's organization, which drafted the Charter, instead of being independent, had been an integral part of the Army-Military Government team in Germany.

IX. *Conclusion.* It is too early to evaluate the results of the American war crimes program in Germany. The organizational structure which was erected to carry it out displayed in its inception a number of independent agencies with poorly-defined and overlapping jurisdictions and without a single common goal. Although some of these agencies, such as Colonel Mickelwait's large and important one, were well organized within themselves, there was a distinct lack of authoritative coordination between the agencies. The existence of the war crimes problem was foreseen before the United States entered the war; the lack of a unified organization to meet it must be attributed to a lack of high-level planning in Washington. The coordination and unity of purpose which were eventually attained were due almost wholly to the disinterested cooperation of Mr. Fahy and the selfless, devoted work of General Betts. General Betts died in May 1946, worn out after four exhausting years as the chief legal officer of the American forces in Europe.⁵² His country owes him a debt of gratitude for a great public service.

51. Leventhal, *et al.*, *The Nuernberg Verdict*, 60 HARV. L. REV. 857, 893-894, 899, 902 (1947). Sir Norman Birkett, the British Alternate Member on the International Military Tribunal, appears to feel, as the present writer does, that Articles 9 and 10 of the Charter, if carried into execution, would have worked an injustice. Mr. Justice Birkett, *International Legal Theories Evolved at Nuremberg*, 23 INT'L AFF. 317, 325 (1947).

52. He was succeeded as Theater Judge Advocate by Colonel Mickelwait, whose position of Deputy Theater Judge Advocate for War Crimes was taken by Colonel Clio E. Straight, a graduate of the State University of Iowa College of Law and a career officer of the Judge Advocate General's Department.

APPENDIX

CONTROL COUNCIL PROCLAMATION No. 3

Fundamental Principles of Judicial Reform

By the elimination of the Hitler tyranny by the Allied Powers, the terrorist system of Nazi Courts has been liquidated. It is necessary to establish a new democratic judicial system based on the achievements of democracy, civilization and justice. The Control Council therefore proclaims the following fundamental principles of judicial reform which shall be applied throughout Germany.

I

Equality Before the Law

All persons are equal before the law. No person, whatever his race, nationality or religion, shall be deprived of his legal rights.

II

Guaranties of the Rights of the Accused

1. No person shall be deprived of life, liberty or property without due process of law.

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

3. Determination by any court of any crime "by analogy" or by so-called "sound popular instinct," as heretofore provided in the German Criminal Code, is prohibited.

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

5. Sentences on persons convicted under the Hitler Regime on political, racial or religious grounds must be quashed.

III

Liquidation of Extraordinary Hitler Courts

The People's Court, Courts of the N.S.D.A.P. and Special Courts are abolished and their re-establishment prohibited.

IV

Independence of the Judiciary

1. Judges will be independent from executive control when exercising their functions and owe obedience only to the law.

2. Access to judicial functions will be open to all who accept democratic principles without account of their race, social origin or religion. The promotion of judges will be based solely on merit and legal qualifications.

V

Concluding Clause

Justice will be administered in Germany in accordance with the principles of this proclamation by a system of Ordinary German Courts. Done at Berlin, 20 October 1945.

P. KOENIG

Lieutenant General

DWIGHT D. EISENHOWER

General of the Army

G. ZHUKOV

Marshal of the Soviet Union

B. H. ROBERTSON

Lieutenant General for

Field Marshal Montgomery

CONTROL COUNCIL LAW No. 10

*Punishment of Persons Guilty of War Crimes,
Crimes Against Peace and Against Humanity*

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

Article I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

Article II

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

(a) *Crimes Against Peace*. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) *War Crimes*. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labor or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

(c) *Crimes Against Humanity*. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprison-

ment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

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

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he (a) was a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1(a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any person found guilty of any of the Crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

- (a) Death.
- (b) Imprisonment for life or a term of years, with or without hard labour.
- (c) Fine, and imprisonment with or without hard labour, in lieu thereof.
- (d) Forfeiture of property.
- (e) Restitution of property wrongfully acquired.
- (f) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

Article III

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

(a) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.

(b) shall report to the Legal Directorate the names of all suspected criminals, the reasons for and the places of their detention, if they are detained, and the names and location of witnesses.

(c) shall take appropriate measures to see that witnesses and evidence will be available when required.

(d) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.

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

3. Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors. Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.

4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1(b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned.

5. The execution of death sentences may be deferred by not to exceed one month after the sentence has become final when the Zone Commander concerned has reason to believe that the testimony of those under sentence would be of value in the investigation and trial of crimes within or without his Zone.

6. Each Zone Commander will cause such effect to be given to the judgments of courts of competent jurisdiction, with respect to the property taken under his control pursuant hereto, as he may deem proper in the interest of justice.

Article IV

1. When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone in which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.

2. The Legal Directorate shall consider all requests referred to it, and shall determine the same in accordance with the following principles, its determination to be communicated to the Zone Commander.

(a) A person wanted for trial or as a witness by an International Military Tribunal shall not be delivered for trial or required to give evidence

outside Germany, as the case may be, except upon approval by the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.

(b) A person wanted for trial by several authorities (other than an International Military Tribunal) shall be disposed of in accordance with the following priorities:

(1) If wanted for trial in the Zone in which he is, he should not be delivered unless arrangements are made for his return after trial elsewhere;

(2) If wanted for trial in a Zone other than that in which he is, he should be delivered to that Zone in preference to delivery outside Germany unless arrangements are made for his return to that Zone after trial elsewhere;

(3) If wanted for trial outside Germany by two or more of the United Nations, of one of which he is a citizen, that one should have priority;

(4) If wanted for trial outside Germany by several countries, not all of which are United Nations, United Nations should have priority;

(5) If wanted for trial outside Germany by two or more of the United Nations, then, subject to Article IV 2(b)(3) above, that which has the most serious charges against him, which are moreover supported by evidence, should have priority.

Article V

The delivery, under Article IV of this Law, of persons for trial shall be made on demands of the Governments or Zone Commanders in such a manner that the delivery of criminals to one jurisdiction will not become the means of defeating or unnecessarily delaying the carrying out of justice in another place. If within six months the delivered person has not been convicted by the Court of the Zone or country to which he has been delivered, then such person shall be returned upon demand of the Commander of the Zone where the person was located prior to delivery.
Done at Berlin, 20 Decmeber 1945.

JOSEPH T. McNARNEY
General, U. S. Army

SIR BERNARD L. MONTGOMERY
Field Marshal

LOUIS KOELTZ
General d'Corps de Armee
for PIERRE KOENIG
General d'Armee

GEORGI ZHUKOV
Marshal of the Soviet Union